State of Minnesota
in Court of Appeals

State of Minnesota,

Plaintiff – Respondent,

vs.

[redacted].

Defendant – Appellant.

APPEAL FROM MINNESOTA DISTRICT COURT
COUNTY OF CLAY
HONORABLE [redacted] AND [redacted]
JUDGES OF DISTRICT COURT

APPELLANT'S BRIEF AND ADDENDUM

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LEGAL ISSUES

1) Whether law enforcement properly secured the warrant that permitted the initial search of [redacted] home.

[redacted] claimed the warrant used to conduct the first search of his home was illegally obtained because the officer who secured it did so by making a deliberate statement in reckless disregard of the truth. The officer stated in the warrant application that he knew [redacted] couldn't possess a firearm because of past felony convictions. But this subjective belief was objectively incorrect; [redacted] had no such convictions, and proper investigation would have revealed this. The officer's failure to do so constituted reversible error. The trial court disagreed, holding that since the officer had not made the statement in reckless disregard of the truth, the warrant was valid. [redacted] objected to this ruling and timely appealed.

- *State v. Matthew Anderson*, 683 N.W.2d 818 (Minn. 2004)
- *State v. George*, 557 N.W.2d 575 (Minn. 1997)
- U.S. Const. amend. IV

2) Whether [redacted] phone was illegally seized the moment the police grabbed it and began manipulating and examining it.

[redacted] claimed officers illegally seized a phone belonging to him during the first search of his home. This was because the warrant that authorized the search was for guns and ammunition, not phones, and so officers exceeded the warrant's scope when they grabbed the phone and began manipulating and examining it. The trial

court agreed the phone had been illegally seized, but it disagreed the seizure was illegal the moment officers grabbed the phone. Instead, the trial court held that the seizure only became illegal once ████ probation agent directed law enforcement to take the phone. ███ objected to this ruling and timely appealed.

- *Arizona v. Hicks*, 480 U.S. 321 (1987)
- *State v. Barajas*, 817 N.W.2d 204 (Minn. Ct. App. 2012)
- *Matter of Welfare of T.S.F.*, 1991 WL 90869 (Minn. Ct. App. 1991)
- U.S. Const. amend. IV

3) Whether the trial court's "fruit of the poisonous tree" analysis was incorrect.

███ claimed that since officers illegally seized his phone during the first search of his home, all evidence that flowed from this illegality should be suppressed as "fruit of the poisonous tree," including the SD card on which the illegal images were later found.[1] The trial court disagreed, holding that because the SD card was not the fruit of the illegal seizure of ████ phone, it should not be suppressed. ███ objected to the ruling and timely appealed.

- *State v. Leonard*, 943 N.W.2d 149 (Minn. 2020)
- *State v. Bergerson*, 659 N.W.2d 791 (Minn. Ct. App. 2003)
- U.S. Const. amend. IV

[1] "SD card" is shorthand for "secure digital card," and it is a small, chip-like device that is used in smartphones and cameras to store data.

4) **Whether the trial court gave [redacted] an illegal sentence.**

[redacted] claimed the trial court sentenced him illegally because it violated Minnesota law and the Sentencing Guidelines by wrongly assigning "misdemeanor units" to prior, out-of-state convictions. This overcounting allowed the trial court to sentence [redacted] to 99 months in custody when it otherwise couldn't have. The trial court disagreed, holding that [redacted] prior convictions were properly counted, making the sentence permissible. [redacted] objected to the ruling and timely appealed.

- *State v. Rowland*, 2021 WL 6109558 (Minn. Ct. App. 2021)
- *State v. Smith*, 2020 WL 7688601 (Minn. Ct. App. 2020)
- *State v. Maurstad*, 733 N.W.2d 141 (Minn. 2007)
- Minn. Sent. Guidelines § 2.B.3(d)

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STATEMENT OF FACTS

This appeal challenges (1) a suppression ruling made by the Honorable [redacted];[2] and (2) a sentencing ruling made by the Honorable [redacted].[3] Both judges are chambered in Minnesota's Seventh Judicial District.[4]

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[2] Add. 42.

[3] Add. 64.

