IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0151

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL KURT CHILINSKI,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fifth Judicial District Court,
Jefferson County, The Honorable Loren Tucker, Presiding

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STATEMENT OF THE CASE

Following the October 12, 2011 search of Mr. Chilinski residence and the seizure of one hundred and sixty-two Malamute dogs and pups (Trial Tr. at 352, 374-75), the State charged Mr. Chilinski with ninety-one counts of cruelty to animals, one count for each specific dog against which the State alleged Mr.

Chilinski to have committed offenses under Mont. Code Ann. § 45-8-211.[1] (D.C. Doc. 3.) Mr. Chilinski moved to suppress evidence obtained from the search on grounds including that the warrant failed to particularly describe the things to be seized and that the State used private individuals in executing the warrant. (D.C. Docs. 51 at 11-12, 53 at 3; 9/27/2012 A.M.[2] Tr. at 268-69.) The district court held an evidentiary hearing over two days and then denied the motion to suppress. (9/19/2012 Tr.; 9/27/2012 A.M. Tr.; D.C. Doc. 71 (attached as App. A).)

At trial, the district court ruled that evidence of Mr. Chilinski's kennel's historical condition was irrelevant and barred Mr. Chilinski from introducing any evidence of his kennel's condition prior to June, 2011. (Trial Tr. at 213-21 (attached as App. B); *see also*, Trial Tr. at 766-67.) The district court instructed the jury as to four alternative elements of cruelty to animals (D.C. Doc. 89, Instr. 7 (attached as App. C)) but did not direct jurors that they had to unanimously agree within each count that Mr. Chilinski committed the same element or combination of elements in order to find him guilty. The State argued that jury could find Mr. Chilinski guilty based either upon the cruel confinement element or upon the lack of adequate nutrition or lack of medical care elements. (Trial Tr. at 916-17.) The

[1] The initial Information also included one duplicate dog count and three unrelated charges that were later dismissed upon motion of the State. (9/27/2012 P.M. Tr. at 10:16-22; Trial Tr. at 7:8-19.)

[2] The 9/27/2012 evidentiary hearing starting at 11:10 A.M. and the 9/27/2012 pretrial conference starting at 4:43 P.M. have been separately transcribed and are cited herein as 9/27/2012 A.M. Tr. and 9/27/2012 P.M. Tr.

jury found Mr. Chilinski guilty of ninety-one counts of cruelty to animals as to each of ninety-one specifically enumerated dogs. (D.C. Doc. 88 at 1-11 (attached as App. D).)

The district court sentenced Mr. Chilinski to $7,275 in statutory surcharges and a total of thirty-years commitment to the Department of Corrections with twenty-five of those years suspended on various conditions. (12/19/2012 Tr. at 124-35 (attached as App. E).) In addition, the district court imposed forfeiture to Jefferson County of all seized dogs as well as of all pups born of those dogs since the seizure. (12/19/2012 Tr. at 130, 138.) Mr. Chilinski argued that the district court lacked authority to order forfeiture of dogs beyond those ninety-one for which the State had tried him. (12/19/2012 Tr. at 110:7-11, 137-38.)

The district court entered its written Judgment on December 26, 2012, and Mr. Chilinski filed a timely notice of appeal from this final judgment on February 22, 2013. (D.C. Docs. 99 (attached as App. F), 113.)

STATEMENT OF THE FACTS

Mr. Chilinski was between a rock and hard place. He had more dogs than he wanted, but unlike some other breeders and Humane Society shelters, he was unwilling to euthanize the older, unwanted dogs. (9/27/2012 A.M. Tr. at 249-50; Trial Tr. at 707, 811, 830.) He was actively trying to give dogs away at the local farmers market and through ads in the paper, but adult Malamutes are large, active

dogs, for whom it is hard to find appropriate homes. (Trial Tr. at 729-30; 809-11.) Mr. Chilinski feared that if he gave the dogs to a local shelter many would go unplaced and would be euthanized. (9/27/2012 A.M. Tr. at 250; *see* Trial Tr. at 830.) Malamute rescue groups would not take his excess dogs because he was a breeder, yet because he was a breeder, he was bound by the Alaskan Malamute Club's code of ethics to take unwanted dogs back from his own customers. (Trial Tr. at 809-11, 823-24, 869.) Despite his too-high population, Mr. Chilinski felt he had no choice but to keep breeding because the sale of puppies was what fed all of the other unwanted adults. (Trial Tr. at 823; *see also*, 9/17/2012 Ex. 3 at 26:43 to 27:08 (offered and admitted 9/19/2012 Tr. at 15-16).) Unwilling to put the dogs down and unable to find other homes for them, Mr. Chilinski continued to care for them as best he could.

For decades Mr. Chilinski had successfully raised Malamutes as a hobby and later as a living. (Trial Tr. at 795-97.) In 2009, with Mr. Chilinski's consent, the Jefferson County Sheriff's office hired a veterinarian with sled dog expertise to inspect Mr. Chilinski's kennel. (9/27/2011 A.M. Tr. at 223-25; Trial Tr. at 764-67.) Although the veterinarian was not allowed to testify to her 2009 findings at trial, the Sheriff recounted pretrial that she had opined that there was no illegal activity occurring in Mr. Chilinski's kennel in 2009. (9/27/2011 A.M. Tr. at 224-25.)

Between 2009 and the 2011 offenses, Mr. Chilinski suffered a succession of economic, medical, and kennel misfortunes. With the general economic downturn, an unusual number of customers were returning dogs to Mr. Chilinski's kennel. (9/27/2012 A.M. Tr. at 250; Trial Tr. at 810-11.) Dog food prices went up, necessitating his switch to a cheaper, corn-based brand. (Trial Tr. at 799, 805-06, 846-47.) Mr. Chilinski lost his part-time kennel assistants, and then broke his foot, impairing his ability to move around and to clean the kennel on his own. (Trial Tr. at 711, 805-06, 839, 842-43, 858.)

During this period, Mr. Chilinski swallowed his pride and went on food stamps for the first time in his life. (Trial Tr. at 806.) He sold assets to buy food for the dogs and had recently arranged to rent out his basement in exchange for kennel assistance. (Trial Tr. at 806-07, 842-43, 891.) Because of his low and irregular income, he could not get a normal bank loan but was applying for a $20,000, high interest loan to get the dogs through until the sale of new puppies could get the kennel back on its feet. (Trial Tr. at 807-08.) When he injured his foot, Mr. Chilinski took dog antibiotics that he had on hand because he didn't have health insurance to go to a doctor. (Trial Tr. at 863.)

Adding to his own financial and health difficulties, Mr. Chilinski's kennel lost a litter of largely pre-sold puppies to an outbreak of Parvovirus. (Trial Tr. at 797, 804.) The kennel also suffered unrecognized outbreaks of Giardia, round

worm, and whip worm in the adult dogs that combined with the cheaper corn-based diet to leave many of Mr. Chilinski's dogs noticeably thinner than he wanted. (Trial Tr. at 812, 824-25, 862, 870-71.)

