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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 19-0070

DA 19-0070

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 4

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ARTHUR RAY PEOPLES,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 02-319B
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Kathryn Hutchison (argued), Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, C. Mark Fowler (argued), Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Alison E. Howard, Deputy County Attorney, Kalispell, Montana

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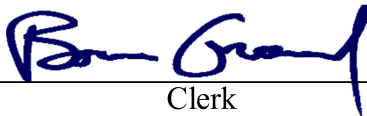
Argued and Submitted on: July 7, 2021

Decided: January 11, 2022

Filed:



Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Arthur Ray Peoples (Peoples) appeals the September 2018 judgment of the Montana Eleventh Judicial District Court, Flathead County, denying his motion to suppress evidence obtained as a result of a warrantless search of his apartment in Missoula, Montana, in March 2018. We address the following restated issue:

> *Whether the District Court erroneously denied Peoples's motion to suppress evidence seized in a warrantless probation search of his apartment based on asserted violations of Article II, Sections 10-11 of the Montana Constitution?*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2003, Peoples was convicted in Flathead County of operation of an unlawful clandestine methamphetamine laboratory and criminal possession of dangerous drugs. The court sentenced him to a net 20-year prison term, with 5-years suspended, and multitude of conditions applicable to the probationary term of his sentence. Among various other conditions, the sentencing order prohibited him from using alcohol and illegal drugs and required him to obey all laws. The order further mandated that:

> [he] must submit to a warrantless search of his person, vehicle, place of residence, and place of employment by his supervising officer whenever there is reasonable cause to believe that he has violated the law or any condition of his sentence.

¶3 On February 27, 2017, Peoples discharged onto probation for the suspended term of his sentence under the supervision of a Montana Department of Corrections (MDOC)

probation officer (PO) in Missoula.[1] After establishing residence and finding employment, Peoples admitted to his PO on June 1, 2017, that he had used methamphetamine on multiple occasions since discharging onto probation and then subsequently tested positive for methamphetamine use. On August 31, 2017, he again admitted to using methamphetamine, this time "for about a week" and again subsequently tested positive for methamphetamine use.

¶4 On a probation home visit on September 12, 2017, Peoples once again admitted to continued methamphetamine use and again tested positive. On October 12, 2017, he called and reported to his PO that he was yet again using methamphetamine. Following an MDOC administrative intervention hearing, he received a 4-day jail sanction, with 16 more suspended, followed by placement in the MDOC Enhanced Supervision Program (ESP) in which he would be subject to more intensive drug-testing, *inter alia*. Despite later testing positive for opiate use in November 2017, he ultimately completed the ESP program in January 2018.[2] After Peoples had clean urinalysis tests on his December 2017 and January 2018 home visits, his PO observed drug paraphernalia in plain view on his February 2018 home visit. Upon challenge, Peoples admitted using methamphetamine again.

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[1] Prior to discharging onto probation in 2017, Peoples was paroled in August 2008 and thereafter violated parole conditions on several occasions. On a number of occasions, the parole violations resulted in returns to prison followed by re-releases on parole. His last parole violation was in 2016. The same MDOC probation and parole officer supervised Peoples on parole and his subsequent probation.

[2] On January 3, 2018, he was discharged from an intensive outpatient chemical treatment program due to unexcused absences.

¶5 At his next home visit on March 7, 2018, the 60 year-old Peoples provided a clean urinalysis sample. However, on March 15, 2018, as she had on several prior occasions, Peoples's wife called his PO after being at his apartment and reported that she believed he was again using methamphetamine. She reported further that she thought he may have overdosed and that she saw a "large amount of blood in his apartment."

¶6 The PO later testified that, upon obtaining his supervisor's authorization for a forced entry if necessary, the PO, accompanied by two other MDOC probation officers and a deputy United States Marshal, went to Peoples's apartment complex the next day to check on him and conduct a probation search regarding his reported illegal drug use, possible overdose, and the "large amount of blood" reported by his wife.[3] It later came out at a hearing that the wife's report of a large amount of blood in Peoples's apartment had also piqued the interest of one of the accompanying probation officers who had recently received unconfirmed third-hand information that he may have been involved in some capacity in a recent homicide in the Missoula area.[4] The PO later testified that, upon arrival

[3] The PO testified that it is "customary" for probation officers to go to a probationer's home "to conduct a search" when they "have concerns that [the probationer is] using" illegal drugs. He explained that they had a deputy U.S. Marshal accompany them based on the nature of the report from Peoples's wife, as is often the case when forced entry may be necessary and a deputy Marshal is available to assist.

[4] However, except for asking the PO the non-sequitur question at the hearing on Peoples's subsequent suppression motion as to whether the other probation officer "contacted the Sheriff or the Police Department" regarding an unspecified "subsequent investigation," defense counsel did not make introductory record reference to the other probation officer's interest and unconfirmed knowledge regarding the independent homicide investigation until later, at the hearing on the merits of the State's probation revocation petition, and then only on purportedly questioning the PO regarding facts pertinent to sentencing "mitigation" in the event of revocation.

at the apartment complex, the officers saw Peoples's car parked outside his apartment. He testified that they then repeatedly knocked on his apartment door for "a long time" in a "very loud" manner, announced "that we were Probation," but received no response from Peoples. Rather than force the door, one of the other officers called the apartment complex manager who came to the scene with a key to Peoples's apartment.[5] The PO then opened the apartment door with the key and he and the other three officers entered the apartment with their sidearms temporarily drawn.[6] The PO testified at the suppression hearing that, upon entry into the apartment, they immediately saw Peoples "seated on his bed" naked and, as they continued "closer to" him, saw "a baggy of white crystalline substance," suspected as methamphetamine, "near him" in plain view "on his bed."[7] One of the probation officers immediately handcuffed the naked Peoples and left him sitting on the bed while the others performed a protective sweep of the apartment. On cross-examination, the PO acknowledged that, in the process, the officers saw suspected "spots of blood" on the floor in or about the adjacent bathroom/laundry area of the apartment. He testified that one of the other probation officers called the Missoula Police Department (MPD) and

[5] The PO testified at the suppression hearing that one of the other probation officers told the apartment manager that they needed the key because they had "information that [Peoples] may have overdosed in his house using drugs and that there was blood found in his house."

[6] The PO testified that his weapon was a "Glock 40" handgun and that the other three officers similarly entered with their guns temporarily "drawn" until subsequently "re-holstered" after they "cleared [the apartment] for safety."

[7] The PO testified at the subsequent revocation hearing that, after the subsequent arrival of a responding Missoula police officer, the substance field-tested positive for methamphetamine.

reported their discovery of the suspected methamphetamine as well as blood spots "that [they] thought needed further investigation."[8] The PO explained at hearing that it is "customary that [we] call law enforcement" when a probation search yields "evidence of a new crime." He testified that the probation officers and the deputy Marshal then waited with Peoples in the apartment until an MPD officer arrived about 30 minutes later. The PO stated that he stood nearby Peoples for most of that time, except when he briefly stepped away to look at the blood spots that the other officers were looking at on the adjacent floor in the bathroom/laundry area while waiting for the MPD to respond.

¶7 Upon arrival, the MPD officer found Peoples still sitting handcuffed, naked on his bed with one of the probation officers nearby. At the prompting of the MPD officer, the PO allowed Peoples to get dressed and the police officer later took him into custody regarding his suspected methamphetamine possession and removed him from the apartment.[9] The PO testified at the subsequent revocation hearing that Peoples was "calm and compliant" throughout the process.

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[8] In response to defense counsel's cross-examination question as to whether the other probation officer also reported the suspected blood spots to the Missoula County Sheriff's Office, the PO acknowledged that she could have, but that the PO did not know.

[9] It is unclear from the actual evidentiary record as to how many and what type of other law enforcement officers subsequently responded to the scene. Contrary to Peoples's unsupported assertion on appeal that "two Missoula police officers and a detective arrived at the scene," the PO's suppression and revocation hearing testimony refers to only one responding officer—the initially responding MPD officer who immediately took custody of Peoples and removed him from the apartment. At the later hearing on merits of the State's probation revocation petition, defense counsel played and questioned the PO about the contents of the MPD officer's body-cam video, a video neither admitted, nor even offered, into evidence. The PO acknowledged that the body-cam video showed "officers" in the apartment, but nothing in the actual evidentiary record indicates how many or their agency affiliations other than the original three probation officers and

¶8 Pursuant to § 46-18-203, MCA, the PO subsequently filed a report of probation violation (ROV) alleging that Peoples violated the terms and conditions of his probation on March 16, 2018, based on possession and use of methamphetamine and refusing to open the door for probation officers when they knocked and announced their presence at his apartment. Based on the ROV, the State filed a petition for revocation of his suspended sentence. After obtaining appointed counsel and answering "not true" to the alleged violations, Peoples filed a motion to suppress the methamphetamine evidence found in his apartment. The sole asserted grounds for suppression were that the search and resulting seizure were constitutionally unreasonable because "[t]he stated basis for . . . [the] forced entry . . . was a pretext for . . . [a] warrantless search of [his] home" and that "[l]aw enforcement lacked sufficient justification" for the search. At the subsequent evidentiary hearing on the motion, the State presented the testimony of Peoples's PO who ultimately testified that he believed he had reasonable cause to conduct a warrantless probation search of Peoples's apartment under the circumstances. Peoples presented no evidence to support his assertion that the probation search was a pretext for a search of his residence for evidence for some other law enforcement purpose.[10] Analogizing the circumstances of this

accompanying U.S. Marshal. It is nonetheless undisputed on appeal that, after the MPD officer removed Peoples from the apartment, some number of Missoula law enforcement officers arrived and processed the suspected blood evidence in relation to the collateral homicide investigation. On further examination by defense counsel at the revocation hearing, the PO testified that an unidentified officer later advised him that blood DNA testing indicated that the blood found on the floor in the apartment was Peoples's blood.

[10] Even when defense counsel first brought up the parallel Missoula homicide investigation on cross-examination at the subsequent hearing on the merits of the probation revocation petition, the

case to those in *State v. Therriault*, 2000 MT 286, 302 Mont. 189, 14 P.3d 444, Peoples's sole argument at the close of hearing was that the alleged "violation[s] of conditions . . . did not give them the right to break in the door and search" his home. Orally at the close of hearing, and in a supplemental written order, the District Court denied the motion to suppress based on its ultimate finding and conclusion that the search and resulting seizure were lawful under the probation search exception to the warrant requirements of the Fourth Amendment to the United States Constitution and Article II, Sections 10-11 of the Montana Constitution.

¶9 On September 27, 2018, during the initial adjudicatory stage of the subsequent hearing on the merits of the probation revocation petition, the District Court took judicial notice of the evidentiary hearing record from the prior suppression hearing, as well as its resulting findings of fact, conclusions of law, and judgment denying the motion. Defense counsel then concurred that the PO should give supplemental testimony regarding the truth of the alleged probation violations and "with regard to issues pertaining to mitigation or aggravation in sentencing" in the event of revocation. However, defense counsel then proceeded to re-examine the PO regarding the circumstances of, and motivations for, the probation search of Peoples's apartment. When the State objected that Peoples was trying to relitigate the prior suppression motion ruling, the District Court overruled the objection

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PO unequivocally testified that, regardless of the interest of one of the other probation officers in the apartment blood report based on unconfirmed information that Peoples may have been involved in a recent homicide, the PO's sole purpose in conducting the probation search was to investigate Peoples's alleged illegal drug use and possible overdose.

based on defense counsel's assertion that he was not trying to "relitigat[e] the suppression issue," but was merely trying elicit supplemental testimony from the PO "in regard[] to [sentencing] mitigation" as to "the cost to Mr. Peoples's life and reputation already incurred" and the "impact this has had" on his liberty and business. Defense counsel then played and questioned the PO about the contents of a recording from the body-cam of the MPD officer who responded to take custody and remove Peoples from his apartment following the discovery of suspected methamphetamine. Defense counsel did not offer the body-cam video into evidence, however. He merely asserted that it was evidence held by the MPD in relation to the separate prosecution of Peoples in Missoula County for methamphetamine possession resulting from the probation search. After hearing the supplemental testimony of the PO, arguments of both counsel, and Peoples's unsworn statements in allocution, the District Court adjudicated him in violation of his probation as alleged in the ROV, revoked his suspended sentence, and resentenced him to an unsuspended 4-year and 3-month term of commitment to MDOC for placement in an appropriate correctional facility or program, with credit for time-served. Peoples timely appeals the denial of his motion to suppress the fruit of the March 2018 probation search of his apartment.

STANDARD OF REVIEW

¶10 We review denials of motions to suppress evidence for whether the lower court's supporting findings of fact are clearly erroneous. *State v. Conley*, 2018 MT 83, ¶ 9, 391 Mont. 164, 415 P.3d 473. Findings of fact are clearly erroneous only if not supported by

substantial evidence or our review of the evidence leaves us with a definite and firm conviction that the court misapprehended the evidence or was otherwise mistaken. *Conley*, ¶ 9. We review related lower court interpretations and applications of law de novo for correctness. *Conley*, ¶ 9.

DISCUSSION

¶11 *Whether the District Court erroneously denied Peoples's motion to suppress evidence seized in a warrantless probation search of his apartment based on asserted violations of Article II, Sections 10-11 of the Montana Constitution?*

¶12 The Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution similarly guarantee people the right to be free from "unreasonable" government "searches and seizures" of their persons, homes, and other areas or things in which they have a reasonable expectation of privacy. U.S. Const. amend. IV;[11] Mont. Const. art. II. § 11; *State v. Staker*, 2021 MT 151, ¶ 10 n.9, 404 Mont. 307, 489 P.3d 489; *State v. Hamilton*, 2003 MT 71, ¶¶ 17-18, 314 Mont. 507, 67 P.3d 871; *Smith v. Maryland,* 442 U.S. 735, 740-41, 99 S. Ct. 2577, 2580 (1979); *Oliver v. United States*, 466 U.S. 170, 176-78, 104 S. Ct. 1735, 1740-41 (1984) (noting implicit right to privacy embodied in the Fourth Amendment and threshold reasonable expectation of privacy test for non-textual area/things first enunciated in *Katz v. United States*, 389 U.S. 347, 360-61, 88 S. Ct. 507, 516 (1967) (Harlan, J., concurring)).

[11] The Fourth Amendment applies to the States through the Due Process clause of Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961).