[4] Judge [redacted] assumed Judge [redacted] docket when Judge [redacted] moved her chambers from Clay County to Becker County, Minnesota. Judge [redacted] thus assumed control of [redacted] case shortly after Judge [redacted] suppression ruling.

was charged on May 11, 2021, with possession of child pornography, which was found on an SD card belonging to him.[5] He moved to suppress on three grounds: (1) the warrant used to search his home the first time was illegally obtained because it was based on a material misrepresentation by the officer who secured it; (2) even if the warrant were legal, the seizure of his phone was beyond its scope and thus illegal; and (3) any evidence obtained because of the illegal seizure should be suppressed as "fruit of the poisonous tree."[6]

The trial court partially granted and partially denied the motion, holding (1) the warrant was properly secured, so the first search of home was permissible; (2) the seizure of phone during the execution of the warrant was beyond its scope and therefore illegal; and (3) the SD card was not the fruit of the illegal phone seizure.[7] To preserve his appeal right, agreed to a stipulated-facts trial. The trial court found him guilty and sentenced him to 99 months in custody and 15 years of probation. He timely appealed.

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[5] Add. 46.

[6] Add. 46-47.

[7] Add. 49, 54, 57.

In May 2021, law enforcement received a tip of alleged domestic abuse involving a firearm at a home in Moorhead, Minnesota.[8] Police identified ███ as the suspect and his girlfriend as the victim.[9] They also learned that ███ had past criminal convictions and was on Minnesota state probation.[10] Given his convictions and the allegation that a gun was involved, police set to work to determine whether it was illegal for ███ to possess a gun.[11] Their rationale was straightforward: if ████ convictions were a certain type, he couldn't have a gun. And if he couldn't have a gun, police could get a warrant to search ████ home for the gun. And if they found the gun during their search, they could charge ███ with a crime.

It's worth pausing here to appreciate just how important it was to this case to determine whether ███ was a felon. The police's hope for a warrant hinged entirely on whether ████ convictions disqualified him from having a gun, meaning it was imperative for them to answer this question correctly. And the police knew

[8] Add. 44.

[9] Add. 44.

[10] Add. 44.

[11] Add. 44.

this, so they tapped Detective , a veteran officer with more than 20 years of experience, to spearhead the effort.[12]

Given the stakes, Det. unsurprisingly concluded the convictions were disqualifying, meaning he believed it was illegal for to have a gun.[13] Armed with this subjective belief, Det. then applied for a warrant to search home for guns.[14] Taking Det. at his word, a judge signed the warrant, and the police searched home the morning of May 11, 2021.[15] The warrant's terms limited the search to four things: (1) the gun supposedly used in the alleged domestic violence incident, (2) its case, (3) any spare magazines, and (4) any ammunition.[16] Nothing in the warrant mentioned anything about police being able to search, touch, grab, manipulate, look at, or otherwise inspect any of phones.[17]

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[12] Add. 44.

[13] Add. 44-45.

[14] Add. 45.

[15] Add. 45.

[16] Add. 10.

[17] Add. 10, 50-51.

During the search, police arrived at a chest of drawers in one of the home's bedrooms.[18] The drawers were closed, so police opened them to look for the gun. Inside, the first thing they saw was folded clothes.[19] Officers rummaged through the clothes and, while doing so, found a cell phone.[20] What happened next is the turning point of this case, as it transformed it from a gun investigation to something far different. Upon finding the phone, an officer grabbed it, removed it from the drawer, and took it into police custody.[21] During this seizure, the officer claimed to notice that the phone was 100% charged and missing its SD card.[22] The officer made this observation by manipulating the phone, meaning he physically touched and visually examined it.[23]

Officers then told ███ they had seized his phone and that they found it odd that it was 100% charged but missing an SD card. This put ███ on notice that the police had shifted their focus from investigating him for illegal gun possession only.

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[18] Add. 45.

[19] Add. 14.

[20] Add. 14, 45, 50.

[21] Add. 14-15, 27-29.

[22] Add. 14, 45, 50.

[23] Add. 28-29.

That's not to say police didn't find the gun during the search of ████ home; they did, and so they arrested him and took him to jail.[24] But in that moment, the police had bifurcated their investigation. One group focused on the mission's original objective: to find a gun in ████ home and arrest him for it. But now there was a second group, one that formed during the warrant's execution, and their job was to investigate ████ seized phone for illegality.