Deputy Hildebrand of the Jefferson County Sheriff's office videoed two visits to Mr. Chilinski's kennel in June and August of 2011. (9/19/2012 Exs. 3-4 (offered and admitted 9/19/2012 Tr. at 15-16, 23-24).) Based upon these visits and a private complaint regarding a malnourished dog, a second officer, Deputy McFadden, applied for and obtained a warrant to search Mr. Chilinski's kennel and home and to seize all of his dogs. (D.C. Doc. 61 (9/19/2012 Exs. 5-6) (offered and admitted at 9/19/2012 Tr. at 86-87).) The application and warrant made no mention of the deputy using private individuals to execute the search and seizure. Prior to the warrant application, the Sheriff's office had conveyed Deputy Hildebrand's videos of Mr. Chilinski's property to employees of the Humane Society of the United States. (9/27/2012 A.M. Tr. at 220; Trial Tr. at 552.)

During the warrant's execution, Deputy McFadden allowed approximately a dozen private Humane Society personnel and volunteers onto Mr. Chilinski's property. (9/19/2012 Tr. at 99-103; 9/27/2012 A.M. Tr. at 157-58, 186-87; D.C. Doc. 61 (9/19/2012 Ex. 13) (offered and admitted at 9/19/2012 Tr. at 101-03); Trial Tr. at 512, 555.) The deputy also used private veterinarians recommend by the local Humane Society and local and national Humane Society personnel off-

site to photograph, evaluate, and document the dogs on Humane Society intake forms. (9/19/2012 Tr. at 102; Trial Tr. at 441-42, 452, 511-12, 534, 555, 591, 641-42.) These private individuals were not paid or employed by the Sheriff's office. (9/27/2012 A.M. Tr. at 178-79.) No background checks were run; no confidentiality agreements signed; and no written protocols established. (9/27/2012 A.M. Tr. at 131-32, 139-40.) While on Mr. Chilinski's property Humane Society personnel were allowed to take photos and videos. (9/19/2012 Tr. at 108-09; 9/27/2012 A.M. Tr. at 139, 194-95, 198; Trial Tr. 558, 564.) The Humane Society later released these images to the public for its own publicity and fundraising purposes. (9/27/2012 A.M. Tr. at 140, 142-43; Trial Tr. at 564-65.)

One hundred and thirty-nine adults and twenty-three puppies were seized. (Trial Tr. at 352, 374-75.) Based on their evaluations, the veterinarians opined at trial that some eighty-two of these (counts 2-22 and 23-84) were either 1s or 2s on Purina's body condition scale and that such scores indicated malnourishment. (Trial Tr. at 461- 81, 597-622, 644-85.) They also testified that eight other specific dogs were in need of medical attention for various injuries and infections (counts 85-92). (Trial Tr. at 606-07, 615-16, 649-52, 656-58, 673-74.) Adam Parascandola, the Humane Society of the United States's Director of Animal Cruelty Investigations, testified that based on his viewing of Deputy Hildebrand's videos and his own observations while at Mr. Chilinski's kennel that many of the

dogs were underweight and confined in unclean, inappropriate pens. (Trial Tr. at 545, 559-62.) The State also introduced photos and videos of the kennel on October 12 and 13, 2011, which the State argued depicted dogs confined in a cruel manner.

In addition to the dogs seized from Mr. Chilinski on October 12, 2011, numerous puppies were born while in Humane Society custody. These new dogs included at least one December 30, 2011 litter that, given Malamutes' sixty-day gestation period, appears to have been conceived outside of Mr. Chilinski's custody. (Trial Tr. at 515-17, 538.)

SUMMARY OF THE ARGUMENT

The search warrant's purported authorization to seize "any and all dogs" and "any and all records pertaining to dogs" lacked the particularity required by the Fourth Amendment. The use of such catch-all phrases rendered the warrant unconstitutionally overbroad, mandating suppression of all evidence seized pursuant to it.

Without judicial approval, the State used private individuals to execute its search and seizure of Mr. Chilinski's real and personal property. The State failed to prevent some of these individuals from taking photos and videos of Mr. Chilinski's property for their own private advertising and fundraising purposes. The State violated the Fourth Amendment when it allowed the presence on Mr.

Chilinski's property of third parties acting for their own private purposes. The State violated the enhanced privacy protections of Montana Constitution by allowing private individuals access to Mr. Chilinski's real and personal property without adequate, narrowly tailored safeguards. All evidence derived from these private individuals' involvement was unconstitutionally obtained and must be suppressed.

Montana Code Annotated § 45-8-211(1) criminalized various conduct towards animals if done "without justification." Determination of what circumstances constitute "without justification" is a fundamental public policy decision as to which the statute provides no definition or guidance. The statute requires individuals and law enforcement to speculate and make arbitrary, ad hoc determinations as to what is and is not criminal under the "without justification" element. The statute is, thus, unconstitutionally vague both on its face and as applied to Mr. Chilinski's particular circumstances. Mr. Chilinski's conviction for an unconstitutionally vague offense warrants plain error review.

Defendants have a due process right to present a defense. The district court erroneously prohibited Mr. Chilinski from presenting evidence to establish his kennel's historical condition on relevancy grounds. Such evidence was relevant and essential to Mr. Chilinski's defense that the kennel conditions alleged by the State were a temporary occurrence, justified by Mr. Chilinski's recent misfortunes.

The district court both abused its discretion and violated due process in barring this evidence's admission.

Criminal juries are constitutionally required to unanimously find each offense element in order to reach a guilty verdict. When, as here, a jury is provided alternative elements within an offense instruction, the trial court must give a specific unanimity instruction, directing jurors that they must unanimously agree upon which alternative element or combination of elements the defendant committed. The four alternative elements given here cannot have been merely different means of satisfying a singular common element because as the district court defined the cruelty to animals offense to the jury, there was no overarching mistreatment or neglected element. This Court has previously held that violation of the unanimous verdict requirement warrants plain error review.

The Sixth Amendment as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires a jury finding of any fact that increases a criminal defendant's maximum potential sentence. The district court lacked authority to sentence Mr. Chilinski to forfeit any animal under Mont. Code Ann. § 45-8-211(2)(b) without a jury finding that the animal to be forfeited was "affected" by Mr. Chilinski's animal cruelty offense. The jury here found Mr. Chilinski guilty of animal cruelty to ninety-one specifically identified dogs and made no findings as to Mr. Chilinski's other dogs, many of which had not yet born or even conceived at the

time of the animal cruelty conduct of which the jury found Mr. Chilinski guilty. The district court erred in imposing forfeiture of any dogs beyond the ninety-one as to which the jury found Mr. Chilinski guilty.

STANDARDS OF REVIEW

This Court reviews the denial of a motion to suppress to determine whether the trial court's findings of fact are clearly erroneous and whether its interpretation and application of law are correct. *E.g.*, *State v. Allen*, 2010 MT 214, ¶ 21, 357 Mont. 495, 241 P.3d 1045.