¶13 Apart from the implicit privacy protection provided by the Fourth Amendment and similar language of Article II, Section 11, the Montana Constitution separately grants an express right to "individual privacy" against government intrusion. Mont. Const. art. II, § 10 ("[t]he right of individual privacy is essential to . . . a free society" and "shall not be infringed" absent "showing of a compelling state interest"). In accordance with the special privacy concerns of the Framers of our 1972 Constitution, Article II, Section 10 provides broader privacy protection, where implicated, than the Fourth Amendment and similar Article II, Section 11 protections against unreasonable searches and seizures. *See, e.g., State v. Hardaway*, 2001 MT 252, ¶ 51, 307 Mont. 139, 36 P.3d 900; *State v. Scheetz*, 286 Mont. 41, 47, 950 P.2d 722, 725 (1997); *State v. Solis*, 214 Mont. 310, 316-18, 693 P.2d 518, 521-22 (1984); *State v. Sawyer*, 174 Mont. 512, 515-18, 571 P.2d 1131, 1133-34 (1977), *overruled on other grounds by State v. Long*, 216 Mont. 65, 67-69, 700 P.2d 153, 155-56 (1985). Similar to the test that triggers the implicit privacy protection provided by the Fourth Amendment and Article II, Section 11 of the Montana Constitution, the express right to privacy provided by Article II, Section 10 applies only to areas, matters, and things in which the subject has a reasonable expectation of privacy under the totality of the circumstances. *Raap v. Bd. of Trustees, Wolf Point Sch. Dist.*, 2018 MT 58, ¶ 11, 391 Mont. 12, 414 P.3d 788; *Solis*, 214 Mont. at 314, 693 P.2d at 520; *Missoulian, Inc. v. Bd. of Regents*, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984); *Montana Hum. Rights Div. v. City of Billings*, 199 Mont. 434, 442, 649 P.2d 1283, 1287 (1982) (adopting *Katz* reasonable expectation of privacy test as threshold privacy test under Article II,

Section 10). While the threshold privacy test is the same under Article II, Section 10 and the Fourth Amendment, we have in application recognized a broader range of reasonable expectations of privacy under Article II, Section 10 in certain regards than under the Fourth Amendment, which have then resulted in our recognition of a correspondingly narrower range of exceptions to the Article II, Section 11 warrant requirement than the broader range recognized under the Fourth Amendment. *See State v. Elison*, 2000 MT 288, ¶¶ 43-59, 302 Mont. 228, 14 P.3d 456 (rejecting Fourth Amendment automobile exception for warrantless searches of vehicles on probable cause of contraband therein—invalidating warrantless searches on probable cause of areas of vehicle interior beyond plain view absent exigent circumstances rendering warrant requirement impractical); *State v. Goetz*, 2008 MT 296, ¶¶ 13-14 and 35, 345 Mont. 421, 191 P.3d 489 (holding that hidden electronic monitoring of face-to-face conversations in private settings are constitutional searches); *State v. Tackitt*, 2003 MT 81, ¶¶ 17-29, 315 Mont. 59, 67 P.3d 295 (holding that drug dog-sniffs around vehicle exterior are constitutional searches); *Hardaway*, ¶¶ 38-59 (limiting Montana exception for inventory body search incident to arrest to search for weapons/dangerous instruments and prevention of escape or destruction of evidence—holding that hand-swabbing for blood evidence incident to arrest is a search); *State v. Bassett*, 1999 MT 109, ¶¶ 21-44, 294 Mont. 327, 982 P.2d 410 (recognizing owner/occupant reasonable expectation of privacy in burnt-out/fire-damaged home/ruins); *Hulse v. Mont. Dep't of Justice, Motor Vehicle Div.*, 1998 MT 108, ¶¶ 19 and 33, 289 Mont. 1, 961 P.2d 75 (holding that field sobriety tests are constitutional searches valid only

upon particularized suspicion); *State v. Siegal*, 281 Mont. 250, 265-78, 934 P.2d 176, 184-92 (1997) (holding that thermal imaging of occupied structures is a constitutional search), *overruled on other grounds by State v. Kuneff*, 1998 MT 287, 291 Mont. 474, 970 P.2d 556; *State v. Bullock*, 272 Mont. 361, 376-85, 901 P.2d 61, 71-76 (1995) (recognizing reasonable expectation of privacy of residents in areas of land beyond curtilage of the home where reasonable precaution to shield them from public access/sight); *Solis*, 214 at 314-20, 693 P.2d at 520-23 (plurality holding that undisclosed electronic monitoring of face-to-face conversations in private settings constitutes a search); *State v. Sawyer*, 174 Mont. at 515-18, 571 P.2d at 1133-34 (limiting Montana exception for impounded vehicle inventory search to items in plain view).[12] Thus, in contrast to the narrower Fourth Amendment protection against unreasonable searches and seizures, we construe the Article II, Section 11 protection against unreasonable searches and seizures in conjunction with the greater range of privacy protection provided under Article II, Section 10. *See Goetz*, ¶¶ 13-14 and 35; *Hardaway*, ¶ 32; *State v. Smith*, 2004 MT 234, ¶ 9, 322 Mont. 466, 97 P.3d 567 (Mont. Const. art. II, § 10 right to privacy augments § 11 search and seizure protection); *Solis*, 214 Mont. at 319, 693 P.2d at 522 (Mont. Const. art. II, § 10 right to

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[12] *See also Goetz*, ¶ 58 ("Fourth Amendment . . . focus on the person rather than the place or setting is even more compelling" under Article II, Section 10 which "is broader in the sense that it encompasses information and activities in addition to places and persons"—internal citation omitted); *State v. Nelson*, 283 Mont. 231, 241-43, 941 P.2d 441, 448-49 (1997) (Article II, Section 10 right to privacy provides broader privacy protection including "'autonomy privacy'" and "'informational privacy,'" but does not provide any "new or heightened level of protection for any particular privacy interest[s]" traditionally protected by the Fourth Amendment and Article II, Section 11 such as the home, *inter alia*).

privacy "is the cornerstone of [the] protection[] against unreasonable searches and seizures" under Mont. Const. art. II, § 11).

¶14 Whether under the Fourth Amendment or Article II, Sections 10-11 of the Montana Constitution, a "search" is a means of gathering items of evidence or information employed by government agents which substantially infringes or intrudes into or upon one's home, person, or other area, thing, or information in which he or she has a reasonable expectation of privacy. Mont. Const. art. II, § 11; U.S. Const. amend. IV; *Elison*, ¶ 48 (citation omitted); *State v. Boyer*, 2002 MT 33, ¶¶ 20-69, 308 Mont. 276, 42 P.3d 771 (internal citations omitted); *Scheetz*, 286 Mont. at 46, 950 P.2d at 724-25 (1997); *Siegal*, 281 Mont. at 265, 934 P.2d at 84-85; *State v. Carlson*, 198 Mont. 113, 119, 644 P.2d 498, 501 (1982); *Florida v. Jardines*, 569 U.S. 1, 5-6, 133 S. Ct. 1409, 1414 (2013) (internal citations omitted); *Katz*, 389 U.S. at 351, 88 S. Ct. at 511 (Fourth Amendment protects people—not just places). In contrast, a constitutional "seizure" is government action that "deprives [an] individual of dominion over his or her person or property." *State v. Loh*, 275 Mont. 460, 468, 914 P.2d 592, 597 (1996) (quoting *Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 2306 (1990)).[13] Government searches and seizures are unlawful except as constitutionally reasonable. *See* Mont. Const. art. II, § 11; U.S. Const. amend. IV.

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[13] *Compare State v. Clayton*, 2002 MT 67, ¶ 12, 309 Mont. 215, 45 P.3d 30 (further defining constitutional seizure of a person—citing *United States v. Mendenhall*, 446 U.S. 544, 552-54, 100 S. Ct. 1870, 1876-77 (1980)).

¶15 As a means to implement the over-arching protection against unreasonable searches and seizures, the Fourth Amendment and Article II, Section 11 include express warrant requirements similarly providing that no warrant "shall issue" for the search of a person's home, body, or other place or thing, or for seizure of any person or thing, except upon a sworn showing of probable cause particularly describing the area or thing to be searched and/or the person or thing to be seized. Mont. Const. art. II, § 11; U.S. Const. amend. IV; *State v. Graham*, 2004 MT 385, ¶ 25, 325 Mont. 110, 103 P.3d 1073 ("warrant requirement is the mechanism implementing the constitutional protection against" unreasonable searches and seizures); *State v. Sorenson*, 180 Mont. 269, 274, 590 P.2d 136, 140 (1979) (discussing the "high function" of search warrants—quoting *McDonald v. United States*, 335 U.S. 451, 455-56, 69 S. Ct. 191, 193 (1948)), *overruled on other grounds by Loh*, 275 Mont. 460, 914 P.2d 592). Searches or seizures authorized by a valid warrant issued on probable cause are thus presumptively reasonable under the Fourth Amendment and Article II, Section 11. *Staker*, ¶¶ 8 and 13; *United States v. Banks*, 884 F.3d 998, 1011 (10th Cir. 2018); *Ganek v. Leibowitz*, 874 F.3d 73, 81 (2d Cir. 2017). *See also Goetz*, ¶¶ 26-27; *Graham*, ¶ 25; *Sorenson*, 180 Mont. at 274, 590 P.2d at 140 (quoting *McDonald*, 335 U.S. at 455-56, 69 S. Ct. at 193); *Winston v. Lee*, 470 U.S. 753, 759, 105 S. Ct. 1611, 1615-16 (1985); *United States v. Ross*, 456 U.S. 798, 828-29, 102 S. Ct. 2157, 2175 (1982). Warrantless searches and seizures, however, are *per se* unreasonable except under certain recognized and narrowly delineated exceptions to the warrant requirement. *Elison*, ¶ 39 (citing *Loh*, 275 Mont. at 468, 914 P.2d at 597); *Hardaway*, ¶ 36; *State v. Hubbel*, 286

Mont. 200, 212, 951 P.2d 971, 978 (1997); *Horton*, 496 U.S. at 133-34, 110 S. Ct. at 2306; *Katz*, 389 U.S. at 358, 88 S. Ct. at 515. Because they are unreasonable *per se*, the State has the burden of demonstrating that a warrantless search or seizure falls within one of the narrow range of recognized exceptions to the warrant requirement of the Fourth Amendment or Article II, Sections 10-11 of the Montana Constitution, as at issue. *Goetz*, ¶ 40 (citing *Sorenson*, 180 Mont. at 273, 590 P.2d at 139).

A. Validity of Warrantless Probation Search of Peoples's Apartment.

¶16 In this case, the PO, accompanied by two other probation officers and a deputy U.S. Marshal, made a warrantless entry into Peoples's apartment without his consent to, at a minimum, investigate his reported methamphetamine use and possible drug overdose in violation of his probation and the criminal law. His apartment was a constitutionally-protected area within the express language of the Fourth Amendment and Article II, Section 11, and in which he had a reasonable expectation of privacy to the extent undiminished by his probation status. *See Graham*, ¶ 22 ("the home . . . is historically the *raison d'être* for" the similar protection provided by the Fourth Amendment and Article II, Section 11); *Therriault*, ¶ 53 ("physical invasion of the home is the chief evil to which the 4th Amendment and . . . Article II, § 11, are directed"); *Siegal*, 281 Mont. at 274, 934 P.2d at 190 (person's "greatest expectation of privacy" is in his or her residence); *Payton v. New York*, 445 U.S. 573, 583-90, 100 S. Ct. 1371, 1378-82 (1980) (entry into the home was "the chief evil against which . . . Fourth Amendment is directed"—"the archetype" and at the "very core" of Fourth Amendment protection—internal citations omitted). Like any other

person's home or dwelling, "[a] probationer's home . . . is protected by" the express requirement of the Fourth Amendment, and similar language of Article II, Section 11, that government searches be reasonable in manner and scope. *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168 (1987). *Accord State v. Moody*, 2006 MT 305, ¶ 27, 334 Mont. 517,148 P.3d 662 (probationers maintain an "expectation of privacy during" probation). As found by the District Court, and manifest on the totality of the circumstances of record, the officers' warrantless entry into Peoples's apartment was a constitutional search, and thus per se unreasonable under the Fourth Amendment and Article II, Section 11 of the Montana Constitution except to the extent that it fell within one of the narrow range of exceptions to the warrant requirement recognized under Article II, Sections 10-11 of the Montana Constitution.

¶17 One such exception is the probation search exception. *See State v. Fischer*, 2014 MT 112, ¶¶ 10-11 and 17, 374 Mont. 533, 323 P.3d 891; *State v. Fritz*, 2006 MT 202, ¶¶ 10-14, 333 Mont. 215, 142 P.3d 806; *State v. Burchett*, 277 Mont. 192, 195-97, 921 P.2d 854, 856-57 (1996); *State v. Burke*, 235 Mont. 165, 169-71, 766 P.2d 254, 256-57 (1988); *United States v. Knights*, 534 U.S. 112, 119-22, 122 S. Ct. 587, 591-93 (2001); *Griffin*, 483 U.S. at 873-80, 107 S. Ct. at 3168-72. Under this exception, a probation officer may search a probationer's residence and property, or cause them to be searched by another officer, without a warrant or probable cause for evidence of violation of a probation condition or the criminal law if: (1) such searches are generally authorized by an established state law regulatory scheme that furthers the special government interests in rehabilitating

probationers and protecting the public from further criminal activity by ensuring compliance with related conditions of probation and the criminal law; (2) the probation officer has reasonable cause to suspect, based on awareness of articulable facts, under the totality of the circumstances that the probationer may be in violation of his or her probation conditions or the criminal law; and (3) the warrantless search is limited in scope to the reasonable suspicion that justified it in the first instance except to the extent that new or additional cause may arise within the lawful scope of the initial search. *See Fischer*, ¶¶ 10-17 (citing *Burchett*, *Burke*, and *Griffin*, *inter alia*); *State v. Brooks*, 2012 MT 263, ¶¶ 14-15, 367 Mont. 59, 289 P.3d 105; *Fritz*, ¶¶ 10-14 (applying *Griffin* exception under Mont. Const. art. II, § 11 by citation to *Burchett*, *inter alia*); *Burchett*, 277 Mont. at 195-97, 921 P.2d at 856-57 (citing *Burke* and *Griffin*); *Burke*, 235 Mont. at 169-71, 766 P.2d at 256-57 (citing *Griffin*); *Knights*, 534 U.S. at 119-22, 122 S. Ct. at 591-93 (applying and elaborating on *Griffin*); *Griffin*, 483 U.S. at 873-80, 107 S. Ct. at 3168-72 (applying special regulatory needs "beyond the normal need for law enforcement" exception to Fourth Amendment warrant and probable cause requirements in context of probation searches). *See also State v. Roper*, 2001 MT 96, ¶¶ 12-17, 305 Mont. 212, 26 P.3d 741 (probation officer lawfully in probationer's workplace to conduct warrantless probation search of his person on reasonable cause of drug use/possession lawfully seized suspect drug container-pouch observed in plain view in close proximity to probationer); *United States v. McGill*, 8 F.4th 617, 622-24 (7th Cir. 2021) (probationer officer lawfully present in probationer's home within scope of lawful warrantless probation search exception lawfully

seized immediately apparent contraband under plain view exception to warrant requirement); *Terry v. Ohio*, 392 U.S. 1, 17-21, 88 S. Ct. 1868, 1878-80 (1968) (Fourth Amendment reasonableness requirement strictly limits scope and duration of a permissible warrantless search or seizure to its initial justification—must be "reasonably related . . . to the circumstances which justified the interference in the first place"). The constitutional justification for dispensing with the more stringent warrant and accompanying probable cause requirements under the over-arching reasonableness requirements of the Fourth Amendment and Article II, Section 11 are that, unlike ordinary citizens who are entitled to the full breadth of constitutional privacy protection, probationers have significantly diminished subjective and objective expectations of privacy based on: (1) the nature of probation as criminal punishment in the form of conditional liberty granted as a matter of sentencing grace; (2) their resulting awareness and expectation that they will thus be subject to extraordinary government scrutiny while on probation; (3) the government's offsetting special needs and compelling interests in probationer rehabilitation and public safety through close monitoring and enforcement of compliance with conditions of probation and the criminal law; and (4) recognition that probationers are more likely than ordinary citizens to violate the law and have greater incentive to attempt to conceal such violations and immediately dispose of incriminating evidence. *See Brooks*, ¶¶ 14-15; *Fritz*, ¶¶ 10-14; *Burchett*, 277 Mont. at 195-97, 921 P.2d at 856-57; *Burke*, 235 Mont. at 169-71, 766 P.2d at 256-57; *Knights*, 534 U.S. at 119-22, 122 S. Ct. at 591-93; *Griffin*, 483 U.S. at 873-80, 107 S. Ct. at 3168-72.