Knowing the police had formed this "phone taskforce," ███ made several incriminating jail calls to his girlfriend related to his seized phone and the missing SD card.[25] But had the police not seized the phone and began investigating its alleged irregularities, ███ would have never made these calls. The logic is simple: if the police didn't have the phone, and didn't believe there was illegality afoot with the phone, then ███ would have no reason at all to talk to his girlfriend about the phone or the missing SD card.

After listening to these calls, police applied for a second warrant to go back to ████ house and look for the missing SD card.[26] The judge who signed the first warrant signed the second one, and police searched ████ home a second time at

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[24] Add. 45, 56.

[25] Add. 45-46, 56.

[26] Add. 46.

9:00 p.m. on May 11th, just 12 hours after the initial search.[27] Police found the missing SD card during the second search, and on the card they found several images of child pornography.[28] This was the first mention of this crime in the case. From the start, the police wanted to get ███ for illegally having a gun.[29] It was only by an unconstitutionally-created happenstance that they got him for what they did. A bedrock principle of criminal law is that the ends can never justify the means, but without intervention by this Court, that's exactly what will have happened here.

ARGUMENT

The trial court made four errors in ███ case: it failed to (1) hold that the first warrant was illegally granted; (2) hold that the illegal phone seizure occurred right when police grabbed it; (3) suppress all evidence flowing from the illegal seizure; and (4) sentence ███ legally. Each merits reversal.

1) Law enforcement's subjective belief that ███ was a felon was objectively incorrect, thereby invalidating the warrant that permitted the initial search of his home.

In excusing Det. ███ objectively incorrect belief that ███ was a felon, the trial court focused on the many steps he took before reaching his

[27] Add. 37, 46, 60.

[28] Add. 46.

[29] Add. 44-46.

conclusion.[30] The unstated premise being that there could be no way he recklessly disregarded the truth because, well, look at all the stuff he did before deciding![31] But that's the wrong framing. It should be about quality, not quantity. Otherwise officers would soon figure out they could conduct shoddy police work as long as it's a lot of shoddiness and not just a little. But just like trial lawyers prefer one good eyewitness to three mediocre ones, Det. ████████ substandard investigative efforts should not be saved simply because he talked to multiple people. The better question is whether the people he talked to were the proper ones to make the "felon/no felon" determination in ███ case.

For the reasons explained to the trial court,[32] they weren't. Most damning to Det. ████████ investigation is that he made far more work for himself than was needed to answer the question.[33] All he had to do was call the county attorney's office and ask the prosecutor whether ███ convictions were

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[30] Add. 44-45, 48-49.

[31] *See State v. Kenneth Anderson*, 784 N.W.2d 320, 327 (Minn. 2010).

[32] Add. 2-9.

[33] Add. 5-7.

disqualifying.[34] One phone call, one answer, no uncertainty. After all, who knows the law better: a lawyer or a lawman? That Det. █████ chose a lawman shows his true motives. It was never about getting the right answer; it was always about getting the answer that ensured the warrant's granting. Taking the long and meandering path when the direct one was available, in legal parlance, is reckless disregard for the truth. When the answer is right in front of your face, but you close your eyes so you don't have to see it, that's a problem. That's what Det. █████ did. The Court cannot endorse such myopic policework.

Next, the trial court also seemed to suggest that because Det. █████ was trying his best, even if he was objectively wrong, it was a good-faith mistake.[35] Even if that were true, there are certain decisions law enforcement makes where good faith is not enough to save objectively incorrect conduct. This distinction is known as "mistake of fact" versus "mistake of law."[36] The trial court seemed to construe Det. █████ error as a mistake of fact when really it was a mistake of law. And this difference matters: a mistake of fact means the conduct will be

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[34] Add. 7-8.

[35] Add. 44-45, 48-49.

[36] *See State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (officer's "honest, reasonable mistakes of fact are unobjectionable under the Fourth Amendment.").

excused; a mistake of law means it won't.[37] Det. [redacted] committed a mistake of law, and Minnesota caselaw supports this conclusion.