A motion to dismiss is a question of law that this Court reviews de novo. *E.g.*, *State v. Pyette*, 2007 MT 119, ¶ 11, 337 Mont. 265, 159 P.3d 232. The Court reviews conclusions of law, including issues of due process, for correctness. *E.g.*, *Pyette*, ¶ 11. A party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional, and any doubt must be resolved in the statute's favor. *E.g.*, *Pyette*, ¶ 12.

This Court generally reviews admissibility rulings for an abuse of discretion, *e.g.*, *State v. Baze*, 2011 MT 52, ¶ 7, 359 Mont. 411, 251 P.3d 122, but exercises plenary review over violations of due process, *e.g.*, *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934.

This Court reviews a district court's decisions pertaining to jury instructions for an abuse of discretion; however, the district court's discretion "is ultimately

restricted by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law." *State v. Hovey*, 2011 MT 3, ¶ 10, 359 Mont. 100, 248 P.3d 303. Where a discretionary ruling is based on a conclusion of law, this Court's review is plenary as to whether the lower court correctly interpreted the law. *State v. Norquay*, 2011 MT 34, ¶ 14, 359 Mont. 257, 248 P.3d 817; *State v. Price*, 2006 MT 79, ¶ 17, 331 Mont. 502, 134 P.3d 45.

The Court reviews criminal sentences for legality and reviews the constitutionality of a sentence de novo to determine whether the lower court's interpretations of law are correct. *E.g.*, *State v. Legg*, 2004 MT 26, ¶ 24, 319 Mont. 362, 84 P.3d 648.

This Court permits parties "to make further arguments within the scope of the legal theory articulated to the trial court." *State v. Montgomery*, 2010 MT 193, ¶ 12, 357 Mont. 348, 239 P.3d 929. However, even when insufficient contemporaneous objections were made, this Court may still review errors that implicate a defendant's fundamental constitutional rights "where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79; *see also*, *State v. Wagner*, 2009 MT 256, ¶¶ 14-21, 352 Mont. 1, 215 P.3d 20 (applying plain error review to the State's use

of the defendant's invocation of the right to remain silent); *State v. West*, 2008 MT 338, ¶¶ 23-30, 346 Mont. 244, 194 P.3d 683 (determining that a due process, unreasonable delay violation was appropriate for plain error review).

ARGUMENT

I. OVERBROAD WARRANT

The Fourth Amendment mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." "[N]othing regarding what is to be taken should be left to the discretion of the officer executing the warrant." *Hauge v. Dist. Ct.*, 2001 MT 255, ¶ 14, 307 Mont. 195, 36 P.3d 947 (citing *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). Catch-all phrases, such as "anything else of value," are overbroad and all evidence seized pursuant to them must be suppressed. *State v. Seader*, 1999 MT 290, ¶ 16, 297 Mont. 60, 990 P.2d 180.

The warrant here provided for the seizure of "any and all dogs" on Mr. Chilinski's property as well as "any and all records pertaining to dogs," including documents, photos, videos, and computers. (D.C. Doc. 61 (9/19/2012 Ex. 6) (offered and admitted at 9/19/2012 Tr. at 87).) The warrant gave officers discretion to decide which of Mr. Chilinski's dogs to seize without any limitation as to the individual dog's health or condition and purported to authorize the

general, exploratory rummaging of all Mr. Chilinski's kennel and personal records. Such a general warrant violated the Fourth Amendment, and all dogs and evidence seized pursuant to it must be suppressed. *Seader*, ¶ 16. The overbroad clauses cannot be severed here as the overbroad clauses for "any and all dogs" and "any and all records pertaining to dogs" are the warrant's core, pursuant to which the main evidence used against Mr. Chilinski at trial was seized. *Cf. Hauge*, ¶¶ 18-19.

II. UNREASONABLE SEARCH AND SEIZURE

Mr. Chilinski also moved to suppress evidence obtained through the search of his property and dogs because the search was constitutionally unreasonable due to the State's use and involvement of private individuals in the search's execution. (D.C. Docs. 51 at 11-12, 53 at 3-4; 9/27/2012 A.M. Tr. at 132-33. Mr. Chilinski relied both upon the United States Constitution as interpreted in *Wilson v. Layne*, 526 U.S. 603 (1999), and upon "Montana's heightened Constitutional Right to Privacy and constitutional protections from unreasonable search and seizures." (D.C. Doc. 53 at 3; *see also*, 9/27/2012 A.M. Tr. at 251-52 (Mr. Chilinski's testimony as to his constitutional arguments).) Mr. Chilinski maintains both arguments on appeal.

A. Fourth Amendment, Private-Purposes Violation

In *Wilson*, the United States Supreme Court considered a civil suit against federal officers who brought a newspaper reporter and photographer into the plaintiff's home during the execution of an arrest warrant. The United States Supreme Court unanimously held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Wilson*, 526 U.S. at 614; *see also*, *Hanlon v. Berger*, 526 U.S. 808, 810 (1999) (per curiam) (describing *Wilson* as holding that "police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home"); *Lauro v. Charles*, 219 F.3d 202, 211 (2d Cir. 2000) (observing that *Wilson* stands for the principles that the Fourth Amendment limits the manner in which searches are carried out and the reasonableness of that manner must be judged, in part, by the degree to which it furthers legitimate law enforcement purposes). The United States Supreme Court distinguished situations where the third party was acting for its own private purposes from searches where the third parties are directly assisting officers in a warrant's execution and held that it is constitutionally impermissible for police to allow the presence of third parties acting for private purposes. *Wilson*, 526 U.S. at 611-13.

Following *Wilson*, the Jefferson County Sheriff's Office violated the Fourth Amendment by bringing Humane Society volunteers who were acting for their own private purposes onto Mr. Chilinski's property. While *Wilson* would not have prohibited the Humane Society volunteers' presence had their actions been limited to assisting deputies in tasks within the scope of the search warrant, the volunteers' gathering of information and photographs for their own private fundraising and publicity purposes rendered their presence and search unconstitutional under *Wilson*.

Deputy McFadden brought the Humane Society volunteers onto Mr. Chilinski's property without ensuring that they would not engage in their own private purposes while there. Deputy McFadden did not run background checks. (9/27/2012 A.M. Tr. at 140:17-19.) He did not obtain confidentiality agreements or otherwise prohibit them from publicizing their accounts of Mr. Chilinski's property. (9/27/2012 A.M. Tr. at 131-32.) While orally advising the Humane Society leaders to have their personnel turn over all photos (9/19/2012 Tr. at 92, 108-09; Trial Tr. at 526), he did not establish written protocols for the individuals' conduct and did not physically secure the photos and videos upon the Humane Society personnel's departure (9/27/2012 A.M. Tr. 131-32, 139-40, 142-43). He had no ability to discipline any of the private personnel for violating his oral directions. (9/27/2012 A.M. Tr. at 179.) The Humane Society personnel were not

in fact prevented from carrying out their own private purposes while present on Mr. Chilinski's property—they made video that they then released to the public. (*See* 9/27/2012 A.M. Tr. at 140, 142-43; Trial Tr. at 564-65.) The deputy's failure to prevent the Humane Society personnel's private actions while on Mr. Chilinski's property rendered their presence an unreasonable search in violation of the Fourth Amendment.