¶18 It remains unsettled whether the reasonable suspicion standard of the Fourth Amendment probation search exception is the substantial equivalent of the articulable particularized suspicion standard of reasonableness under the *Terry* investigative stop exception[14] or, rather, the nature of the special regulatory government needs beyond normal law enforcement that underly the probation search exception substantially outweigh the diminished expectation of privacy of probationers to such an extent as to render a particularized suspicion requirement impractical and unnecessary as long as the justification and scope of the warrantless search is otherwise reasonably related to those special needs under the totality of the circumstances.[15] Nor is that questioned well-settled

[14] *See Knights*, 534 U.S. at 121-22, 122 S. Ct. at 592-93 ("degree of individualized suspicion" will vary—requisite suspicion must merely be "reasonable" under the totality of the circumstances on "balance" of probationer's "significantly diminished privacy interests" and the special government needs in rehabilitation and public safety); *see also State v. Questo*, 2019 MT 112, ¶ 12, 395 Mont. 446, 443 P.3d 401 (recognizing application of *Terry* investigative stop exception under Fourth Amendment and Montana Constitution art. II, §§ 10-11); *State v. Gopher*, 193 Mont. 189, 192-94, 631 P.2d 293, 295-96 (1981) (applying *Terry* investigative stop exception to motor vehicles); *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 694-95 (1981) (law enforcement officer may effect warrantless stop and detention of persons for investigative purposes without probable cause for an arrest based on *specific and articulable facts known to the officer*, and rational inferences therefrom, sufficient for an objectively *reasonable particularized suspicion* that an individual is engaged or about to engage in criminal activity—citing *Terry*, 392 U.S. at 16-21, 88 S. Ct. at 1877-80).

[15] *See Knights*, 534 U.S. at 120 n.6, 122 S. Ct. at 592 (reserving question of whether the probation search condition "so diminished, or completely eliminated, [the probationer's] reasonable expectation of privacy" such that "a search . . . without any individualized suspicion would have satisfied the [Fourth Amendment] reasonableness requirement" because subject probation "search was supported by reasonable suspicion"); *People v. Reyes*, 968 P.2d 445, 449-51 (Cal. 1998) (holding based on balancing of the special compelling government interests in supervising probationer against the significantly diminished expectation of privacy of probationers that Fourth Amendment reasonableness does not necessarily require particularized suspicion of a criminal law or probation violation for warrantless probation searches as long as reasonably related to those special interests and not otherwise unreasonable in frequency, time of day, duration, or other

under Article II, Sections 10-11 of the Montana Constitution. *See Fischer*, ¶ 11 ("reasonable suspicion standard" "is substantially less than the probable cause standard" due to "probationer's diminished expectation of privacy"); *Brooks*, ¶ 14 (probationers do not have "same liberty and expectations of privacy afforded every [other] citizen" under Mont. Const. Article II, Section 10 and recognizing that probationers are "more likely than the ordinary citizen to violate the law"—internal citation and punctuation omitted);

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reasons that are arbitrary or oppressive under the circumstances), *cert. denied*, *Reyes v. California*, 526 U.S. 1092, 119 S. Ct. 1507 (1999); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 and 672-79, 109 S. Ct. 1384, 1390-91 and 1394-98 (1989) (noting "longstanding principle that neither a warrant[,] . . . probable cause, nor . . . any measure of individualized suspicion, is an indispensable component of [constitutional] reasonableness in every circumstance" and holding that warrantless urinalysis tests of customs agents "directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty" is constitutionally reasonable based on the "special governmental needs, beyond the normal need for law enforcement," served by such intrusion in furtherance of the compelling government interests in border safety and integrity substantially outweigh the "diminished expectation of [individual] privacy" in this context); *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 619-20 and 624, 109 S. Ct. 1402, 1414-15 and 1417 (1989) (federal government "interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison likewise presents special needs beyond normal law enforcement"—noting that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable" and holding that regulatory urinalysis testing of railroad employees is a circumstance "where the privacy interests implicated . . . are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion," and are thus constitutionally "reasonable despite the absence of such suspicion"—internal citations and punctuation omitted); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 n.8, 105 S. Ct. 733, 743 (1985) (reserving question of warrantless special needs-based searches of students by school authorities, based on "reasonable grounds" under the totality of the circumstances "for suspecting that the search will [reveal] evidence that [a] student has violated or is violating" the criminal law or school rules, require "individualized suspicion [a]s an essential element of [such] reasonableness standard" and noting that "although some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," particularized suspicion is not an "irreducible requirement" of Fourth Amendment reasonableness in every circumstance—internal citations and punctuation omitted).

Burchett, 277 Mont. at 195-96, 921 P.2d at 856 ("reasonable cause" standard "is substantially less than the probable cause standard" on balance of probationer's "diminished expectation of privacy" with special government needs for probationer rehabilitation and public protection); *Burke* 235 Mont. at 168-69 and 171, 766 P.2d at 256-57 (adopting *Griffin* "reasonable grounds" to suspect contraband possession standard for warrantless probation searches based on recognition: (1) that probationers have diminished expectation of privacy resulting from nature of probation as punishment in form of "conditional liberty;" (2) their resulting awareness of extraordinary scrutiny; and (3) that state "operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement" to effect "genuine rehabilitation" and public protection from "the probationer's conditional liberty status," "that may justify departures from the usual warrant and probable cause requirements" thus allowing probation officers to act on a "lesser degree of certainty than" constitutional reasonableness typically requires based on the officer's "entire experience with the probationer" and assessment of "probabilities in the light of . . . knowledge of" his or her "life, character, and circumstances"—quoting *Griffin*, 483 U.S. at 873-74 and 879, 107 S. Ct. at 3168 and 3171—internal punctuation omitted).[16] However, even if it does not necessarily require the equivalent of the *Terry*

[16] *See also State v. Spady*, 2015 MT 218, ¶¶ 23 and 26-31, 380 Mont. 179, 354 P.3d 590 (noting that "individualized suspicion" is the "typical[]" requirement for constitutional reasonableness for warrantless searches under Fourth Amendment and Article II, Sections 10-11, but noting exception for "special law enforcement needs" in context of "an individual's diminished expectations of privacy" and relatively "minimal intrusion" under the circumstances—holding that twice-daily

standard of particularized suspicion for a valid warrantless probation search in every case, the reasonableness requirements of the Fourth Amendment and Article II, Sections 10-11, of the Montana Constitution at least require some specific and articulable factual basis known to the probation officer upon which to reasonably suspect, based on the probationer's criminal and probation compliance history and the officer's knowledge of his or her life, character, and circumstances, that the probationer may be in possession of contraband in violation of his or her probation or the criminal law. *See Fischer*, ¶¶ 10-17; *Brooks*, ¶¶ 14-15; *Burchett*, 277 Mont. at 195-97, 921 P.2d at 856-57; *Burke*, 235 Mont. at 168-69 and 171, 766 P.2d at 256-57; *Knights*, 534 U.S. at 119-22, 122 S. Ct. at 591-93; *Griffin*, 483 U.S. at 873-80, 107 S. Ct. at 3168-72; *United States v. Hill*, 967 F.2d 902, 910 (3d Cir. 1992) ("it is reasonable to allow a parole officer to search" upon reasonable belief "that it is necessary to perform his duties" but the decision to search must be based on "specific facts"). Whether a probation search was justified by reasonable suspicion of violation of a probation condition or the criminal law "is a factual inquiry" under "the totality of the circumstances" in each case. *Fischer*, ¶ 11; *Fritz*, ¶ 10.

¶19 Here, as express conditions of the suspended portion of his sentence under the authority of §§ 46-18-201(4)(c), (p), and -202(1)(g), MCA, Peoples's 2003 sentencing

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warrantless pretrial breath alcohol content searches of accused DUI offenders under statutory 24/7 Program are reasonable special needs searches without requirement for individualized suspicion based on relative balance of "important governmental interest" furthering highway safety by deterring drunk driving, diminished expectation of privacy of individuals accused of second or subsequent DUI, and relatively minimal nature of the intrusion).

order in pertinent part specifically required him to "submit to the supervision of . . . [MDOC] and fully comply with all requirements and regulations imposed by that agency" and to additionally:

> submit to a warrantless search of his person, vehicle, place of residence, and place of employment by his supervising officer whenever there is reasonable cause to believe that he has violated the law or any condition of his sentence.

As a matter of law, MDOC "is responsible for [the] investigation and supervision" of felony probationers. *See* §§ 46-1-202(21), 46-18-201(8), 46-23-1001(7), -1004, and -1011, MCA. MDOC accordingly "may . . . adopt rules for the conduct of persons placed on parole or probation" except that it "may not make any rule conflicting with" parole conditions imposed by the parole board or probation conditions imposed by the sentencing court. Section 46-23-1002(3), MCA. To that end, MDOC has adopted administrative rules specifying, *inter alia*, that:

(1) probationers are "prohibited from using or possessing . . . illegal drugs;"

(2) probationers "must comply with all municipal, county, state, and federal laws and ordinances and shall conduct" themselves as "good citizen[s];"

(3) probationers "must make the[ir] residence open and available to an officer for a home visit or for a search upon *reasonable suspicion*;"

(4) "the sentencing court [has] the authority to order the [probationer] to abide by additional conditions . . . contained in the judgment" of sentence; and

(5) "[u]pon *reasonable suspicion* that" a probationer "has violated the conditions of supervision, a probation and parole officer may search [his or her] person, vehicle, and residence" and the probationer "must submit to such search.

Admin. R. M. 20.7.1101(1), (7)-(9), and (12) (2008) (emphasis added).[17] Probationers "must" sign a "copy of the [applicable] conditions of probation" and, by written agreement provided by a supervising officer and setting forth "all of the conditions of probation," "must agree to" comply with "the conditions." Section 46-23-1011(3), MCA, and Admin. R. M. 20.7.1102(1) (2008).

¶20 Here, Peoples does not dispute that Title 46, chapter 18, MCA, and Admin. R. M. 20.7.1101 and 20.7.1102 (2008) are part of an established state law regulatory scheme that furthers Montana's special interests in rehabilitating probationers and protecting the public from further criminal activity by ensuring probationers' compliance with related conditions of probation and the criminal law. He similarly does not dispute that, based on his wife's report the day before, his PO had reasonable cause to suspect that he was again using and in possession of methamphetamine in violation of his probation and the criminal law. He likewise does not dispute his PO's suppression hearing testimony that the PO, and other accompanying probation officers and deputy U.S. Marshal, repeatedly knocked on his apartment door for "a long time" in a "very loud" manner, announced "that [they] were Probation," but received no response before entering his apartment with a key obtained from the apartment complex manager. Nor does he dispute the PO's testimonial assertion that the suspected methamphetamine was immediately visible on the bed in plain view

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[17] See also Admin. R. M. 20-7-1101(7) (2008) ("probation . . . officer may authorize a law enforcement agency to conduct a search, provided the . . . officer determines reasonable suspicion exists that the offender has violated the conditions of supervision").

upon the officers' initial entry into his apartment. *See Loh*, 275 Mont. at 468-73, 914 P.2d at 597-600 (recognizing plain view exception to the warrant requirement enunciated in *Horton*, 496 U.S. at 136-37, 110 S. Ct. at 2308 (authorizing warrantless seizure of immediately apparent contraband visible within plain view upon lawful police entry/presence in the area and concomitant lawful access to the contraband)).[18] Based on those facts not subject to genuine material dispute on the evidentiary record in this case, we hold that the District Court correctly found and concluded that the warrantless entry and search of his home for evidence of methamphetamine possession and use on March 16, 2018, was lawful under the probation search exception recognized under Article II, Sections 10-11 of the Montana Constitution.[19]

¶21 Consistent with his cursory assertion in support of his suppression motion below, Peoples continues, in essence, to expressly or implicitly assert, *inter alia*, that the warrantless entry into his apartment was nonetheless unreasonable in scope under Article II, Sections 10-11 because the methamphetamine-based probation search was

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[18] *See also*, *e.g.*, *United States v. Naugle*, 997 F.2d 819, 823 (10th Cir. 1993) ("officers cannot use the plain view doctrine to justify a warrantless seizure" of an object seen "through the window of a house").

[19] As in *Knights*, 534 U.S. at 120 n.6, 122 S. Ct. at 592, we need not determine whether the reasonableness requirement of Article II, Sections 10-11 of the Montana Constitution permits some lesser standard for warrantless probation searches because the search at issue here was based on specific articulable facts, and rational inferences, known to the PO that resulted in an objectively reasonable particularized suspicion that Peoples had been using and was likely in possession of methamphetamine in violation of his probation and the criminal law and that evidence of that violation was likely present in his apartment.

merely a pretext to gain warrantless entry into his apartment to search for and seize potential blood evidence, reportedly seen by his wife the day before, in relation to an independent law enforcement investigation of which the PO and accompanying officers were aware. However, aside from the argument of counsel and reference to matters not in evidence below, Peoples's original pretext search theory is not supported by the actual evidentiary record in this case. Viewed in the light most favorable to Peoples, the record factual basis for that theory, largely based on the record of the probation revocation hearing which did not take place until after the court had already denied his suppression motion on the prior suppression hearing record, takes nothing away from the reasonable suspicion articulated by the PO at the suppression hearing that Peoples was again using methamphetamine in his apartment in violation of his probation and the criminal law. There is simply no non-speculative record *evidence* in this case that the PO, or any of the accompanying officers, either collaborated in advance with Missoula area law enforcement authorities, or acted unilaterally among themselves, to orchestrate the probation search as a means to get otherwise unlawful law enforcement access into Peoples's apartment to investigate the blood reportedly seen by his wife the day before. Nor does Peoples assert that the suspected blood spots observed in his apartment were not readily observable by the officers within the scope of the probation search for methamphetamine evidence based on his extensive methamphetamine-based non-compliance history and his wife's report of his most recent methamphetamine use the day before.