First, in *State v. George*, the court addressed the question of what to do when an officer pulls over a vehicle for what he subjectively believes is a traffic violation, but in reality is an objectively incorrect interpretation of the law.[38] George was pulled over while driving a motorcycle with three headlights, which the officer believed was illegal.[39] As it turned out, this was not illegal.[40] The state asked the court to excuse the officer's mistaken belief, but it declined the invitation:

> On these facts, we hold that Trooper Vaselaar did not have an objective legal basis for suspecting that George was driving his motorcycle in violation of any motor vehicle law (or that he was violating any other law) . . . There was no *objective* basis in the law for the trooper to reasonably suspect that George was operating his motorcycle in violation of this law.[41]

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[37] *See State v. Sanders*, 339 N.W.2d 557, 559–60 (Minn. 1983) (holding that a good-faith and reasonable mistake of fact will not invalidate an otherwise valid stop).

[38] 557 N.W.2d 575, 576–79 (Minn. 1997).

[39] *Id.* at 576.

[40] *Id.* at 578–79.

[41] *Id.*

Because there was no objective basis for the officer's mistake, the court ruled the stop was illegal and suppressed all evidence that stemmed from it.[42]

Next, in *State v. Matthew Anderson*, the court again dealt with the question of what to do when an officer is subjectively wrong about the objectively "correct interpretation of a traffic law."[43] Anderson was driving his car near the University of Minnesota and, on the same road, an officer had pulled over a different car than Anderson's.[44] In this situation, state law required Anderson to move "a lane away from the emergency vehicle."[45] According to Anderson, he did just that; according to the officer, he didn't.[46] So the officer ended the original traffic stop and pulled over Anderson for this alleged violation.[47] Anderson challenged the stop, claiming that the officer had wrongly interpreted the law.[48]

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[42] *Id.* at 576, 581.

[43] 683 N.W.2d 818, 820 (Minn. 2004).

[44] *Id.*

[45] *Id.* at 822; *see also* Minn. Stat. § 169.18, subd. 11.

[46] *Id.* at 820–21.

[47] *Id.* at 821.

[48] *Id.*

The state argued that "because the officer stopped Anderson for conduct that the officer *believed* to be illegal, the stop was not a product of a 'whim, caprice, or idle curiosity' and therefore constituted a reasonable stop."[49] Anderson responded that it should not be "dependent on the officer's subjective belief, but rather on the correctness of the officer's conclusion that the defendant was violating the law."[50] The court sided with Anderson:

> We hold that an officer's mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a traffic stop. We do not question the good faith of the officer in stopping Anderson for the conduct the officer believed to be illegal. We emphasize that whether made in good faith or not, the officer was mistaken in his interpretation of [the statute].[51]

Given this, the court suppressed all evidence stemming from the illegal stop.[52]

While these cases don't involve the exact factual situation as here—i.e., traffic stops instead of warrants—their holdings still apply. The logic being that, in some cases, an officer commits an error so vital to the outcome that it doesn't matter if he was acting in good faith. In *George* and *Matthew Anderson*, the errors

[49] *Id.* at 823 (quoting *State v. Pike*, 551 N.W.2d 919, 921–22 (Minn. 1996)).

[50] *Id.*

[51] *Id.* at 823–24.

[52] *Id.* at 824.

were the officers' objectively mistaken belief that the law allowed them to pull over the defendants.[53] Here, it was Det. [redacted] objectively mistaken belief that [redacted] convictions were disqualifying.[54]

And in *Matthew Anderson*, the court made clear it didn't think the officer was acting with malice when he committed the error.[55] But it didn't matter, the court held, because a mistake of law is a mistake of law, and it cannot be excused.[56] The Court should reach the same conclusion here. Det. [redacted] made a mistake of settled law when he concluded [redacted] convictions were disqualifying. Once that occurs, motive is irrelevant. His subjective belief was objectively incorrect, and it was the only reason the police got a warrant to conduct the first search of [redacted] home. Without this warrant, the case against [redacted] disappears. As in *George* and *Matthew Anderson*,[57] that's what should happen here.

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[53] *George*, 557 N.W.2d at 576; *Matthew Anderson*, 683 N.W.2d at 821.