Any evidence developed or discovered by the unconstitutionally present Humane Society personnel must be suppressed. The exclusionary rule requires suppression of physical evidence and testimony as to information acquired during an unlawful search as well as of any derivative evidence developed as fruit of those materials and knowledge. *E.g.*, *Murray v. United States*, 487 U.S. 533, 536-37 (1988). Because *Wilson* was a civil suit for damages, the United States Supreme Court in *Wilson* had "no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives." *Wilson*, 526 U.S. at 614 n. 2. However, the United States Supreme Court did instruct that so long as the police are otherwise lawfully present, the Fourth Amendment violation is the presence of the third-party media, not the presence of the police. *Wilson*, 526 U.S. at 614 n. 2.

Under the Fourth Amendment analysis, the unlawful search here was the presence of the Humane Society personnel on Mr. Chilinski's property. Thus, the

evidence developed by and testimony of those private individuals must be suppressed. This includes the testimony of Gina Weist and Adam Parascandola regarding their observations while on Mr. Chilinski's property and any photos or videos taken by Humane Society personnel on Mr. Chilinski's property.

B. Montana Constitution, Disclosure to Non-Law-Enforcement Violation

Article II, Section 10 of the Montana Constitution provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Read together with Article II, Section 11's prohibition of "unreasonable searches and seizures," Article II, Section 10 provides greater protections than under a Fourth Amendment analysis. *E.g.*, *Allen*, ¶ 47. Independent of whether the volunteers were present for private purposes in violation of the Fourth Amendment, the deputies' revealing of Mr. Chilinski's property and information to non-law-enforcement personnel without a prior showing of a compelling state interest and a judicial authorization (or other recognized exception to the warrant requirement) violated Article II, Sections 10 and 11 of the Montana Constitution.

When a state action implicates Article II, Sections 10 and 11, this Court undertakes a three-part analysis to determine whether the action is unconstitutional. *Allen*, ¶ 47. The Court determines, first, "'whether the person challenging the state's action has an actual subjective expectation of privacy'" and, second,

"'whether society is willing to recognize that subjective expectation as objectively reasonable.'" *Allen*, ¶ 47 (quoting *State v. Goetz*, 2008 MT 296, ¶ 27, 345 Mont. 421, 191 P.3d 489). "[I]f there is a subjective expectation of privacy that society is willing to accept as reasonable, then the police conduct constitutes a search, subject to constitutional safeguards." *Allen*, ¶ 47. The Court must then consider the third step: whether this search "violated the Article II, Section 10 and 11 protections because it was not justified by a compelling state interest or was undertaken without procedural safeguards such as a properly issued search warrant or other special circumstances." *Goetz*, ¶ 27.

The Sherriff's office implicated Mr. Chilinski's constitutional privacy rights by sending a copy of the Deputy Hildebrandt's June and August, 2011 videos of Mr. Chilinski's property to Humane Society representatives, by bringing private personnel onto Mr. Chilinski's real property during the search, and by exposing his personal property to inspection by private veterinarians.

1. Subjective Expectation of Privacy

Mr. Chilinski had an actual subjective expectation that the deputies would not expose his information and property to private parties. He had previously dealt with deputies of the Jefferson County Sheriff's office on his property, not Humane Society personnel, when addressing complaints. (*See* 9/19/2012 Tr. at 21-22, 84-85; 9/27/2012 A.M. Tr. at 128, 215, 230.) Prior to the search, Deputy Hildebrandt

had told Mr. Chilinski that the deputy would report his observations to the County Attorney; he did not tell Mr. Chilinski that he would be disseminating the information to Humane Society representatives. (9/17/2012 Ex. 3 at 28:07 to 28:23 (offered and admitted 9/19/2012 Tr. at 15-16).) Mr. Chilinski did not understand the Humane Society to have any law enforcement function and felt his privacy was violated by their involvement. (9/27/2012 A.M. Tr. at 251-52.) The prior inspection of Mr. Chilinski's dogs by a veterinarian contracted to the County had occurred only upon Mr. Chilinski's consent. (9/27/2012 A.M. Tr. at 224-25.) Mr. Chilinski had posted a "no trespassing" sign at his gate (9/27/2012 A.M. Tr. at 155, 229), and when Deputy Hildebrandt asked Mr. Chilinski on August 11, 2011, whether he would consent to another search of his property, Mr. Chilinski refused consent. (9/19/2012 Tr. at 25.)

Mr. Chilinski had a subjective expectation of privacy in the fenced confines of his remote, private property. He had a privacy expectation that the Sheriff's Office would not use their police powers to expose his property and animals to private parties without his approval or a judicial order.

2. Objectively Reasonable Expectation

Mr. Chilinski's subjective expectation that the State would not expose his property and information to private, non-law-enforcement persons was also objectively reasonable. The people of Montana, acting through their elected

Legislature and Governor, have codified a reasonable expectation of privacy in such law enforcement investigative information. First passed as part of the "Montana Criminal Justice Information Act of 1979," Mont. Code Ann. § 44-5-303(1) prohibits the dissemination of "confidential criminal justice information" beyond criminal justice agencies except by order of a district court upon "a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure." Montana Code Annotated § 44-5-103(3) and (6) defines "confidential criminal justice information" to include "information associated with an individual, group, organization, or event compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes." Such "criminal investigative information" includes "information about a crime or crimes derived from reports of informants or investigators or from any type of surveillance." Mont. Code Ann. § 44-5-103(6)(a).[3] This Court has consistently allowed the dissemination of confidential criminal justice information only upon judicial review and privacy balancing. *See Lincoln Co. Commn. v. Nixon*, 1998 MT 298, ¶¶ 19-29, 292 Mont. 42, 968 P.2d 1141; *Bozeman Daily Chronicle v. City of*

[3] Montana Code Annotated § 44-5-103(13)(f) defines "public criminal justice information"—which may be disseminated without restriction, Mont. Code Ann. § 44-5-301(1)—as encompassing "information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a suspect" but contains no such exemption for information the officers consider necessary to gaining assistance in executing a search warrant or for disseminations when the suspect is already in custody.

Bozeman, 260 Mont. 218, 229, 859 P.2d 435, 442 (1993); *Allstate Ins. Co. v. City of Billings*, 239 Mont. 321, 326, 780 P.2d 186, 189 (1989).

Mr. Chilinski's subjective expectation that the State would not use its police powers to allow private individuals access to his property and confidential information is a privacy interest that society is willing to accept as reasonable. Under steps one and two, the deputies' exposure of Mr. Chilinski's real and personal property to the private individuals constituted a search, subject to constitutional safeguards. *See Allen*, ¶ 47.