¶22 We are nonetheless cognizant of the possibility of probation-police collaboration or cooperation in the execution of an otherwise valid probation search with some secondary enforcement purpose in mind. Here, however, Peoples has failed to demonstrate how, even if evidence of a secondary purpose was actually present here, any such collaboration or cooperation would be of constitutional magnitude. We have long recognized that probation-police collaboration and cooperation in monitoring and ensuring probationer compliance with probation conditions and the criminal law is not only constitutionally proper, but highly desirable in furtherance of probation compliance and public safety. *See Burchett*, 277 Mont. at 196-97, 921 P.2d at 856-57; *Burke*, 235 Mont. at 170, 766 P.2d at 257. We have further recognized that police involvement or assistance in an otherwise valid probation/parole search, even if motivated in part by an independent law enforcement purpose, does not render a search unreasonable under the Fourth Amendment or Article II, Section 11 of the Montana Constitution if initially authorized by a probation officer based on reasonable suspicion of a probation/parole violation and the search remains within the scope of that reasonable suspicion. *State v. Crawford*, 2016 MT 96, ¶¶ 19-22, 383 Mont. 229, 371 P.3d 381 (inquiry into any alleged ulterior law enforcement motive is "inappropriate" if parole search is otherwise validly based on reasonable suspicion and noting that *Knights*, 534 U.S. at 122, 122 S. Ct. at 593 "dealt a fatal blow" to any "continued validity" of such "stalking horse"/ulterior motive theories of constitutional unreasonableness); *Fritz*, ¶¶ 12-13 (reaffirming that police involvement in conducting or assisting a probation-authorized probation search "does not render an otherwise valid

probation search invalid" under the Fourth Amendment and Article II, Section 11); *Burchett*, 277 Mont. at 196-97, 921 P.2d at 856-57 (rejecting ulterior motive theory of constitutional unreasonableness—holding police involvement or assistance in an otherwise lawful probation search conducted by a probation officer on reasonable cause is not an unreasonable subterfuge search "as a matter of law"); *Burke*, 235 Mont. at 170, 766 P.2d at 257 (noting "unique circumstances of probation enforcement in Montana" and "encourag[ing] cooperation and communication between police and probation officers" as long as the "discretion" for a probation search "remains with the probation officer"). Montana's broader constitutional right to privacy is further of no avail to Peoples in that regard because probationers and parolees have no greater expectation of privacy from reasonable suspicion based probation searches under Article II, Sections 10-11, than under the Fourth Amendment. *See Crawford*, ¶¶ 19-22 (rejecting "stalking horse"/ulterior motive theory of invalidity of reasonable suspicion based parole search—citing *State v. Farabee*, 2000 MT 265, 302 Mont. 29, 22 P.3d 175 (noting that Article II, Section 11 provides no independent justification for deviating from Fourth Amendment jurisprudence regarding validity of alleged pretext/ulterior motive based warrantless traffic stops regardless of any subjective motivation of the officers)); *Brooks*, ¶ 14 (noting diminished expectation of privacy of probationers under Article II, Section 10 based on nature of probation as punishment, discretionary opportunity for rehabilitation outside of prison, and that probationers are more likely than ordinary citizens to violate the law—probationers do not have same reasonable expectations of liberty and privacy as non-probationers). We thus

hold that, regardless of any alleged secondary motive for the search, the District Court correctly concluded that the warrantless entry and probation search of Peoples's apartment, and resulting seizure of suspected methamphetamine, was lawful under the reasonable suspicion based probation search exception to the warrant requirement of Article II, Sections 10-11 of the Montana Constitution.

B. Reasonableness of the Manner of Entry and Temporary Detention.

¶23 Though imprecisely characterized as a search that exceeded the lawful *scope* of any reasonable suspicion of illegal drug use that may have justified a warrantless probation search, Peoples further essentially asserts on appeal that the "violent," "intimidating," "harassing," and "degrading" *manner* in which his PO and accompanying officers entered his apartment with guns drawn was unreasonably disproportionate to the suspicion of illegal drug use that may have otherwise justified a probation search.[20] He posits on appeal that the PO should have more reasonably attempted to conduct a less-intrusive probation home visit[21] and then, if he did not answer the door, either leave and "try again later" or attempt to telephone him "from outside the door." Further deviating from the stated basis

[20] While the sole asserted basis of his written suppression motion was that the search was constitutionally invalid because it "was a [mere] pretext for an unlawful warrantless search" of his apartment, he did argue in passing at the suppression hearing that the alleged probation "violation[s] . . . did not give [the officers] the right *to break in the door*." (Emphasis added.)

[21] See *Moody*, ¶¶ 19 and 27 (holding that limited-in-scope probation "home visit" was insufficiently intrusive in manner and scope to rise to the level of a constitutional "search" in the probation supervision setting), and Admin. R. M. 20.7.1101(1) (2008) (distinguishing probation "home visit" from "a search upon reasonable suspicion").

of his suppression motion, Peoples asserts for the first time on appeal that the manner and duration of his temporary detention following the methamphetamine discovery (i.e. leaving him sitting handcuffed on his bed naked for the next 30 minutes until a responding police officer arrived and took him to jail) was also constitutionally unreasonable, thus, in conjunction with the officers' manner of initial entry, rendering the probation search and resulting methamphetamine seizure invalid in violation of Article II, Sections 10-11 of the Montana Constitution in any event. Peoples did not reference and decry the manner of his subsequent detention, after the methamphetamine discovery, in support of his suppression motion below. He did not reference it until later, at the subsequent hearing on the merits of the probation revocation petition, and then only on the express disclaimer, in response to a State objection, that he was not trying to "relitigat[e] the suppression issue," but was merely raising the manner of the search "in regard[] to" post-revocation *sentencing* "mitigation." While the State objected at oral argument that Peoples did not properly preserve this unreasonable manner assertion, it did not timely object in its response brief. Under these unique circumstances, we will thus address both unreasonable manner assertions on the merits in tandem.

¶24 A government search or seizure satisfies the over-arching reasonableness requirement of the Fourth Amendment and Montana Constitution Article II, Sections 10-11 only if it satisfies the warrant requirement, or a recognized exception thereto, *and* the manner of execution was reasonable in relation to the reason that justified the search or seizure in the first place. *See State v. Neiss*, 2019 MT 125, ¶¶ 23-26, 396 Mont. 1, 443

P.3d 435 (distinguishing reasonableness and warrant requirements of Mont. Const. art. II, § 11, and recognizing constitutional reasonableness as function of compliance with warrant requirement and the reasonableness of the manner of execution of the search or seizure); *State v. Clayton*, 2002 MT 67, ¶¶ 12 and 26-27, 309 Mont. 215, 45 P.3d 30 ("central inquiry" regarding "legality of a search or seizure" under Fourth Amendment and "broader" Montana constitutional "protections" is "reasonableness under all the circumstances" of the "invasion" of a constitutionally protected "privacy interest"—holding that police car approach without lights or siren, stop behind, and shining spotlight into standing occupied vehicle on city street did not effect a constitutional seizure of the occupant); *Illinois v. Caballes*, 543 U.S. 405, 407-10, 125 S. Ct. 834, 837-38 (2005) (seizure lawful at inception may yet violate Fourth Amendment if "manner of execution unreasonably infringes [constitutionally-protected] interests"—citing *United States v. Jacobsen*, 466 U.S. 109, 124, 104 S. Ct. 1652 (1984)); *United States v. Banks*, 540 U.S. 31, 35-43, 124 S. Ct. 521, 524-29 (2003) (assessment of Fourth Amendment "reasonableness" encompasses consideration of both threshold legitimacy and manner of execution of a search or seizure under the totality of the circumstances—but holding that 15-20 second delay before entry after officers knocked and announced in executing search warrant did not render the otherwise valid entry unreasonable); *Wilson v. Arkansas*, 514 U.S. 927, 934-36, 115 S. Ct. 1914, 1918-19 (1995) ("method" of otherwise lawful "entry into a dwelling" is a relevant factor, *inter alia*, in assessing the reasonableness of a "seizure"—holding that compliance with common law knock-and-announce rule is

relevant factor, *inter alia*, in assessing reasonableness of a warrant-authorized search); *Terry*, 392 U.S. at 17-20 and 28, 88 S. Ct. at 1878-79 and 1883 (scope and duration of a warrantless search or seizure "must be strictly tied to and justified by the circumstances which rendered . . . [it] permissible," *i.e.*, "reasonably related in scope to the circumstances which justified the interference in the first place"—"[t]he manner in which the [warrantless] seizure and search were conducted is, of course, as vital a part of the [reasonableness] inquiry as whether they were warranted at all"). As a preliminary matter here, there is no assertion, much less record evidence, that any of the officers who entered the apartment to conduct the probation search in fact pointed a gun at Peoples. Nor is there any record evidence that any of them were physically or verbally threatening, aggressive, or unruly toward him or evinced any otherwise oppressing or harassing intent or conduct. *See Fischer*, ¶ 11 (probation search exception may not be used "as an instrument of harassment or intimidation"—*citing Burke*, 235 Mont. at 171, 766 P.2d at 257). There is similarly no evidence that they kicked or otherwise forced the apartment door open as alleged by Peoples.[22] Based on the records of the separate suppression hearing and post-suppression hearing on the merits of the probation revocation petition, the only *evidence* regarding the *manner* of the warrantless entry and detention in this case was the testimony of Peoples's PO that:

[22] Similarly without record support other than the mere fact of his race, Peoples further suggests in passing for the first time on appeal that the officers treated him in a racially discriminatory manner. We will not indulge this unsupported and unpreserved assertion raised for the first time on appeal.

(1) one of the officers loudly knocked on the apartment door several times and announced the officers as "probation;"

(2) Peoples was inside but did not open the door or answer from inside;

(3) the officers then entered the apartment in a non-forceful manner with the turn of the manager's key;

(4) the officers entered with their sidearms temporarily drawn until "re-holstered" after they "cleared [the apartment] for safety;"

(5) the officers immediately saw Peoples sitting naked on the edge of his bed with a bag of suspected methamphetamine clearly visible on the bed;

(6) an officer immediately handcuffed the compliant Peoples while the others completed their sweep of the apartment;

(7) after handcuffing Peoples, several officers observed suspected blood spots in or about the bathroom/laundry area of the apartment;

(8) one of them summoned an MPD officer to respond and take custody of Peoples and the suspected methamphetamine;

(9) the officer who summoned the MPD to take custody of Peoples also notified the MPD and/or the Missoula County Sheriff's Office (MCSO) of the suspected blood spots, apparently in relation to a separate homicide investigation;

(10) Peoples remained handcuffed sitting naked on the edge of the bed for 30 minutes until the MPD officer arrived, directed the others to get him some clothes, and shortly thereafter removed him from the apartment under arrest for possession of methamphetamine; and

(11) other MCSO and/or MPD officers subsequently arrived to examine and process the suspected blood spots in regard to the separate investigation.

¶25 Peoples mis-cites isolated language from *Therriault*, ¶ 53 ("it is well-settled that the government's intrusion into a home through an unlocked door is no different than if entry is gained with a key, or the use of force"), out of context to support his apparent assertion

that any non-consensual entry is a *forceful* entry *as a matter of law* for purposes of assessing the reasonableness of the manner of a search. However, we made the cited statement in *Therriault* in the context of assessing whether the probation officer's non-forceful entry through an unlocked door was a constitutional search and then whether it was justified under the probation search exception to the warrant requirement of Article II, Sections 10-11 of the Montana Constitution—not whether the manner of an otherwise permissible warrantless search was unreasonable. *See Therriault*, ¶¶ 30-53. Contrary to the Dissent's assertion, our distinguishing recognition here of the actual analytical context of the Peoples-cited statement from *Therriault* does not "overrule[] *Therriault*." We have long recognized that "two separate factors" "determine *what constitutes a search*," that then requires compliance with the state and federal warrant requirements or an applicable recognized exception thereto—whether the subject government action intruded into or upon a reasonable expectation of privacy and the "*nature of the* [government] *intrusion*." *Hardaway*, ¶ 16 (citing *Scheetz*, 286 Mont. at 48, 950 P.2d at 726—emphasis added). The cited language from *Therriault* was thus no more than a case-specific application of the threshold test for whether a constitutional "search" occurred for purposes of triggering application of the warrant requirement of Article II, Sections 10-11 of the Montana Constitution. *See Therriault*, ¶ 53 (noting that the "nature of an officer's warrantless intrusion" into or upon a subject's reasonable expectation of privacy "necessit[ates] that the State prove that one of the exceptions" to the constitutional search warrant requirement "applies"); *compare Hardaway*, ¶ 16 (citing *Scheetz*, 286 Mont. at 48, 950 P.2d at 726.

Unlike here, and contrary to the apparent assertions of Peoples and the Dissent, the question of whether a warrantless search that was otherwise authorized under a recognized exception to the warrant requirement was nonetheless constitutionally unreasonable based on the manner by which it occurred was not at issue in *Therriault*.[23]

¶26 Except as otherwise provided by statute, and subject to the federal and Montana constitutional protections against unreasonable searches and seizures, it is generally within the discretion of executive branch law enforcement officers "to determine the details of how best to proceed" in executing a search or seizure. *Dalia v. United States*, 441 U.S. 238, 257, 99 S. Ct. 1682, 1693 (1979). Assessment of the constitutional reasonableness of a particular use of force by police incident to an otherwise lawful search or seizure "requires a careful balancing of the nature and quality of the intrusion" on the constitutionally-protected privacy interests at issue "against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1871-72 (1989) (construing Fourth Amendment reasonableness requirement as the predicate legal right for purposes of a 42 U.S.C. § 1983 civil rights claim—internal punctuation omitted). As recognized by the Supreme Court:

> the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of [constitutional] reasonableness . . . is not capable of precise definition or mechanical application, however, its proper application

[23] Nor does pointing-out the actual analytical context of the subject statement from *Therriault* state or otherwise suggest that an otherwise valid non-consensual entry into a probationer's home with a key under the probation search exception necessarily precludes consideration of whether the manner of entry may yet be constitutionally unreasonable under the totality of the circumstances in a particular case.