[54] Add. 5, 24-27.

[55] 683 N.W.2d at 824.

[56] *Id.*

[57] *George*, 557 N.W.2d at 581; *Matthew Anderson*, 683 N.W.2d at 824.

2) The police illegally seized ████ phone the moment they manipulated and examined it without a warrant.

Even if the Court finds the first warrant were properly obtained, there's no doubt the police illegally seized ████ phone during the first search of his home.[58] The only question is when the seizure occurred. The trial court held it occurred when ████ probation agent directed officers to take the phone.[59] ███ argued it occurred earlier than that, the moment police grabbed, manipulated, and examined the phone.[60] Logic, common sense, and caselaw support ████ conclusion.

In ruling the phone seizure didn't occur right away, the trial court framed the issue in state-friendly terms. First, "a phone was discovered in a drawer located" in a "bedroom of the residence;" next, "the phone was moved to further that search;" and finally, "the officer searching the drawer observed that the phone appeared to be 100% charged and missing the SD card when he moved it in furtherance of his search."[61] This framing doesn't reflect reality, however, and to

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[58] Add. 49-54.

[59] Add. 52.

[60] Add. 9-17, 27-34.

[61] Add. 45.

understand why, we must step into the shoes of the officer who searched the drawer where the phone was found.

1) Officer sees and opens the drawer. Tasked with searching the home for the gun, it's reasonable for the officer to think the gun might be in the drawer, allowing him to open it up and look inside.

2) Officer sees folded clothes in the drawer. When the officer opens the drawer, and sees folded clothes inside, he has two options. One is to take a cursory look for the gun and then move on with his search. The other is to sift through the clothes to see if the gun is hidden among them. Rightly, the officer chooses the latter.

3) Officer feels phone. When the officer begins to rummage through the clothes in search of the gun, he comes across a phone. He feels it "folded in clothes."[62]

4) Officer grabs phone and removes it from the drawer. The officer then moves the phone to further his search. He does so by picking it up and taking it out of the drawer.[63] At this moment, the officer's conduct transforms from reasonable to unreasonable.

The conduct is unreasonable because a trained officer knows the difference between a phone and a gun. So when he feels the phone folded in clothes, he knows it's a phone and not a gun. And he knows the warrant is for guns, not phones. So in that moment, there's no logical reason for the officer to grab the phone and remove it from the drawer. The phone is no different from the clothes, meaning it's

[62] Add. 14.

[63] Add. 28 (phone was "already seized" when police called probation agent).

unrelated to the search, and therefore should not interest the police. But the police didn't remove the clothes and take them into custody; only the phone. Just like they brushed the clothes to the side, the police should have done the same thing with the phone. That they didn't is proof that they intentionally seized the phone the moment they grabbed it and removed it from the drawer.

This conclusion is bolstered by the officer's claims related to the 100% battery and missing SD card. It's just not credible to believe the officer could have seen or noticed these things without doing more than "moving" the phone to "further the search."[64] First, the phone was stationary in the drawer, so its screen was in sleep mode, unilluminated. Without some sort of intentional manipulation, nothing was visible on the screen. But even if the phone lit up accidentally when the officer felt it folded in clothes, there's no reason for him to look closely at the screen. Again, the officer knows the search is for guns, not phones. So even if it were truly a happy accident that the phone's screen lit up, why is the officer

[64] Add. 45.

looking at it? He's got no business doing so.[65] And there's no explanation for this other than to satisfy his "mere whim, caprice, or idle curiosity," which is illegal.[66]

The same can be said about the officer noticing the missing SD card, but that's even more tenuous than the illuminated screen. Without picking up, manipulating, and closely looking at the phone, how could the officer possibly notice the SD card was missing? Even if he were an expert in phones, meaning he knew exactly where on the phone to look for the SD card, the same question applies: why is the officer looking at it? He's there for guns, not phones. And so even if he came upon the phone legally, his manipulation of it in a way that allowed him to notice the missing SD card transformed a legal search into an illegal one.