3. Nature of the State's Intrusion

Under the third analysis step, the deputies' revelation of Mr. Chilinski's property and information to private individuals violated Article II, Sections 10 and 11 because it was not subject to adequate, narrowly tailored procedural safeguards such as warrant-authorization or a warrant exception. *See Allen*, ¶ 47; *Goetz*, ¶ 27.

The revelation of Mr. Chilinski's property and confidential information to private parties occurred entirely at the whim of the individual officers without judicial oversight. Deputy McFadden ignored statutory provisions for obtaining a district court order before disseminating confidential investigative information and conspicuously omitted from his warrant application any indication that the warrant would be executed by non-law-enforcement personnel. While Deputy McFadden did obtain a warrant authorizing search of Mr. Chilinski's property "in the manner

required by law," he did not seek and did not obtain judicial authority to provide private parties with access to Mr. Chilinski's real or personal property. (*See* D.C. Doc. 61 (9/19/2012 Exs. 5-6) (offered and admitted at 9/19/2012 Tr. at 86-87).) To the degree the warrant authorized a search "in the manner required by law," Mont. Code Ann. § 44-5-303(1) prohibited Deputy McFadden from disseminating confidential criminal justice information regarding Mr. Chilinski without a district court order and, thus, rendered the deputy's actions and disclosures beyond the warrant's authorized scope. Exposing Mr. Chilinski's property to private individuals without privacy safeguards such as prescreening the individuals, obtaining confidentiality contracts, and establishing enforceable written protocols for the individuals' conduct was not narrowly tailored. As discussed above, the insufficiency of the deputy's oral directions is manifest in the Humane Society personnel's actual use and publication of images they obtained while conducting the search.

Deputy McFadden did not seek judicial permission to expose Mr. Chilinski's private property to non-law-enforcement personnel. There was no showing within the warrant application that law-enforcement officers were incapable of documenting the search such that it was reasonable to allow private volunteers to photograph and video Mr. Chilinski's property, no showing in the application that officers could not execute the search without showing videos of

prior searches to non-law enforcement personnel, no showing in the application of the need to use private veterinarians rather than state agents or inspectors. (*See* D.C. Doc. 61 (9/19/2012 Ex. 5) (offered and admitted at 9/19/2012 Tr. at 86).)

Deputy McFadden requested a warrant "authorizing him and his agents" to enter and search Mr. Chilinski's property but gave no hint in the application that he intended to use—and thus release Mr. Chilinski's information to—private individuals. (D.C. Doc. 61 (9/19/2012 Ex. 5 at 4) (offered and admitted at 9/19/2012 Tr. at 86).) Although Deputy McFadden explained that the number of dogs and rural location might lengthen the search time and requested a day and night warrant, his application did not suggest that these factors would require allowing private individuals to access Mr. Chilinski's property. (D.C. Doc. 61 (9/19/2012 Ex. 5 at 4) (offered and admitted at 9/19/2012 Tr. at 86).) Similarly, Deputy McFadden stated that the large number of dogs would require micro-chipping each dog for identification, but he again made no claim that the number of dogs required the dissemination of Mr. Chilinski's information to private parties. (D.C. Doc. 61 (9/19/2012 Ex. 5 at 4) (offered and admitted at 9/19/2012 Tr. at 86).) There was no constitutionally mandated "showing" within the warrant application of a narrowly tailored, compelling interest and no authorization of dissemination to private parties within the resulting warrant.

Nor was the infringement of Mr. Chilinski's privacy justified by any recognized exception to the warrant requirement. Mr. Chilinski did not consent to the deputies bringing private parties onto his property or revealing information gained during prior law enforcement searches. No emergency existed to prevent the deputies from seeking warrant authorization for allowing private parties access to Mr. Chilinski's property and information. Deputy McFadden had time to prepare and submit a lengthy search warrant application, and there is no reason that he could not at the same time have sought judicial authorization for revealing Mr. Chilinski's private property and information. The deputy simply chose not to do so in favor of making his own unilateral decision regarding Mr. Chilinski's privacy.

4. Remedy

Absent a judicial authorization of the deputies' revelation of Mr. Chilinski's information and property to private individuals and a warrant finding that such access and disclosure was narrowly tailored to a compelling state interest, the deputies' involvement of non-law-enforcement personnel in the planning and execution of the search of Mr. Chilinski's real and personal property violated Mr. Chilinski's rights under the Montanan Constitution. The district court's denial of Mr. Chilinski's motion to suppress must be reversed and the matter remanded. Upon remand, any evidence gathered by or derived from the unconstitutional

involvement of non-law enforcement personnel must be suppressed. *Cf. Goetz*, ¶ 54 (suppressing evidence derived from unconstitutional electronic monitoring). Such evidence includes the testimony of Gina Weist, Adam Parascandola, Sandy Newton, Julie Kappes, Jillian Dougherty, and Greg Lovgren as to their observations of Mr. Chilinski's property and his dogs as well as all photos, videos, and documents prepared by these non-law-enforcement personnel.

III. VOID FOR VAGUENESS

The Due Process Clauses of the United States and Montana Constitutions require that a criminal statute must "'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v. Knudson*, 2007 MT 324, ¶ 18, 340 Mont. 167, 174 P.3d 469 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *see also*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *State v. Stanko*, 1998 MT 321, ¶¶ 21-30, 292 Mont. 192, 974 P.2d 1132. The void-for-vagueness doctrine invalidates both criminal statutes that fail to give sufficient notice of what is prohibited and those that fail to set minimum guidelines to govern law enforcement and leave police, prosecutors, and juries free to apply their personal predilections. *Kolender*, 461 U.S. at 357-58.

Vagueness challenges can be either "facial," where the statute is so vague as to be void on its face, or "as-applied," where the statute is unconstitutional vague when applied to the defendant's particular situation. *Stanko*, ¶ 17. To have standing to facially challenge a statute, the defendant's own particular conduct must not be "clearly prohibited" by the statute. *Stanko*, ¶¶ 12-13 (citing *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

Mr. Chilinski makes both facial and as-applied challenges to Mont. Code Ann. § 45-8-211 and does so on both notice and arbitrary enforcement grounds. Despite the lack of an objection below, the statute's unconstitutionality is properly before this Court on plain error review. The vagueness violations here implicate Mr. Chilinski's fundamental due process rights and failure to review Mr. Chilinski's convictions of and imprisonment for an unconstitutional statute would leave unsettled the fundamental fairness of these proceedings and compromise the integrity of the judicial process. *See West*, ¶ 30; *Weaver*, ¶¶ 25-27.