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The [protection against unreasonable searches and seizures] is not violated by an . . . [otherwise valid arrest], even though the wrong person is arrested . . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . [is constitutionally unreasonable]. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.
>
> . . . [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a [constitutional] violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Graham, 490 U.S. at 396-97, 109 S. Ct. at 1871-72 (internal punctuation and citations omitted). Here, whether the *manner* of the initial warrantless entry and subsequent detention of Peoples was constitutionally reasonable or unreasonable under the totality of the circumstances is difficult to assess on the limited evidentiary record, particularly when the district court did not address either unreasonable manner assertion because Peoples neither squarely challenged the manner of entry below, other than in passing reference in oral argument at the suppression hearing, nor made any challenge to the manner of his subsequent temporary detention in relation to his motion to suppress. Nonetheless, on one

hand, the mere fact that three probation officers and accompanying U.S. Marshal—with reasonable suspicion of Peoples's use and possession of methamphetamine in violation of his probation and the criminal law—entered his apartment during the day, with the turn of the manager's key, after no answer to their repeated loud knocking and announcement as probation officers, and absent evidence that they pointed guns at him or otherwise used force is insufficient alone to establish on appeal that their *manner* of entry was constitutionally unreasonable under the totality of the record circumstances.[24] On the other hand, the State has yet to articulate any reasonable justification for requiring Peoples to sit handcuffed naked on his bed for 30 minutes in the presence of several officers, including a female, until an MPD officer arrived to arrest him for suspect methamphetamine possession. Taking as true, *arguendo*, his assertion that the way the officers treated him for those 30 minutes was constitutionally unreasonable, the dispositive question in this case becomes whether the exclusionary rule would in any event require suppression of the methamphetamine previously found in plain view upon a lawful warrantless entry.[25]

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[24] Contrary to the Dissent's assertion, this recognition of the insufficiency of the actual evidentiary record under the totality of the circumstances in this case to support Peoples's unreasonable manner assertion is by no means a blanket statement of law giving rise to a new standard requiring that officers "must actually point their weapons at a probationer to effectuate inappropriate fear, intimidation, or harassment" for purposes of proving that an otherwise lawful warrantless search or seizure was nonetheless constitutionally unreasonable based on the manner by which it occurred. In the context of his assertion that the officers' "forced entry" into his home was constitutionally unreasonable, it is simply a matter of record that there is no evidence, or even assertion, that the officers pointed their unholstered sidearms at Peoples.

[25] We make no finding or conclusion on this limited record in this criminal case as to how Peoples was treated after the officers entered his apartment and handcuffed him. We take his assertion of unreasonableness as true only for the sake of argument in order to address whether the exclusionary rule would in any event apply as asserted if so.

C. Application of the Exclusionary Rule.

¶27 The exclusionary rule, also known as the "fruit of the poisonous tree" doctrine, provides that, under certain circumstances, evidence discovered or obtained as the direct or indirect result of a constitutionally invalid search or seizure is not admissible against the subject person in subsequent proceedings. *State v. Hilgendorf*, 2009 MT 158, ¶ 23, 350 Mont. 412, 208 P.3d 401 (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 416 (1963)); *State v. Pipkin*, 1998 MT 143, ¶ 12, 289 Mont. 240, 961 P.2d 733 (citing *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961) and *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974)); *Murray v. United States*, 487 U.S. 533, 536-37, 108 S. Ct. 2529, 2533 (1988) (internal citations omitted). However, the rule does not apply in every case where there is a causal connection between the prior constitutional violation and the subsequent police discovery of the evidence (*i.e.* in every case where police would not have discovered the evidence but for the prior illegality). *Hudson v. Michigan*, 547 U.S. 586, 591-92, 126 S. Ct. 2159, 2163-64 (2006) (noting rejection of "reflexive" or "indiscriminate application of the rule" derived from earlier "[e]xpansive dicta in *Mapp*," *inter alia*, and that rule should be applied only where its "deterrence benefits outweigh its substantial social costs"—internal punctuation and citations omitted). The rule applies only where: (1) the prior illegality was a direct or indirect cause-in-fact of the police discovery of the evidence (*i.e.* the police would not have discovered or acquired the evidence "but for" the illegality) and (2) the discovery was the result of police "exploitation of that illegality" rather than "means sufficiently distinguishable to . . .

purge[]" it of "the primary taint" of the prior illegality. *Hudson*, 547 U.S. at 591-92, 126 S. Ct. at 2163-64 (quoting *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417—internal punctuation omitted). *Accord State v. New*, 276 Mont. 529, 535-36, 917 P.2d 919, 922-23 (1996); *State v. Ribera*, 183 Mont. 1, 10, 597 P.2d 1164, 1169 (1979) (questions under *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417, are whether the prior illegality was "a cause-in-fact of the later discovery of evidence" and, "if so, was there an intervening cause or event sufficient to attenuate the taint" of the prior illegality).[26]

¶28 Nor is the exclusionary rule a personal right or remedy expressly or implicitly provided by, or rooted in, the Fourth and Fourteenth Amendments or Article II, Sections 10-11 of the Montana Constitution—it is a judicial remedy designed for the narrow purpose of deterring government agents from acquiring incriminating evidence through violation of constitutional rights. *State v. Courville*, 2002 MT 330, ¶ 20, 313 Mont. 218, 61 P.3d 749 (internal citations omitted); *Pipkin*, ¶ 12; *State v. Christensen*, 244 Mont. 312, 317, 797 P.2d 893, 896 (1990) (citing *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 3048

[26] In contrast to police exploitation of the prior illegality, means of discovery sufficiently distinguishable to purge the evidence of the primary taint of the prior illegality include one that was too attenuated in the causal chain from the prior illegality, or in regard to which suppression would not relate to the particular constitutional interest infringed by the prior illegality. *Hudson*, 547 U.S. at 593, 126 S. Ct. at 2164. *Accord Ribera*, 183 Mont. at 10, 597 P.2d at 1169. The rule thus does not apply if the same evidence is subsequently discovered and acquired "from an independent source," or inevitably would have been, sufficiently free of the "primary taint" of the prior illegality. *In re R.P.S.*, 191 Mont. 275, 279, 623 P.2d 964, 967 (1981) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183 (1920)); *Murray*, 487 U.S. at 537-43, 108 S. Ct. at 2533-36; *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417. *Accord State v. New*, 276 Mont. 529, 535-36, 917 P.2d 919, 922-23 (1996). The independent source and inevitable discovery doctrine or exceptions are "closely related," *Therriault*, ¶ 60, with the inevitable discovery exception essentially an "extrapolation from" the independent source exception. *Murray*, 487 U.S. at 539, 108 S. Ct. at 2534.

(1976)); *United States v. Leon*, 468 U.S. 897, 906, 104 S. Ct. 3405, 3411-12 (1984) (subsequent "use of fruits of a past unlawful search . . . works no new" constitutional violation—internal punctuation and citation omitted); *Calandra*, 414 U.S. at 347-48, 94 S. Ct. at 619-20 ("purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim"—it is "to deter future unlawful police conduct" "by removing the incentive to disregard" constitutional rights). Whether the exclusionary rule should apply in a particular case "is an issue separate from" the question of whether a constitutional search or seizure violation occurred. *Leon*, 468 U.S. at 906, 104 S. Ct. at 3412 (quoting *Illinois v. Gates*, 462 U.S. 213, 223, 103 S. Ct. 2317, 2324 (1983)—internal punctuation omitted).

¶29 Here, in regard to the manner and duration in regard to which the officers temporarily detained Peoples, they did not handcuff and leave him sitting naked on his bed for 30 minutes until *after* they entered his apartment, after he ignored their loud knocking on the door and announcement of their presence, and then found him already sitting naked on the bed with a bag of suspected methamphetamine in plain view. As a matter of fact not subject to genuine material dispute on the actual evidentiary record in this case, the subsequent act of handcuffing and leaving him sitting on the bed naked for 30 minutes was thus not a cause-in-fact of the officers' *preceding* discovery of the methamphetamine at issue in his suppression motion and now on appeal.

¶30 The result is the same even if we take as true, *arguendo*, Peoples's related allegation that the officers' preceding guns-drawn entry was constitutionally unreasonable. It is

beyond genuine material dispute on the evidentiary record in this case that the cause-in-fact of the discovery of the methamphetamine, which was the subject of the subsequent motion to suppress, was not the *manner* of the officers' entry into his apartment, but their reasonable suspicion that he had been using and was in possession of methamphetamine in violation of his probation and the criminal law, thus justifying a warrantless entry and related search under the probation search exception to the warrant requirements of the Fourth Amendment and Article II, Sections 10-11 of the Montana Constitution. *See similarly Hudson*, 547 U.S. at 592, 126 S. Ct. at 2164 (exclusionary rule inapplicable to failure to knock-and-announce in violation of Fourth Amendment reasonableness requirement because it was "*not* a but-for cause of obtaining the evidence" and police would have discovered the evidence on execution of the warrant regardless of "[w]hether that preliminary misstep had occurred *or not*"—original emphasis). *See also United States v. Ramirez*, 523 U.S. 65, 71, 118 S. Ct. 992, 996 (1998) (excessive force or destruction of property may violate Fourth Amendment reasonableness requirement "even though the entry itself is lawful and the fruits of the search are not subject to suppression"); *United States v. Garcia-Hernandez*, 659 F.3d 108, 112-14 (1st Cir. 2011) (exclusionary rule inapplicable to knock-and-announce/excessive force violation for home entry search warrant execution "accomplished with an armored vehicle, a large complement of officers, noise-flash accompaniment, and a formidable show of force" because that alleged illegality was not a cause of discovery of evidence seized under an otherwise valid warrant); *United States v. Watson*, 558 F.3d 702, 704-05 (7th Cir. 2009) (exclusionary rule inapplicable to

use of excessive force incident to otherwise lawful car search); *United States v. Ankeny*, 502 F.3d 829, 837-38 (9th Cir. 2007) (exclusionary rule inapplicable because the evidence discovery was "not causally related to the manner of executing the search"—police would have discovered the evidence pursuant to the otherwise lawful warrant "[e]ven without the use of a flash-bang device, rubber bullets, or any of the other methods . . . challenge[d]").[27] Consequently, the exclusionary rule would not apply here in any event because neither the officers' initial manner of entry, nor the ensuing 30-minute period during which Peoples remained handcuffed naked, was a cause-in-fact of the methamphetamine discovery. The facts of this case do not satisfy either element required for application of the exclusionary rule. In the words of *Wong Sun*, the discovery of the methamphetamine at issue was simply not the result of any government exploitation of either of the constitutionally unreasonable manner violations alleged in this case. We hold that the District Court did not erroneously deny Peoples's motion to suppress the suspected methamphetamine found in his apartment

[27] Without comment on the merits of any such claim, Peoples is not without remedy for any constitutional violation that he may be able to properly prove on a well-developed evidentiary record. *See Cassady v. Yellowstone Cty. Sheriff*, 2006 MT 217, 333 Mont. 371, 143 P.3d 148 (applying Fourth Amendment reasonableness requirement as predicate legal standard in context of 42 U.S.C. § 1983 civil rights claim based on alleged knock-and-announce and excessive force violations); *Dorwart v. Caraway*, 2002 MT 240, ¶ 48, 312 Mont. 1, 58 P.3d 128 (recognizing direct constitutional tort claim for money damages caused by "violation of those rights guaranteed by Article II, Sections 10 and 11 of the Montana Constitution"); *Hudson*, 547 U.S. at 597-98, 126 S. Ct. at 2167-68 (describing 42 U.S.C. § 1983 civil rights action as "an effective deterrent" and remedy for knock-and-announce/manner of entry violations of Fourth Amendment reasonableness requirement); *Garcia-Hernandez*, 659 F.3d at 113 (noting availability of civil remedies that "can adequately redress the harm to the [constitutional] interests . . . affected" by knock-and-announce/excessive force violations of Fourth Amendment reasonableness requirement).

based on the manner in which his PO, and accompanying officers, entered the apartment, or treated him thereafter.

CONCLUSION

¶31 In summary, we hold that the District Court correctly concluded that the warrantless entry and probation search of Peoples's apartment, and resulting seizure of illegal methamphetamine in plain view, was lawful on reasonable suspicion under the probation search exception to the warrant requirement of Article II, Sections 10-11 of the Montana Constitution. We hold further that the District Court did not erroneously deny his motion to suppress the suspected methamphetamine found in his apartment based on the manner in which his PO, and accompanying officers, entered the apartment, or treated him thereafter. Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

Justice Beth Baker, specially concurring.

¶32 I am quite troubled by the probation officers' treatment of Peoples after they entered his apartment and find no justification for it in the record. I agree with the decision to affirm because a contrary ruling would be a departure from both state and federal precedent

on the application of the exclusionary rule. The Court's Opinion reviews this precedent in considerable detail. *See* Opinion, ¶ 30. At bottom, when officers have ground for warrantless entry under an exception to the warrant requirement—which the officers plainly did here—evidence they obtain from a lawful warrantless entry is not subject to suppression even if their actions after that are unconstitutionally unreasonable.

¶33 If an exception to the warrant requirement applies, a law enforcement officer's forcible entry into the home is permissible. *See State v. Vegas*, 2020 MT 121, ¶¶ 4, 10, 400 Mont. 75, 463 P.3d 455 (internal citations omitted) (concluding that exigent circumstances existed justifying law enforcement agents' warrantless entry into the defendant's hotel rooms by "kick[ing] down the door"). Under the express conditions the sentencing court imposed in Peoples's judgment, Peoples was required to "submit to a warrantless search of his person, vehicle, place of residence, and place of employment by his supervising officer *whenever there is reasonable cause to believe that he has violated the law or any condition of his sentence*." As the Court (¶¶ 20-21) and the Dissent (¶ 59) agree, the officers here had reasonable cause to search Peoples's apartment for evidence of methamphetamine use and possession. The sentencing court's mandate that Peoples submit to such a search, imposed in Condition (1)(k) of the judgment, was "in addition to any special rules imposed by the [Adult Probation and Parole] Bureau" and *separate from* Condition (9). That condition required that Peoples "submit, at any time, to a warrantless search of his residence, person, vehicle, and place of employment, and to a chemical

analysis (at his own expense) of his blood, breath, and urine, *at the reasonable request of his supervising officer*."