Both state and federal caselaw supports this conclusion. And while much of this is laid out in ████ trial court briefing,[67] three cases merit highlighting. First, in *Arizona v. Hicks*, the U.S. Supreme Court held that the warrantless touching of an object inside a home was illegal because, in the words of Justice Scalia, "a search is

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[65] The plain view exception doesn't apply because its only available when the thing in plain view (phone screen) is related to the item being searched for (gun), which isn't the case here. *See State v. Holland*, 865 N.W.2d 666, 671–73 (Minn. 2015).

[66] *Pike*, 551 N.W.2d at 921–22.

[67] Add. 9-17, 27-34.

a search, even if it happens to disclose nothing but the bottom of a turntable."[68] This idea that the touching of an object, however minimal, constitutes a search was echoed in *Matter of Welfare of T.S.F.*, where the court held that if an officer inspects an object without moving it, it's not a search; but if he moves the object and turns it over, it's a search.[69] Finally, the rule that minimal touching equals a search was incorporated into the digital context in *State v. Barajas*, where the court held that something as minor as a single "key strike" of a phone constitutes a search.[70]

The timing of the illegal phone seizure matters because of the domino-like nature of ███ case. Law enforcement's phone observations are the only reason the investigation morphed from guns to child pornography. Without them, the first domino falls, and the rest topple. Meaning if the officer doesn't see the phone's 100% battery and missing SD card, this case never happens. The phone is felt in the drawer, it's identified as a phone and left in the drawer, no guns are found in the drawer, the officers move on in their search, they find a gun elsewhere, they arrest ███ for illegal gun possession, and ███ is prosecuted for it.

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[68] 480 U.S. 321, 325 (1987); *see also* Add. 30-33.

[69] No. CX-90-2615, 1991 WL 90869, at *2 (Minn. Ct. App. June 4, 1991); *see also* Add. 33-34.

[70] 817 N.W.2d 204, 211, 214, 216 (Minn. Ct. App. 2012); *see also* Add. 11-12, 15-16.

Since they don't look at the phone, they don't tell ▇ about the alleged phone oddities, ▇ has no reason to worry about the phone, ▇ doesn't make incriminating jail calls to his girlfriend, the officers never get a second search warrant for ▇ house, no SD card is found, and no child pornography charges are brought. Simply put, but for law enforcement's observations during their illegal seizure of ▇ phone, this case doesn't exist. The trial court was right to find the phone seizure illegal, but it was wrong as to when it happened. The Court should correct this error and hold that the seizure occurred the moment the officer grabbed ▇ phone.

3) The trial court's "fruit of the poisonous tree" analysis was conclusory and incorrect.

Putting aside exactly when it occurred, the trial court correctly held that police illegally seized ▇ phone during the execution of the first warrant.[71] When this happens, the "exclusionary rule" usually applies, which holds that police cannot use any direct or indirect evidence (fruit) gathered from their illegal conduct (poisonous tree).[72] But that's not how the trial court ruled. Instead, it held

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[71] Add. 49-54.

[72] *State v. Davis*, 910 N.W.2d 50, 54 (Minn. Ct. App. 2018) (defining exclusionary rule); *Segura v. United States*, 468 U.S. 796, 804 (1984) (exclusionary rule extends to both direct and indirect evidence).

that all the evidence police found after the illegal seizure—including the SD card—had been obtained "by means sufficiently distinguishable to be purged of the primary taint" of the illegal conduct.[73] This was an incorrect application of the taint test, however, and this Court should reverse.

The problem with the trial court's ruling is that it's hardly a ruling at all. It's two pages long, it cites no cases, and it just sort of reaches a conclusion with very little analytical rigor.[74] This contrasts with ███ thorough briefing on the issue.[75] And while it's true that ███ filings also didn't cite any cases, it's not because none support his position; they do. ██ didn't cite them because the facts supporting suppression seemed so clear he didn't think it necessary. But to help the Court conduct a more robust analysis than the trial court, ██ will reanalyze the four-part test from *State v. Sickels*,[76] this time weaving in Minnesota caselaw that supports his position.

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[73] *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *see also* Add. 57.

[74] Add. 57-59.

[75] Add. 20-22, 34-39.

[76] 275 N.W.2d 809, 813–14 (Minn. 1979) (defining the test).

a) Flagrancy of misconduct.