A. Facially Vague

The leading facial vagueness case in Montana is *Stanko*, in which this Court held Montana's former "reasonable and proper" speed limit to be unconstitutional on its face. *Stanko*, ¶ 30. The Court faulted the statute for failing to give motorists notice of a specific speed at which they could lawfully drive and for impermissibly delegating a basic public policy decision to "'policemen, judges, and juries for

resolution on an ad hoc and subjective basis.'" *Stanko*, ¶ 28 (quoting *Grayned*, 408 U.S. at 109). The Court noted that even if law enforcement officers were qualified to make engineering decisions regarding the safe maximum speed for a particular vehicle on a particular road, "the statute would not satisfy the requirement that a motor vehicle operator of average intelligence know what conduct is prohibited and when his or her conduct is going to be subject to criminal penalties." *Stanko*, ¶ 29.

Similarly, Mont. Code Ann. § 45-8-211 is impermissibly vague because it does not inform an animal owner of normal intelligence when his conduct is criminal and it impermissibly delegates basic public policy decisions to the individual officers, judges, and juries. Under Mont. Code Ann. § 45-8-211, no conduct towards an animal is criminal unless it is done "without justification," yet that dispositive term is completely undefined in the statute and untethered to any objective criteria.

Montana Code Annotated § 45-8-211(1) provides:

> A person commits the offense of cruelty to animals if, *without justification*, the person knowingly or negligently subjects an animal to mistreatment or neglect by:
>
> (a) overworking, beating, tormenting, torturing, injuring, or killing the animal;
>
> (b) carrying or confining the animal in a cruel manner;
>
> (c) failing to provide an animal in the person's custody with:
>
> (i) food and water of sufficient quantity and quality to sustain the animal's normal health;

> (ii) minimum protection for the animal from adverse weather conditions, with consideration given to the species;
>
> (iii) in cases of immediate, obvious, serious illness or injury, licensed veterinary or other appropriate medical care;
>
> (d) abandoning any helpless animal or abandoning any animal on any highway, railroad, or in any other place where it may suffer injury, hunger, or exposure or become a public charge; or
>
> (e) promoting, sponsoring, conducting, or participating in an animal race of more than 2 miles, except a sanctioned endurance race.

(Emphasis added.)

Neither Mont. Code Ann. § 45-8-211 nor any other Montana statute provides a definition of "without justification." The ordinary meaning of the word is "a reason, fact, circumstance, or explanation that justifies or defends." Dictionary.com Unabridged, Random House (2013). "Justify," in turn, means either "to show (an act, claim, statement, etc.) to be just or right" or "to defend or uphold as warranted or well-grounded." Dictionary.com Unabridged, Random House (2013). Whether a proposed reason or circumstance is sufficient to show that the conduct was "right" or "warranted" depends upon fundamental policy and moral determinations about the role and use of animals in Montana.

The statute, thus, invites—and indeed mandates—exactly the speculation and subjective enforcement that the vagueness doctrine prohibits. It gives citizens no notice of what is and is not justified and leaves the basic public policy decision of what treatment of animals is permissible to individual officers, judges, and juries on an *ad hoc* basis. Can you temporarily reduce rations or switch to a

cheaper brand of pet food when you yourself are on food stamps? If no one will adopt a dog, can you keep it in impoverished conditions rather than put it down? What reduction in kennel maintenance is justified by a kennel operator's debilitating foot injury? Is it justified to breed more puppies into an already tight kennel because selling puppies is how the rest of the kennel gets fed? Does a lack of knowledge as to a parasite infestation justify having dogs at below normal weight? Mr. Chilinski has standing to ask these questions and challenge the statute's facial invalidity as his response to recent financial and health misfortunes invoke these very questions and was not clearly prohibited by the statute's "without justification" element. *See Stanko*, ¶¶ 12-13 (citing *Parker*, 417 U.S. at 756).

The "reasonable and proper" speed statute struck in *Stanko* was impermissibly vague because the assessment and balancing of the various environmental and vehicle factors provided by the statute was so complex that a normal citizen could not hope to know what speed the law actually prohibited. *Stanko*, ¶ 29. But at least the speed statute articulated factors to be considered in determining a lawful speed. Montana Code Annotated § 45-8-211 provides no criteria from which to even begin an assessment of what conduct is and is not "without justification." Is "justification" a moral judgment, a private business decision about the use of one's own property, or a societal utilitarian assessment?

How is human need, desire, or inconvenience to be weighed against an animal's interests? Do different animals have different value? Does it take less human inconvenience to justify harming a cow than a cat, less for a working dog than a pampered house pet? Is it better for a dog to suffer some than to be put down?

Montana Code Annotated § 45-8-211 is devoid of instruction, leaving both citizens and law enforcement to their own personal feelings and speculation as to what treatment can and cannot be justified and how such a calculation is even to be made. As with the "at a rate of speed no greater than is reasonable and proper under the conditions existing" speeding statute that this Court held to be unconstitutionally vague in *Stanko*, "without justification" impermissibly delegates the basic public policy of how an animal's interests are to be weighed against a person's "to 'policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.'" *Stanko*, ¶ 28 (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). The statute facially violates due process, and Mr. Chilinski's convictions under it must be reversed and the charges dismissed. *See Stanko*, ¶¶ 30, 32.

B. Vague As-Applied

As an alternative to declaring Mont. Code Ann. § 45-8-211 facially void, the Court can hold, limited to the unique facts of this case, that the statute is unconstitutional as applied to Mr. Chilinski. *See Knudson*, ¶¶ 16, 30. Mirroring a

facial challenge, a statute can be void-for-vagueness as-applied either because it failed to give the defendant notice that his particular conduct was prohibited or because it failed to provide sufficient guidelines to prevent arbitrary, *ad hoc* enforcement with regard to the defendant's particular conduct. *Knudson*, ¶¶ 19, 21, 27.

Nothing in Mont. Code Ann. § 45-8-211 warned that Mr. Chilinski's particular financial and medical problems and his desire not to euthanize could not justify keeping dogs with reduced rations, less feces removal, and continued breeding for income. As discussed above, "without justification" is a subjective policy decision that lacks a singular, obvious meaning. The statute did not explain how Mr. Chilinski's financial and medical impairments are to be weighed in a "without justification" analysis nor did it provide notice that Mr. Chilinski would not be justified to keep the dogs without euthanizing until he could find adoptive homes for them. The statute similarly left the Jefferson County Sheriff's deputies, the Jefferson County Attorney, and the empanelled jurors to make their own *ad hoc* determinations of whether Mr. Chilinski's kennel conditions were "without justification."

The State's charging decision was arbitrary and unguided by any objective definition of "without justification," and there was no notice that Mr. Chilinski's particular circumstances did not justify his kennel's conditions. The cruelty to

animals statute was, thus, unconstitutional as-applied to Mr. Chilinski, and the resulting convictions must be reversed and the charges dismissed. *See Knudson*, ¶¶ 20-30.

IV. DENIAL OF RELEVANT EVIDENCE AS TO THE KENNEL'S HISTORICAL CONDITION

Montana Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Montana Rule of Evidence 402 provides that relevant evidence is admissible unless barred by some other specific Rule or law.