¶34 The addition of Condition (1)(k) in Peoples's sentencing judgment renders *Therriault* largely unhelpful to the analysis. The judgment in *Therriault* imposed a condition requiring Therriault to "submit himself, his vehicle and his residence to search at any time by lawful authorities upon reasonable request of his Probation Officer." *Therriault*, ¶ 7. "[H]owever limited" by his status as a probationer, the Court explained, Therriault's privacy expectation was "derived directly from the court's conditions of his probation, which expressly provide that he would submit his residence to search at any time by lawful authorities *upon reasonable request* of his Probation Officer." *Therriault*, ¶ 48 (emphasis in original). Given the express limitation in Therriault's judgment, "whether [the probation officer] had a reasonable cause—or whether he believed he needed none—to enter Therriault's residence was not sufficient *in this instance*." *Therriault*, ¶ 50 (emphasis added). Under the conditions of his judgment, "Therriault could expect that an intrusion into the privacy of his home would not occur unless [the probation officer] had reasonable cause and first posed a reasonable request." *Therriault*, ¶ 48. The Court emphasized that the conditions the sentencing court specifies in an offender's judgment control the parameters of his supervision, including the conduct of a warrantless search, and override any general rules the Department of Corrections may adopt for the conduct of probationers. *Therriault*, ¶¶ 46-47. Thus, although the officer's entry into Therriault's residence

> may have satisfied the "reasonable grounds" requirement [in the applicable Department rules], [the officer's] physical presence inside Therriault's residence required that he make a reasonable request prior to entering. Combined, the two conditions formed the only "well-delineated" exception to the warrant requirement at issue here: the one carefully crafted by the District Court as a condition of Therriault's suspended sentence, pursuant to state law.

Therriault, ¶ 54.

¶35 In contrast to the general rules the Court found insufficient in *Therriault*, the sentencing court here imposed two express conditions, each authorizing a search under independent circumstances. Condition (9) required a reasonable request for the search. Condition (1)(k) did not; but it did require reasonable grounds. Peoples's expectation of privacy was limited by either express condition. Because Peoples's supervising probation officer unquestionably had reasonable grounds, Condition (1)(k) authorized his warrantless entry with or without Peoples's consent. For this reason, I agree with the Court that the decision to make a warrantless entry into Peoples's apartment did not violate his reasonable expectation of privacy or his right to be free from unreasonable searches.

¶36 What happened after that is what makes this case more problematic. "Searches executed in an unreasonable manner may offend Article II, Section 11's reasonableness clause and the significant privacy interests enshrined in Article II, Section 10." *Neiss*, ¶ 26. We afford law enforcement officers "flexibility when evaluating the circumstances surrounding the execution of [a] search[,]" though the manner of execution "is a factor a court should consider when assessing whether the search was constitutionally reasonable." *Neiss*, ¶ 37 (reviewing no-knock execution of search

warrant). These are factual determinations for the trial court, giving due regard to an officer's discretion to execute the search "in a manner that maximizes public safety, protects property, and secures evidence of a crime." *Neiss*, ¶ 22. Peoples makes a strong argument on appeal that his history on supervision did not justify the officers' unconsented entry of Peoples's apartment in the manner they chose, given the facts they had. But I agree with the Court that, on the record and arguments presented in the suppression proceedings, the appellate court should not second-guess the officers' assessment in this case and should leave the District Court's ruling undisturbed.

¶37 Under established law, suppression is not a recognized remedy when the discovery of evidence is dissipated from a constitutional violation. *Courville*, ¶ 21; *Therriault*, ¶ 58. *See* Opinion, ¶ 30. Though the Montana Constitution affords greater individual protection in determining whether a government intrusion violated an individual's reasonable expectation of privacy, *see State v. Smith*, 2021 MT 324, ¶ 12, 407 Mont. 18, ___ P.3d ___, we have not applied a broader exclusionary rule than that recognized for Fourth Amendment violations once a search is found to have been unlawful. *See, e.g. State v. Pearson*, 2011 MT 55, ¶ 24, 359 Mont. 427, 251 P.3d 152; *Hilgendorf*, ¶¶ 24-25; *In re B.A.M.*, 2008 MT 311, ¶¶ 15-16, 346 Mont. 49, 192 P.3d 1161; *New*, 276 Mont. at 535-36, 917 P.2d at 923. The Dissent posits a reasoned analysis why we should do so, but the parties have not presented the question or developed such an argument in this case. Accepting that the initial entry into Peoples's apartment was not constitutionally

unreasonable, the officers' discovery of methamphetamine next to him on the bed was legitimate.

¶38 That a search continues unreasonably beyond the lawful discovery of evidence does not leave an individual without remedy for unconstitutional conduct. If, for example, the government's misconduct is sufficiently outrageous, a defendant may be entitled to dismissal of the charges for violation of his due process rights. *See State v. Williams-Rusch*, 279 Mont. 437, 444-45, 928 P.2d 169, 173-74 (1996). *See also State v. LeMay*, 2011 MT 323, ¶ 34, 363 Mont. 172, 266 P.3d 1278 (noting that "prosecution should be barred only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice" (internal citations omitted)). When the defendant does not "show how the alleged police misconduct violated the defendant's constitutional rights relating to the crimes charged," her remedy is a civil action. *Williams-Rusch*, 279 Mont. at 445-46, 928 P.2d at 174. The same is true for application of the exclusionary rule.

¶39 The Dissent dismisses this as a hollow remedy (Dissent, ¶ 70), but I see it differently, both as a matter of federal constitutional standards and as this Court has interpreted the Montana Constitution and the responsibilities of law enforcement officers. Peoples cites *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 129 S. Ct. 2633 (2009), to support his argument that the search was constitutionally unreasonable because the forcible entry and treatment of Peoples lacked any "distinct justification" based on the suspicion of personal drug use. The United States Supreme Court held in *Safford* that a thirteen-year-old student's Fourth Amendment right was violated when school officials

searched her bra and underpants on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. *Safford*, 557 U.S. at 368-69, 379, 129 S. Ct. at 2637-38, 2644. Like probation searches, the standard of reasonable suspicion, rather than probable cause, applies to determine legality of a school administrator's search of a student. *Safford*, 557 U.S. at 370, 129 S. Ct. at 2639. Applying that standard, the Court observed, "The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T. L. O.*, that 'the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place.'" *Safford*, 557 U.S. at 375, 129 S. Ct. at 2642 (quoting *T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 743). Without "any indication of danger to the students from the power of the drugs or their quantity [or] any reason to suppose that Savana was carrying pills in her underwear," the Court concluded that the search was constitutionally unreasonable. *Safford*, 557 U.S. at 376-377, 129 S. Ct. at 2643. *Safford* was a civil action brought under 42 U.S.C. § 1983. Finding sufficient lack of clarity in its prior statements of the law, the Court held that the school officials were entitled to qualified immunity despite violating the student's rights. *Safford*, U.S. at 378-79, S.Ct. at 2644.[1]

¶40 Article II, section 4, of the Montana Constitution provides in part that "[t]he dignity of the human being is inviolable." We have read the dignity provision in some circumstances to provide Montana citizens greater protections than those afforded by the

[1] "A school official searching a student is entitled to qualified immunity [from civil liability] where clearly established law does not show that the search violated the Fourth Amendment." *Safford*, 577 U.S. at 377, 129 S. Ct. at 2643 (internal quotations and citations omitted).

federal constitution. *See Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, 68 P.3d 872 (reading Art. II, section 4 together with Art. II, section 22, to provide enhanced protection from cruel and unusual punishment). And we have read Article II, sections 10, 11, and 17 to authorize direct actions for money damages when law enforcement action violates a person's rights under those provisions. *Dorwart*, ¶¶ 44, 48.[2] Based on Article II, section 18 (prohibiting governmental immunity "except as may be specifically provided by law by a two-thirds vote of each house of the legislature") and Article II, section 16 (guaranteeing that "courts of justice [afford] . . . speedy remedy" for those claims recognized by law for "injury of person, property or character"), we held in *Dorwart* that qualified immunity, while barring federal civil rights claims under 42 U.S.C. § 1983, "is not applicable to those claims filed by the Plaintiffs for violation of those rights guaranteed by the Montana State Constitution." *Dorwart*, ¶¶ 65-69. For twenty years, that has been the law in Montana. Our reasoning in *Dorwart* bears repeating:

> The difference in the nature of the harm arising from a beating administered by a police officer or from an officer's unconstitutional invasion of a person's home, on the one hand, and an assault or trespass committed against one private citizen by another, on the other hand, stems from the fundamental difference in the nature of the two sets of relationships. A private citizen generally is obliged only to respect the privacy rights of others and, therefore, to refrain from engaging in assaultive conduct or from intruding, uninvited, into another's residence. A police officer's legal obligation, however, extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to *protect and defend* those rights. In order to discharge that considerable responsibility, he or she is vested with extraordinary authority. Consequently, when a law enforcement officer, acting with the apparent imprimatur of the state, not

[2] We have not addressed whether Section 4's dignity provision similarly authorizes a direct claim for relief.

> only fails to protect a citizen's rights but affirmatively *violates* those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen.

Dorwart, ¶ 43 (quoting *Binette v. Sabo,* 710 A.2d 688, 698 (Conn. 1998)). Finally, we have made clear that a Montana law enforcement officer may owe a legal duty to, and thus be sued by, a person injured directly by the officer's affirmative actions. *Bassett v. Lamantia*, 2018 MT 119, ¶ 31, 391 Mont. 309, 417 P.3d 299.

¶41 I offer no comment or opinion on whether Peoples may have a viable claim in this case but observe simply that the threat of civil action against an officer for his or her unlawful conduct is a real one in Montana. I have no doubt that law enforcement officers take this threat seriously and strive to conform their conduct to the law. When they do not, they may be held accountable.

/S/ BETH BAKER

Justice James Jeremiah Shea joins in the special concurring Opinion of Justice Baker.

/S/ JAMES JEREMIAH SHEA

Justice Ingrid Gustafson, dissenting.

Facts

¶42 Peoples has been under the supervision of the State of Montana for over eighteen years. The Eleventh Judicial District Court, Flathead County, filed its Judgment and

Sentence on May 16, 2003, sentencing Peoples to the Montana State Prison for twenty years, with five suspended, for Operation of an Unlawful Clandestine Laboratory, a felony, and Criminal Possession of Dangerous Drugs, methamphetamine, a felony, after Peoples was pulled over while driving with a suspended license and officers found a small amount of methamphetamine and many of the ingredients needed to cook methamphetamine in the vehicle.

¶43 Peoples has not had a perfect record while under the supervision of the Department of Corrections. He is an admitted methamphetamine addict, who has repeatedly relapsed. The Department of Corrections intervened with Peoples on multiple occasions, seeking to place him in environments where he could be successful and providing him with treatment opportunities. When not in custody, Peoples has successfully maintained employment and housing. Peoples, however, has failed to maintain any prolonged period of sobriety despite his and the State's efforts.[1]

¶44 Peoples discharged his prison term and moved from parole supervision to probation supervision to serve the suspended portion of his sentence on September 8, 2017. Not surprisingly, Peoples's long-standing pattern of intermittent drug use continued under probation supervision. Peoples did not hide his struggles with substance abuse from his probation officer, Sam Stricker. He admitted to using methamphetamine in September and

[1] Peoples told the District Court, "I work hard for my money, and I work hard – I mean I work hard in my community, I attend church, I take kids to church, I do the best I can, but yet I am a drug addict."

October 2017, after which Stricker placed him into the Enhanced Supervision Program (ESP), which required regular drug testing. He successfully completed ESP at the beginning of January 2018. Peoples again tested positive for methamphetamine on February 8, 2018, but provided a clean urinalysis on March 7, 2018.

¶45 On March 15, 2018, Lisa Peoples, Peoples's ex-wife, called Stricker and reported she believed Peoples had relapsed yet again and she was concerned he may have overdosed. Lisa had been a reliable source in the past about reporting Peoples's relapses. Stricker also had information there was blood in the apartment from an unnamed source. Stricker did not attempt to call Peoples on his phone to check on his welfare or immediately conduct a home visit. Instead, Stricker sought, and his supervisor authorized a multi-agency, forced-entry search of Peoples's home by three, armed probation officers and an armed U.S. Marshall, which was not conducted until March 16, 2018, over twenty-four hours after Lisa's tip Peoples may have overdosed. When Peoples did not answer the door in response to the officers knocking, they acquired a key from his landlord—on the pretense they were conducting a homicide investigation—and entered his apartment with guns drawn. They found Peoples in his bedroom with a small bag containing a crystalline substance near him. Peoples was conscious, alert, and cooperative with the officers.

¶46 The probation officers proceeded to cuff Peoples and then left him naked and shackled on his bed while they called for reinforcements and searched his apartment. Over the next half hour, the probation officers wandered past a shackled and nude Peoples sitting on his bed as they rifled through closets and wandered in and out of other rooms of the

apartment. Video from the body camera of a City of Missoula police officer shows the officer asking the probation officers to clothe Peoples less than a minute after his entry into the apartment. By this point, the probation officers had been searching through Peoples's apartment for over half an hour. The four officers would eventually be joined by multiple officers from the Missoula Police Department and the Missoula County Sheriff's Office. Peoples's entire apartment was searched, personal belongings were seized, and police tape was put around his apartment to block the entrance. None of the agencies involved had a search warrant.

¶47 The State filed for revocation of Peoples's suspended sentence in Flathead County on March 23, 2018. Peoples did not make an appearance on the matter until June 2018. On July 23, 2018, Peoples moved to suppress evidence and strike the alleged violations and requested an evidentiary hearing on the matter. Peoples argued there was no lawful justification for the warrantless search and seizure and the stated basis for utilizing forced entry into his home—to conduct a home visit to determine whether Peoples had violated the conditions of his probation by relapsing on methamphetamine—was pretext for an unlawful warrantless search of Peoples's home for an unrelated investigation that lacked reasonable suspicion or probable cause. On September 10, 2018, Peoples's counsel filed an Expedited Motion to Compel Discovery and Reserve Motions, seeking discovery from the Missoula Police Department regarding the search from two case files. Peoples explained he had contacted both the Flathead County Attorney and the Missoula Police Department multiple times with his requests and records were not forthcoming. The

prosecutor from the Flathead County Attorney's Office responded he had sent written requests to the Missoula Police Department on two occasions for the records Peoples sought and had not received anything. The prosecutor maintained the records were not in his possession or control pursuant to § 46-15-322, MCA, and compelling further action was not appropriate. The prosecutor suggested Peoples should subpoena the proper party for the records and the court should continue the scheduled suppression hearing. On September 18, 2018, the court denied the motion, agreeing with the prosecutor the records were not in the prosecutor's possession or control. The court did not continue the scheduled suppression hearing set for September 21, 2018.

¶48 Peoples's counsel issued subpoenas to two Missoula Police Officers and a subpoena duces tecum to the City of Missoula Police Department for records relating to the March 16 search. The City of Missoula moved to quash the subpoenas. It argued the testimony and records constituted confidential criminal justice information (CCJI) and its dissemination was restricted under § 44-5-303, MCA; the defendant had not made arrangements to compensate the City of Missoula for the officers' overtime and other costs associated with traveling to Kalispell to testify; and Peoples's request for the records should be directed to the Missoula County Attorney, not the City of Missoula Police Department. The District Court quashed the subpoena duces tecum, agreeing the records request was not properly made to the City of Missoula, but rather should be made to the Missoula County Attorney. The District Court opined the records did not constitute CCJI but rather may be required to be disclosed to Peoples under § 46-15-322, MCA, if requested from the proper party. The

court refused to quash the subpoenas issued to the officers, explaining their testimony does not constitute CCJI.