Criminal defendants have a constitutional right to "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), *quoting California v. Trombetta*, 467 U.S. 479, 485 (1984); *State v. Hauer*, 2012 MT 120, ¶ 24, 365 Mont. 184, 279 P.3d 149. While the right is not absolute, it does protect against the arbitrary exclusion of evidence for reasons not rationally related to any legitimate purpose. *Holmes v. South Carolina*, 547 U.S. 319, 324-31 (2006). The United States Constitution prohibits state court evidentiary rulings that deprive a defendant of "a trial in accord with traditional and fundamental standards of due process." *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973).

In erroneously ruling that critical historical testimony regarding the offenses' "without justification" element was irrelevant, the district court abused its discretion and deprived Mr. Chilinski of his constitutional right to present a defense. Upon the State's requests, the district court prohibited Mr. Chilinski from presenting evidence as to his kennel's condition prior to June, 2011. (Trial Tr. at 218-21; *see also*, Trial Tr. at 766-67.) As defense counsel explained, such historical evidence was necessary to convince the jury that any present mistreatment in Mr. Chilinski's kennel was the result of and justified by Mr. Chilinski's recent misfortunes. (Trial Tr. at 216-17, 221.)

Evidence of the change in kennel conditions from their historical state was both relevant and critical to Mr. Chilinski's defense because it made the existence of some justification for the kennel's present condition more probable that it would have been without such evidence. While the district court may have been correct that the kennel's history had no tendency to show the kennel's condition during the charged period (Trial Tr. at 218), the history was essential to whether the charged conditions were "without justification." Without evidence that the kennel had historically been well-fed and maintained, Mr. Chilinski could not present his complete defense that any malnourishment or substandard conditions presented by the State were justified by factors beyond Mr. Chilinski's control. The State was unwilling to stipulate that Mr. Chilinski had done "all right" up until June, 2011

(Trial Tr. at 220-21), and the district court's ruling prevented Mr. Chilinski from proving to the jury that he had. Mr. Chilinski attempts to demonstrate that the kennel conditions were due to recent, temporary setbacks were futile without the historical evidence to establish that kennel conditions had been different prior to those events.

The district court abused its discretion in excluding relevant evidence as to the kennel's historical condition and violated Mr. Chilinski's constitutional right to present a complete defense. The evidence was essential to Mr. Chilinski's "without justification" defense, and its exclusion on relevancy grounds was arbitrary and disproportionate to any legitimate purpose. Mr. Chilinski was deprived of a fair trial and his resulting convictions must be reversed on constitutional as well as evidentiary grounds. *See Chambers v. Mississippi*, 410 U.S. at 303; *State v. Wing*, 2012 MT 176, ¶ 25, 366 Mont. 37, 285 P.3d 469.

V. FAILURE TO GIVE SPECIFIC UNANIMITY INSTRUCTION

Article II, Section 26 of the Montana Constitution and the Due Process Clause of the United States Constitution require criminal juries to unanimously find each element in order to reach a verdict of guilt. *Richardson v. United States*, 526 U.S. 813, 817 (1999); *State v. Weldy*, 273 Mont. 68, 76, 902 P.2d 1, 6 (1995). When a jury is provided alternative elements or offenses within a single instruction, the trial court must give a specific unanimity instruction, directing

jurors that they must unanimously agree upon which alternative element or combination of elements the defendant committed.[4] *Weldy*, 273 Mont. at 79, 902 P.2d at 7. Jurors need not, however, agree upon the manner in which a singular element was committed. *Richardson*, 526 U.S. at 817; *State v. Matz*, 2006 MT 348, ¶ 31, 335 Mont. 201, 150 P.3d 367. Thus, the requirement for a specific unanimity instruction here depends upon whether the jury was asked to find a singular element that can occur in different ways or to find distinct, alternative elements or offenses. *See Matz*, ¶ 32.

In *Weldy*, this Court considered a felony assault trial in which the offense was defined as purposely or knowingly causing bodily injury with a weapon or reasonable apprehension of bodily injury with a weapon. *Weldy*, 273 Mont. at 77-78, 902 P.2d at 7. This causing bodily injury or reasonable apprehension of bodily injury definition set out two alternative assault offenses, not alternative means of satisfying one common element. *Weldy*, 273 Mont. at 78, 902 P.2d at 7. The trial court's general instruction that the verdict must be unanimous was insufficient to protect Weldy's right to unanimous verdict as to each alternative version of felony assault. *Weldy*, 273 Mont. at 79, 902 P.2d at 7.

[4] Specific unanimity instructions are also constitutionally mandated in situations where two or more temporally distinct acts are tried as a single offense. *E.g.*, *State v. Weaver*, 1998 MT 167, ¶¶ 22-40, 290 Mont. 58, 964 P.2d 713.

The analysis here must rely upon the offenses as they were defined to the jury, not upon their codebook definitions. "[W]here the State has the opportunity to object to a proposed jury instruction before it is given to the jury but fails to do so, that instruction, whether or not it includes an unnecessary element, becomes the law of the case once delivered, and the jury is accordingly bound by it." *State v. Azure*, 2008 MT 211, ¶ 23, 344 Mont. 188, 186 P.3d 1269 (citing *State v. Crawford*, 2002 MT 117, 310 Mont. 18, 48 P.3d 706; *State v. Robbins*, 1998 MT 297, 292 Mont. 23, 971 P.2d 359, *overruled in part on other grounds*, *State v. LaMere*, 2000 MT 45, ¶ 61, 298 Mont. 358, 2 P.3d 204; and *State v. Cline*, 170 Mont. 520, 555 P.2d 724 (1976)). The district court's cruelty to animals instruction was given without State objection (*see* Trial Tr. at 901:1-5) and, thus, became the law of the case despite its divergence from the cruelty to animals statute. The jury and this appeal are bound by the elements of cruelty to animals as defined in the district court's instruction.

The district court defined the elements of cruelty to animals to the jury as follows:

> To convict the defendant of Cruelty to Animals, the State must prove, beyond a reasonable doubt, each of the following elements for each dog:
>
> 1. That the dog was in the custody of the Defendant;
> 2. That the Defendant, without justification:
> a) confined the animal in a cruel manner; or,

b) failed to provide the animal with food and water of sufficient quantity and quality to sustain the animal's normal health; or,
c) failed to provide minimum protection from adverse weather conditions, with consideration given to the species; or,
d) failed to provide licensed veterinary or other appropriate medical care in cases of immediate, obvious, serious illness.

3. That the Defendant acted knowingly or negligently.

(D.C. Doc. 89, Inst. 7.)

Like the felony assault in *Weldy*, the definition of cruelty to animals here presented separate, alternative cruelty to animals offenses: one for each of the four confinement, nutrition, shelter, and medical care alternative elements. The instruction's definition omitted the statute's overarching "subjects an animal to mistreatment or neglect" element and replaced it with four distinct, alternative *actus reus* elements, defining four alternative animal cruelty offenses. The four given alternatives cannot be means of satisfying a singular common element as no common mistreatment or neglect element exists in the district court's instruction.