¶49 At the hearing on the motion on September 21, 2018, the State presented a narrow view to the court of what happened that day. Stricker described the search as a "home visit." He emphasized he had reasonable suspicion Peoples had relapsed and potentially overdosed and officers discovered methamphetamine almost immediately upon entry into Peoples's bedroom, a violation of Peoples's probation conditions. Peoples's counsel was unable to acquire records from the Missoula Count Attorney before the evidentiary hearing on the motion to suppress and was unable to provide the court with a broader understanding of the circumstances and manner of the search. The District Court denied the motion to suppress.

¶50 Peoples's counsel continued to seek additional evidence of the circumstances and manner of the search after the suppression hearing and eventually acquired the related police report and body camera footage. The District Court agreed to hear the evidence as mitigation evidence during the revocation hearing but made clear it was "not really interested in relitigating the suppression issue." Peoples's counsel played video from a Missoula police officer's body camera and discussed information from the police report regarding the search. The video revealed the probation officer's indifferent treatment of Peoples, including leaving him shackled and naked for over a half an hour while officers wandered past him and searched through other parts of his apartment, and the police report and body camera footage revealed reasons for conducting the search that had nothing to do

with Peoples's potential drug relapse or welfare. It appears law enforcement had gotten a tip from an unnamed and unreliable probationer, who was a known drug addict and in custody at the time. This person reported seeing large amounts of blood in Peoples's apartment. At the time, law enforcement agencies in Missoula County were looking for leads in a possible homicide. Nothing in the record connects Peoples with the homicide. The tip from the unreliable probationer about seeing blood in the apartment was not enough to support probable cause for a search warrant or even reasonable suspicion for a probationary search related to the possible homicide.

¶51 Based on the testimony of Stricker at the hearing, the District Court concluded Peoples violated the conditions of his probation and revoked his suspended sentence. The court sentenced Peoples to the Department of Corrections for four years and three months.

Preservation of Issue

¶52 At oral argument, the State questioned whether Peoples properly preserved his challenge to the *manner* in which the search was conducted and argued the record was undeveloped on this point because Peoples had failed to preserve the issue. The record shows Peoples broadly challenged the circumstances surrounding the search of his apartment and not merely the search's inception in his motion to suppress the evidence. In his motion, Peoples argued the State violated his "right to be free from unreasonable searches and seizures," as guaranteed by the federal and state constitutions, and relayed how multiple agencies were involved in a forced entry "home visit" and his entire apartment searched and personal items seized. Peoples argued officers' testimony about

the reason for the "home visit" would be "demonstrably inconsistent" from the basis relied on before the District Court, namely, that Peoples violated his probation conditions by relapsing on methamphetamine. He argued the manner and scope of the warrantless search far exceeded the narrow justification the State now relied on.

¶53 While the Opinion faults Peoples for not raising the manner of entry prior to the revocation hearing and purports to seriously consider whether the manner of execution of the entry was constitutional, it omits the full picture. It's true much of the evidence regarding the circumstances of the search and the manner in which it was carried out did not get in front of the District Court until the revocation hearing and the District Court made clear at that hearing it was "not really interested in relitigating the suppression issue," effectively denying any renewed motion for suppression of the evidence. Nonetheless, the court let in extensive evidence at the revocation hearing—including footage from a body camera of a City of Missoula police officer—that demonstrated the manner in which the home visit was conducted and circumstances leading up to the search.[2] On an appeal from an order granting or denying a motion to suppress, this Court may consider evidence received by a district court after its ruling on the motion when the opposing party has not moved to strike the evidence from the record, because "a ruling denying a motion to suppress is not final and may be reversed at any time, and thus a reviewing court may consider evidence subsequently received during trial." *State v. Sharp*, 217 Mont. 40, 43,

[2] After the additional presentation, the court stated, "the fact that that happened to you is regrettable, and insofar as I can apologize for that fact I do."

702 P.3d 959, 961 (1985). Defense council was not dilatory in seeking supporting evidence, but rather the late entry of evidence resulted from the resistance from the Missoula Police Department to provide information to Peoples's defense attorney—failing to respond to his requests and then contesting subpoenas for the release of video, police reports, and other discovery—and bureaucratic confusion about who was obligated to provide Peoples with the necessary discovery for his Flathead County revocation proceedings when the subject search occurred in Missoula County—the Flathead County Attorney, the City of Missoula Police Department, or the Missoula County Attorney. Peoples raised and preserved his challenge to the manner and scope of the search before the District Court.

¶54 The District Court's order focused on whether a search occurred and whether the probation officers had reasonable cause to search Peoples's apartment prior to their entry. After determining a search occurred, the District Court concluded Stricker had reasonable cause to conduct a search of Peoples's apartment given Peoples's recent admitted relapses. The District Court did not analyze the limits of the applicable exception to the warrant requirement and did not go on to address whether the search as executed was reasonable under the applicable exception. Given Peoples's broad challenge to the search tactics used, the District Court should have considered not only whether reasonable cause supported the search but whether the search, as executed, was reasonable as required by Article II, Sections 10 and 11, of the Montana Constitution.[3]

[3] The Special Concurrence dismisses the Dissent's exclusionary rule analysis because the parties

Article II, Sections 10 and 11, Analysis

¶55 Article II, Sections 10 and 11, of the Montana Constitution provide the citizens of this State with a broader protection than the Fourth and Fourteenth Amendments of the United States Constitution. *See Goetz*, ¶ 14. Under the Montana Constitution, individuals have a fundamental right to privacy, subject to government infringement only upon "showing of a compelling state interest." Mont. Const. art. II, § 10. Individuals also have a separate but corresponding right to be free "from unreasonable searches and seizures." Mont. Const. art. II, § 11. "When analyzing search and seizure questions that specifically implicate the right of privacy, this Court must consider [both] Sections 10 and 11 of Article II of the Montana Constitution." *Hardaway*, ¶ 32. Together these sections "protect the privacy and security of individuals from unreasonable government intrusion or interference." *Staker*, ¶ 9 (quoting *State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533, 402 P.3d 1224).

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did not develop such an argument. But that argument goes both ways—the parties also did not develop any argument that the exclusionary rule under the Montana Constitution is not broader than the federal exclusionary rule. And the Court is now foreclosing any such future argument. Given the lack of suitable record as asserted in both the Opinion and Special Concurrence, it would be better to decline to reach the issue because the parties did not raise it and simply address the federal rule—which this Court has done before. *See State v. Covington*, 2012 MT 31, ¶ 21, 364 Mont. 118, 272 P.3d 43. The Special Concurrence also asserts the threat of civil actions is real in Montana because of the State's waiver of sovereign immunity for rights guaranteed by the Montana Constitution. I do not have the same confidence the Special Concurrence has that this has much of an impact on officer's behavior in light of the egregious conduct, which needlessly occurred in this case.

¶56 This Court recently restated the framework for analyzing searches and seizures challenged under Article II, Sections 10 and 11. *See Staker*, ¶¶ 8-13. The first part of the analysis focuses on the extent of the right to privacy and whether the protection against unreasonable search and seizure is triggered in a particular case—that is, whether a search that implicates constitutional protections occurred. *See Staker*, ¶¶ 10, 12 n.12. We have explained to determine whether a search occurred under the Constitution the court must consider whether an individual has an actual, subjective expectation of privacy society is willing to except as objectively reasonable and the nature of the State's intrusion. *See Staker*, ¶ 11. During this stage of the analysis, part of the inquiry into the nature of the State's intrusion considers whether law enforcement had a warrant or whether an exception to the warrant requirement applies.

¶57 The conclusion a search occurred is not the end of the analysis, rather it "trigger[s] the next question . . . whether the subject search or seizure was constitutionally permissible under the substantive and procedural safeguards respectively provided by or derived from" Article II, Sections 10 and 11. *Staker*, ¶ 12 n.12. The court must consider whether the search or seizure "was both narrowly tailored to further a compelling state interest as required by Article II, Section 10, and constitutionally reasonable as required by Article II, Section 11." *Staker*, ¶ 12. Under Article II, Section 11, "warrantless searches conducted inside a home are per se unreasonable, 'subject only to a few specifically established and well-delineated exceptions.'" *Therriault*, ¶ 53 (quoting *Hubbel*, 286 Mont. at 212, 951 P.2d at 978); *see also Staker*, ¶ 13. "[T]he entrance to the home is where the federal

and Montana constitutions draw a firm line, and that absent an exception, that threshold may not be crossed without a warrant." *Therriault*, ¶ 53. "[W]arrantless searches and seizures must be narrowly tailored to serve the particular compelling state interest at issue under the circumstances of each case." *Staker*, ¶ 12.[4] This means "the government must generally utilize the least intrusive means available to effect a warrantless search under a recognized exception to the warrant requirement of Article II, Section 11." *Staker*, ¶ 12. As we clarified in *Staker*, we consider the nature of the government intrusion both in assessing the threshold question whether a search occurred and again in assessing whether it was constitutionally reasonable as within a recognized exception to the warrant requirement of Article II, Section 11. *Staker*, ¶ 13, n.15. When analyzing whether a search was constitutionally reasonable, the focus on the nature of the search shifts to whether law enforcement stayed within the limits of the warrant or applicable warrant exception. Based on the presumption of unreasonableness for warrantless searches, the State bears the burden

[4] The United States Supreme Court explained in the context of the Fourth Amendment:

> Even if a warrant is not required, a search is not beyond [constitutional] scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior. To say that no warrant is required is merely to acknowledge that "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." This application of "traditional standards of reasonableness" requires a court to weigh "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy."

Maryland v. King, 569 U.S. 435, 448, 133 S. Ct. 1958, 1970 (2013) (first quoting *Illinois v. McArthur*, 531 U.S. 326, 331, 121 S. Ct. 946, 950 (2001) and then quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300 (1999) (second alteration in original)).

of demonstrating a warrantless search or seizure was narrowly tailored to further a particular compelling government interest and fell within a recognized exception to the warrant requirement of Article II, Section 11. *Staker*, ¶ 13.

¶58 Peoples's status as a probationer impacts both stages of this analysis. Probationers have a diminished expectation of privacy given their status as probationers under the supervision of the State. *Moody*, ¶ 19; *Burke*, 235 Mont. at 171, 766 P.2d at 257. Probationary status "can be dispositive of the issue of whether a probationer has an expectation of privacy that society would recognize as legitimate." *Moody*, ¶ 26. Further, this Court has recognized certain exceptions to the warrant requirement for probationers given the State's compelling interest while supervising probationers to facilitate rehabilitation and ensure the community is not harmed by the probationer's conditional liberty status. *Moody*, ¶ 17; *Burke*, 235 Mont. at 169, 766 P.2d at 256. The District Court addressed the question whether a search occurred and whether there was reasonable cause for a search but did not address the limits of the warrantless search exception at issue or whether the search was constitutionally reasonable under that exception. I believe the District Court erred in its analysis of the applicable exception to the warrant requirement and in failing to consider whether the search was constitutionally reasonable.

¶59 The first question is whether a search occurred—that is, whether the subject action substantially intruded upon or infringed a reasonable expectation of privacy. The District Court concluded given the extent of the officer's intrusion, a search—not just a home

visit[5]—occurred in this case. The court concluded the search was lawful because the probation officers had reasonable cause to search the residence given Peoples's recent admitted relapses. I agree with the District Court this was not a home visit and the Constitution required officers to have—and the officers had—reasonable cause to search Peoples's apartment.

¶60 This analysis is incomplete, however. In *Therriault*, we explained a probationer's "privacy expectation, however limited, is derived directly from the court's conditions of his probation." *Therriault*, ¶ 48. In that case, the conditions of probation announced by the district court required Therriault to follow all the rules and regulations of probation and parole, which included the condition to make his residence available for search upon reasonable suspicion. *See* Admin. R. M. 20.7.1101(7) (2008). In addition, the district court required Therriault to submit his residence to search at any time "upon reasonable request." *Therriault*, ¶ 48. This Court explained these two conditions must be read together as § 46-23-1101(1), MCA, requires the State to supervise persons during their probation

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[5] In *Moody*, this Court explained the Montana Constitution allows a probation officer to conduct a home visit to determine whether the individual is abiding by the condition of his probation without reasonable cause to believe the probationer is violating those conditions. During a home visit, "a probation officer may not open drawers, cabinets, closets or the like; nor may the officer rummage through the probationer's belongings." *Moody*, ¶ 24. "The enclosed areas of a probationer's residence (closets, cabinets, drawers and the like) cannot be searched without reasonable cause." *Moody*, ¶ 27. The home visit "must remain within the parameters of a home visit unless or until there is reasonable cause to engage in a search." *Moody*, ¶ 24. In contrast, Article II, Sections 10 and 11, require a probation officer to have reasonable cause to believe a probationer is violating the terms of his probation to conduct a probationary search. *See Therriault*, ¶ 35; *Burke*, 235 Mont. at 169, 766 P.2d at 256.

period "in accord with the conditions set by the court." Thus, "[c]ombined, the two conditions formed the only 'well-delineated' exception to the warrant requirement at issue here: the one carefully crafted by the District Court as a condition of Therriault's suspended sentence, pursuant to state law." *Therriault*, ¶ 54. An allowable search of Therriault's residence under the probation conditions required both reasonable cause and reasonable request from the probation officer. We held the probation officer unlawfully entered Therriault's residence when he entered after knocking and calling out to Therriault and Therriault did not respond. *Therriault*, ¶ 10.

¶61 The District Court in this case imposed the same two restrictions on Peoples that this Court interpreted in *Therriault*.[6] Probation condition 1 imposed by the District Court required Peoples to "submit to the supervision of the Montana Department of Corrections, Adult Probation and Parole Bureau, and fully comply with all requirements and regulations imposed by that agency." It then goes on to list such requirements and regulations, including "(k) must submit to a warrantless search of his person, vehicle, place of residence, and place of employment by his supervising officer whenever there is reasonable cause to believe that he has violated the law or any condition of his sentence." In addition

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[6] Unlike the Opinion, the Special Concurrence tries to distinguish *Therriault*, but from a practical standpoint the only distinction is one of semantics. Both probation conditions at issue in *Therriault* are at issue in this case. Here, there were two separate conditions and together they included both restrictions—Condition (1)(k) (along with most of the conditions listed under 1) was a restatement of the administrative rules of Probation and Parole at issue in *Therriault*. In a practical way—as far as informing the probationer what his privacy interest is—this is not different than the conditions imposed in *Therriault*.

to the agency requirements and regulations, the court also imposed condition 9, requiring Peoples to "submit, at any time, to a warrantless search of his residence, person, vehicle, and place of employment, and to a chemical analysis (at this own expense) of his blood, breath, and urine, at the reasonable request of his supervising officer." As in *Therriault*, these conditions must be read together as defining Peoples's reasonable expectation of privacy and "the only 'well-delineated' exception to the warrant requirement at issue here."[7] *Therriault*, ¶ 54. Also as in *Therriault*, the officers entered Peoples's home when Peoples did not respond to their knocking. The officer's entry into the home was unlawful under our precedent in *Therriault* as no exception to the warrant requirement applied.[8]

¶62 But even if the entry were not unlawful, the officers exceeded the scope of the exception to the warrant requirement in the manner the search was conducted in this case. This was not a mere administrative probationary search as allowed by the conditions of his sentence. This was a pre-planned forced entry search that required staffing with a supervisor for clearance to perform a forced entry and coordination with the U.S. Marshalls to bring in someone with expertise in forced entry. The officers entered with guns drawn.