Because cruelty to animals, as defined under the law of the case here, used four alternative elements, the constitutional requirement for a unanimous jury as to each element required the district court to give a specific unanimity instruction. It is impossible to determine from the given instructions and the district court's general verdict form whether all twelve member of the jury, or fewer than twelve, found Mr. Chilinski guilty of cruelty to animals under the cruel confinement

element, the insufficient food and water element, the protection from weather element, the medical care element, or some combination of the four. *See Weldy*, 273 Mont. at 79, 902 P.2d at 7. The resulting convictions must be reversed and the case remanded for a new trial. *See Weaver*, ¶ 40; *Weldy*, 273 Mont. at 79, 902 P.2d at 7.

This Court has previously established that a district court's failure to give a required specific unanimity instruction warrants plain error review as it implicates fundamental constitutional rights and brings into question the fundamental fairness of the trial. *Weaver*, ¶¶ 25-27. The violation of Mr. Chilinski's right to a unanimous verdict is, thus, properly before this Court pursuant to plain error review despite the defense's failure to request a specific unanimity instruction below.

VI. UNLAWFUL FORFEITURE

Relying upon the cruelty to animals statute, the State sought forfeiture to Jefferson County of all of Mr. Chilinski's dogs, including both those adults as to which no charges had been brought and the puppies that were born—and in some cases conceived—outside of Mr. Chilinski's custody. (12/19/2012 Tr. at 102-03.) Mr. Chilinski opposed the forfeiture, arguing that the district court lacked forfeiture authority as to the dogs that had not been charged or included in the State's trial case. (12/19/2012 Tr. at 110, 137-38.) The district court granted the

forfeiture to Jefferson County of all dogs but on the alternative basis that barring Mr. Chilinski from owning animals was a reasonable condition of Mr. Chilinski's suspended sentence. (12/19/2012 Tr. at 130-31, 138; *see also*, D.C. Doc. 99 at 3.)

The district court was without authority to order forfeiture of dogs as to which the jury had not found Mr. Chilinski guilty of cruelty to animals. Both the district court's and the State's alterative forfeiture theories are incorrect.

The State may not retain seized, non-contraband property indefinitely and that it must return property to its rightful owner once a criminal case has concluded unless the property is subject to a lawful forfeiture process. *State v. Fadness*, 2012 MT 12, ¶ 20, 363 Mont. 322, 268 P.3d 17. This rule is based upon the constitutional prohibition against government takings without just compensation and is also codified in Mont. Code Ann. § 46-5-312. *Fadness*, ¶¶ 20-21; *see also*, U.S. Const. Amend. V ("[N]or shall private property be taken for public use, without just compensation."); Mont. Const. Art. II, § 29. Montana Code Annotated § 46-5-312(2) provides that if the right to possession is established, the judge "shall" order the return of non-contraband property unless property is still needed as evidence in an ongoing proceeding.

The provisions at Mont. Code Ann. § 46-18-201(4) for imposing reasonable conditions upon a suspended sentence are not a forfeiture process. Such conditions could order that a defendant will have his suspended sentence revoked if he owns

or possesses the property, but they cannot actually change legal ownership of the property. If a condition prohibits the defendant from having the property, the district court can refuse to return the prohibited property to the defendant, and if the defendant does not give it away, the court can order it sold at public auction, but the proceeds must go to the defendant. *Fadness*, ¶¶ 36-37. Even if the defendant is prohibited from owning the property, absent a valid forfeiture, the State cannot dispose of the property without giving its value to the defendant or allowing the defendant to give it away. *Fadness*, ¶ 41. The district court was incorrect that it could forfeit Mr. Chilinski's dogs to Jefferson County based upon its Mont. Code Ann. § 46-18-201(4) suspended sentence authority.

As referenced by the State, there is a valid forfeiture provision in the cruelty to animals statute, but it only applies if the person convicted is the animal's owner and if the animal is "affected" by the cruelty offense of which the owner is convicted. Specifically, the penalty section of the animal cruelty statute provides that in addition to a fine and incarceration, "If the convicted person is the owner, the person may be required to forfeit any animal affected to the county in which the person is convicted." Mont. Code Ann. § 45-8-211(2)(b). A court may not sentence a defendant to forfeiture of an animal unless the animal was affected by the defendant's convicted animal cruelty.

The Sixth Amendment mandates a jury finding of any fact (other than the existence of a prior conviction) that increases a criminal defendant's maximum potential sentence. *Apprendi*, 530 U.S. at 490. The United States Supreme Court has recently recognized that "the rule of *Apprendi* applies to the imposition of criminal fines" as well as terms of incarceration. *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2357 (2012). Constitutionally, a district court is without authority to impose a Mont. Code Ann. § 45-8-211(2)(b) forfeiture without a jury finding that the animal to be forfeit was "affected" by its owner's animal cruelty offense.

The State argued at sentencing that all of the dogs—even the unborn and not-yet-conceived pups—were "affected" by Mr. Chilinski's offenses, but the jury was not asked to make and did not make any such findings. Rather the jury expressly found Mr. Chilinski guilty of animal cruelty to ninety-one specific and numbered dogs. Each of the ninety-one guilty verdicts rendered by the jury was explicitly ascribed to Mr. Chilinski subjecting a particular, numbered dog to animal cruelty. There was no catch-all count for the remaining adult dogs and no mention of the yet unborn and unconceived pups. The uncharged, healthy dogs and the unborn/unconceived pups were not found by a jury to have been "affected" by the cruelty to animals of which the jury convicted Mr. Chilinski.

The district court's forfeiture of dogs beyond the ninety-one explicitly found by the jury to have suffered animal cruelty violated the Sixth Amendment and was unauthorized by Mont. Code Ann. § 45-8-211(2)(b). The unlawful forfeiture sentence must be reversed and amended to forfeit to Jefferson County only those ninety-one animals actually found by the jury to have been affected by animal cruelty.

CONCLUSION

Mr. Chilinski respectfully requests this Court to dismiss the charges against him as unconstitutionally vague. In the alternative, Mr. Chilinski requests a new trial due to the district court's erroneous denial of his motion to suppress evidence obtained through the overbroad warrant and unconstitutional involvement of private individuals, the district court's erroneous relevancy ruling and violation of Mr. Chilinski's due process right to present a complete defense, and the district court's failure to give a specific unanimity instruction in violation of Mr. Chilinski's right to a unanimous jury. If the Court affirms his convictions, Mr. Chilinski asks the Court to strike from his Judgment the unlawful forfeiture of those dogs as to which the jury made no findings of animal cruelty.

Respectfully submitted this ____ day of September, 2013.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,999 excluding Table of Contents, Table of Authorities, Signature Block, Certificate of Service, Certificate of Compliance, and Appendices.

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KOAN MERCER

APPENDIX