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[7] The State specifically disavowed that any exigent circumstances, such as concerns about Peoples's welfare or the imminent destruction of evidence, justified the warrantless search.

[8] The State argued *Therriault* is inapposite because the probation officer lacked reasonable cause in that case. This is an incorrect reading of *Therriault*. We explained in *Therriault*: "[w]hile both [of the challenged] entries may have satisfied the 'reasonable grounds' requirement, [the probation officer's] physical presence inside Therriault's residence required that he make a reasonable request prior to entering" and the probation officer had failed to make a reasonable request as Therriault did not answer when the officer knocked and called out. *Therriault*, ¶¶ 54-55.

The Opinion boldly concludes that "absent evidence that they pointed guns at [Peoples] or otherwise used force is insufficient alone to establish that their *manner* of entry was constitutionally unreasonable." Opinion, ¶ 26. Such a standard sets a dangerous precedent, ignores the reality of the fear, intimidation, and harassment occasioned by guns drawn,[9] and ignores that entry into one's home without permission or warrant is a forced entry even if the door is unlocked or a key is used.[10] I believe the search here clearly exceeds the narrow scope of the probationary search exception to the warrant requirement without the officer having some articulable reason to support the forced entry.[11] The State relied on and the District Court found Stricker had reasonable cause to believe Peoples had relapsed again in violation of his probation conditions, something that was not out of the ordinary for Peoples to do. Stricker cited no concerns about officer safety—such as credible reports Peoples had acquired a weapon or had been acting erratically. Yet Stricker planned and executed a forced entry search to investigate the possible probation violation of

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[9] It is peculiar to suggest that officers must actually point their weapons at a probationer to effectuate inappropriate fear, intimidation, or harassment. Entering Peoples's home without permission with guns drawn no doubt effectuated the same fear, intimidation and harassment of Peoples that actually pointing their firearms at him would.

[10] The Opinion asserts Peoples mis-cites *Therriault*, ¶ 53 ("[I]t is well-settled that the government's intrusion into a home through an unlocked door is no different than if entry is gained with a key, or the use of force."), asserting this concept is considered only in assessing whether a search is constitutional but divorced from consideration as to the reasonableness of the manner of the search. The Opinion reaches this conclusion and, in essence, overrules *Therriault* under the guise of Peoples' mis-citing it. No one would consider a burglar's entrance into their home less intrusive because it occurred with a key taken from under the mat, rather than through breaking a window.

[11] Again, this case does not involve exigent circumstances. The State conceded exigent circumstances did not necessitate the forced entry search.

methamphetamine relapse. Going beyond the planning and entry, the probation officers violated Peoples's constitutional rights during the administrative probationary search by shackling Peoples naked on his bed while they "rummage[d] through [Peoples's] belongings," *Moody*, ¶ 24, for over half an hour before the arrival of a police officer from the City of Missoula Police Department. The near immediate request from that officer upon his arrival on the scene to clothe Peoples highlights the condition in which the probation officers kept Peoples served no legitimate law enforcement, rehabilitative, or public safety purpose and did not serve any compelling government interest. Any argument to the contrary is specious at best. Such conduct showed either callous disregard for human dignity or an intent to harass and intimidate Peoples. *See Burke*, 235 Mont. at 171, 766 P.2d at 257.

¶63 Our state constitution holds government actors to a higher standard than the actions taken by the officers in this case. The necessary and important interest in supervising probationers does not provide any cover for the use of tactics to intimidate, humiliate, and degrade a probationer or to callously disregard his welfare. The liberties jealously guarded by our state constitution protect the citizens of Montana from such indignities inflicted by agents of the State.

Remedy

¶64 My conclusion the officers violated Peoples's rights under Article II, Sections 10 and 11, leads to the question: What is the proper remedy in this case?[12] I believe the

[12] In *State v. Neiss*, ¶ 32, we indicated this may be an open question under our state constitution

Montana Constitution requires suppression of the drug evidence found in Peoples's apartment for the unreasonable search. Suppression, while admittedly a harsh remedy, serves multiple important constitutional purposes. First, it serves to deter law enforcement from taking constitutional shortcuts when investigating crimes. *See Therriault*, ¶ 57 ("The primary purpose of the exclusionary rule is to 'deter future unlawful police conduct' by making evidence which the State obtains through a search and seizure in violation of the Fourth Amendment, inadmissible in criminal proceedings." (quoting *Pipkin*, ¶ 12)). In fact, Peoples's experience shows precisely why our Framer's enshrined procedural requirements for probable cause and a warrant in the state constitution. Because his probation officers pursued this search in an effort to aid law enforcement's investigation of a homicide, Peoples faced the indignity and real-world consequences of being publicly accused of a homicide of which he was innocent. He lost his lease on his apartment, lost his business, and faced the opprobrium of his neighbors and community as an accused murderer. All without law enforcement ever having probable cause that could support a search warrant of his home or credibly connect Peoples to the homicide.

¶65 Second, the history of the exclusionary rule in Montana and Article II, Sections 10 and 11, leads inexorably to the conclusion the Montana Constitution imposes a broader exclusionary rule than exists under the Fourth Amendment to the United States

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and declined to "address the remedy had the facts and circumstances supported a conclusion that the warrant's execution was unreasonable."

Constitution.[13] The exclusionary rule was first adopted in Montana in 1921 under the 1889 Constitution. *See State ex rel. Samlin v. District Court*, 59 Mont. 600, 198 P. 362 (1921). We explained the exclusionary rule was required under the 1889 Constitution because "every citizen of the republic, every agency of government, every officer of the nation or state, from the highest to the lowest, is charged with the preservation and enforcement of the fundamental law." *State ex rel. King v. Dist. Court*, 70 Mont. 191, 197, 224 P. 862, 864 (1924) (reaffirming *State ex rel. Samlin*, in which this Court first adopted the exclusionary rule for violations of the prohibition on unreasonable searches and seizures under the 1889 Constitution).[14] This Court specifically considered and rejected the reasoning of other state courts that had declined to adopt the exclusionary rule as "specious" and explained those "courts while claiming admiration for the high and splendid principle of the constitutional mandate, refuse to put it into effect." *State ex rel. King*, 70 Mont. at 197, 224 P. at 864.

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[13] Since *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613 (1974), the United States Supreme Court has consistently restricted the contexts in which the exclusionary rule applies for violations of the Fourth Amendment. Conducting a search in an unreasonable manner likely does not require suppression of the evidence under the Fourth Amendment. *See Ankeny*, 502 F.3d at 837 (discussing United States Supreme Court precedent).

[14] In *State ex rel. King*, this Court recognized exclusion of evidence obtained in an unreasonable search is not the exclusive remedy available to those effected by unlawful searches and seizure, rather a defendant retains a civil right of action against an officer who engages in an unlawful search and seizure, such as an action in trespass, in addition to the suppression of the evidence at a criminal trial. *State ex rel. King*, 70 Mont. at 201, 224 P. at 866.

¶66 By the time of the drafting and ratification of our constitution in 1972, state and federal jurisprudence "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Hudson*, 547 U.S. at 591, 126 S. Ct. at 2164 (quoting *Arizona v. Evans*, 514 U.S. 1, 13, 115 S. Ct. 1185, 1192 (1995)) (discussing *Whitely v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568-69, 90 S. Ct. 1031, 1037 (1971)). Additionally, the Montana State Legislature enshrined the protection of the exclusionary rule in state statute. Section 46-13-302, MCA, provides: "A defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything obtained by the unlawful search and seizure." A version of this statute was first enacted in 1967 and it has remained substantively unchanged since that time. *See* 1967 Mont. Laws ch. 196, § 1, amended 1991 Mont. Laws ch. 800, § 172 (eliminating certain procedural requirements for a defendant filing a motion to suppress).

¶67 This was the state of the federal and state law relating to the exclusionary rule when the people of Montana ratified the state constitution in 1972—a constitution that explicitly increased protections for the privacy interests of Montanans. Admittedly, opinions from the United States Supreme Court since 1974 have laid out a much more restricted application of the exclusionary rule and moved toward requiring a causal nexus between the violation and the discovery of evidence. *See, e.g.*, *Ankeny*, 502 F.3d at 837. But this

trend began after the 1972 ratification and as such has no bearing on the broader protections provided by the Montana Constitution.[15]

¶68 In the entirety of the Constitutional Convention transcripts, not a single Framer raised any issue with the robust exclusionary rule then in effect both at the federal and state levels. Rather the discussion revolved around increasing the protections of privacy rights of Montanans. The Framers of our 1972 Constitution not only retained the protection against unreasonable searches and seizures as it existed in the 1889 Constitution but provided for further protection of the privacy rights of Montanans with the addition of an explicit right to privacy. The Framers well understood the connection between Article II, Sections 10 and 11. Delegate Campbell explained the important role of explicitly providing for a right to privacy in the state constitution:

> In our early history, of course, there was no need to expressly state that an individual should have a right of privacy. Certainly, back in 1776, 1789, when they developed our Bill of Rights, the search and seizure provisions were enough, when a man's home was his castle and the state could not intrude upon this home without the procuring of a search warrant with probable cause being stated before a magistrate and a search warrant being issued. No other protection was necessary; and this certainly was the greatest amount of protection that any free society had given its individuals. . . . However, today we have observed an increasingly complex society and we know that our area of privacy has decreased, decreased, and decreased. . . . [A]s a participating member of society, we all recognize that the state must come into our private lives at some point; but what [Section 10] says is, don't come into our privates lives unless you have a good reason for being there.

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[15] In fact, just three years after the United States Supreme Court opinion in *Calandra*, this Court explicitly held Section 10 provided greater individual privacy protection in search and seizure cases than did the federal constitution. *See State v. Sawyer*, 174 Mont. 512, 515-16, 571 P.2d 1131, 1133 (1977). Since 1990, this Court has consistently provided broader protection under Sections 10 and 11 than that provided under the Fourth Amendment. *See Hardaway*, ¶ 51.

> We feel that this, as a mandate to our government, would cause a complete reexamination and guarantee our individual citizens of Montana this very important right—the right to be let alone; and this has been called the most important right of them all. . . . As government functions and controls expand, it is necessary to expand the rights of the individual. The right to privacy deserves specific protection.

Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1681 (internal quotations omitted).

¶69 While the United States Supreme Court, relying on the law as it existed at the founding of the United States, may pare back federally required protections under the exclusionary rule, *see, e.g.*, *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695 (2009), this Court, relying on the law as it existed at the ratification of the Montana Constitution, must jealously guard the individual privacy rights of all Montanans. We may not give a pass to unconstitutional conduct of government officers committed during the execution of a search. The exclusionary rule not only deters officers but effectuates the state constitutional rights of the individual in the case at bar. The suppression of evidence in a revocation hearing for a probationer is equally applicable given the liberty interest at stake.

¶70 Requiring suppression of all evidence found when the State violates the principles of Sections 10 and 11 during a search ensures the rights of privacy and to be left alone from unreasonable government interference for all Montanans. While any civil remedies remain open for litigants to pursue, it is clear such remedies are not sufficient and were not considered sufficient at the time the 1972 Constitution was ratified by the people of Montana to either encourage law enforcement officers to moderate their behavior or to

effectuate the privacy rights of the individual in the pending case. The evidence of the methamphetamine found in Peoples's apartment should have been suppressed as it was found as part of an unlawfully executed search.

¶71 The Court today attempts to slice up the timeline of the search to cut off the unconstitutional behaviors during the search from the discovery of the methamphetamine. The Court reasons the entry was lawful and the methamphetamine was found before the probation officers engaged in unlawful conduct.[16] Breaking a search down into separate parts and analyzing them separately can be useful to illuminate our understanding of the circumstances surrounding a search, but the use of such an analytical tool should not replace the consideration of the entirety of a search in determining its reasonableness and the application of the exclusionary rule. Law enforcement cannot wantonly humiliate suspects or destroy personal property after they've discovered the evidence they are looking for without violating the Constitution and the evidence found before the bad acts should not be insulated from that bad conduct. Even if under a different set of facts, the unconstitutional conduct could be severed due to attenuation or intervening circumstances or some other ground, the circumstances to consider in assessing reasonableness in this case certainly should not be cut off before the Missoula Police Department or Missoula County Sheriff's office took over the search. The record clearly shows it was the probation officers who initiated the search who violated Peoples's privacy and dignity[17] by leaving

[16] As discussed above, I disagree with this conclusion.

[17] The Montana Constitution instructs "The dignity of the human being is inviolable." Mont.

him naked and shackled on his bed. The probation officers lacked authority under the narrow exception to the warrant requirement and the conditions of probation set out in Peoples's sentence to conduct a search in this fashion. We must resist the impulse to excuse unconstitutional behavior because a search could have been done constitutionally. Many searches later deemed unconstitutional *could* have been done constitutionally had officers followed the proper procedure or behaved appropriately.

Conclusion

¶72 I would hold the State violated Peoples's rights under Article II, Sections 10 and 11, of the Montana Constitution and suppress the evidence on the record as it stands before this Court. At the very least, I would reverse the District Court's order denying Peoples's motion to suppress and remand the case for the District Court to properly consider in the first instance whether the search was narrowly tailored to further a compelling state interest as required under Article II, Section 10, and constitutionally reasonable as required by Article II, Section 11. On remand, Peoples or the State could request an additional evidentiary hearing if necessary to better develop the record before the District Court. If the District Court concluded the search was not reasonable, evidence seized in the search must be excluded under Article II, Sections 10 and 11, of the Montana Constitution.

/S/ INGRID GUSTAFSON

Const. art. II, § 4. This Court should not so easily condone public servants treating Montanans in the dehumanizing manner and with such careless disregard as shown to Peoples.

Justice Laurie McKinnon joins in the dissenting Opinion of Justice Gustafson.

/S/ LAURIE McKINNON