The first factor is the flagrancy of the misconduct—meaning how bad was the officer's illegal behavior. The trial court held it was not flagrant because when the officer illegally seized the phone, it was only because [redacted] probation agent told him to.[77] And if the seizure hadn't happened until this point, the trial court may have been correct. But as discussed above, the phone was seized the moment the officer grabbed it from the drawer, so the trial court was wrong. Under this proper seizure framework, [redacted] case is like *State v. Bergerson*.

There, police violated Bergerson's rights and found incriminating evidence because of the violation.[78] The court suppressed the evidence, focusing its analysis on the officer's reason for stopping Bergerson—to identify and discover his intentions.[79] It held this was exactly what the exclusionary rule was meant to prevent: "the temptation for police officers to proceed with less than constitutional prerequisites for search and seizure."[80] This was despite the court admitting the

[77] Add. 55-56.

[78] 659 N.W.2d 791, 793–94 (Minn. Ct. App. 2003).

[79] *Id.* at 798.

[80] *Id.* at 798 (citing *State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998)).

conduct wasn't "particularly flagrant."[81] The same is true in case. Law enforcement's seizure of the phone wasn't particularly flagrant, but it was the very thing *Bergerson* warned against: emboldening police officers to play fast and loose with peoples' constitutional rights. Such misconduct wasn't tolerated in *Bergerson*, and it shouldn't be tolerated here.

b) Intervening circumstances.

The second factor is intervening circumstances—meaning did anything happen between the police's illegal conduct and their discovery of the challenged evidence. The trial court found two intervening circumstances between police seizing the phone and finding the SD card: (1) went to jail; and (2) made incriminating jail calls.[82] First, it's not like chose to go to jail. It wasn't him creating an intervening circumstance, which courts disfavor.[83] The police took to jail. They shouldn't be allowed to create the intervening circumstance and then point to it as a reason the challenged evidence shouldn't be suppressed. That

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[81] *Id.* at 797.

[82] Add. 56.

[83] *State v. Ingram*, 570 N.W.2d 173, 178–79 (Minn. Ct. App. 1997) (physically resisting illegal arrest was an intervening circumstance that untainted the arrest).

would be like an officer breaking a car's taillight with his nightstick so that he can pull the driver over later. The Court should reject such circular logic.

Next, it's time to put to rest the notion that these jail calls happened independently from the phone seizure. ███ knew there was bad stuff on the SD card. The only reason he was worried the police would find the stuff was because they had just noticed a phone of his was missing an SD card. But what if they didn't know that? Does anyone really think ███ would still get on the jail phone and say:

> *Hey honey, I know I was just arrested for guns, and I know the police have no clue about any other illegal stuff I'm doing, but just out of an abundance of caution, I'm worried about an SD card I have—that again, the police have no clue about—and so I'd like to talk to you about that SD card in an incriminating manner. O.K., here goes . . .*

Seems pretty unlikely, doesn't it? And that's because the jail calls are inextricably linked to the phone seizure; without one, the other doesn't exist. Since neither alleged intervening circumstance turns out to be one, this factor favors ███

c) Likelihood of evidence being obtained absent illegality.

The third factor is the "but-for" test—meaning would the evidence have been obtained but for the illegal conduct. The trial court held the police would have found the SD card even if they hadn't seized the phone because (1) ███ incriminating jail calls and (2) law enforcement's phone observations together were

enough to get the second warrant.[84] That's wrong. Again, to act as if ███ would have made the incriminating calls if police didn't seize his phone is absurd. And without the calls, there's no way police get the second warrant.

First, the phone observations shouldn't even be considered because, as explained, the phone had been illegally seized at that point, so the observations themselves were fruit of the poisonous tree. But even accepting the incorrect seizure timeline, no judge is approving a warrant based solely on a phone found in a drawer, folded in clothes, with a full battery and missing SD card. Put another way:

- But for the police illegally seizing the phone, ███ never would have made the incriminating jails calls; and
- But for those jail calls, the police never would have gotten the second warrant; and
- But for the second warrant, the police never would have found the SD card.

This makes ███ case like *State v. Leonard*. There, police illegally looked at a hotel registry, which led to them find contraband in Leonard's hotel room.[85] The court suppressed the evidence, holding the but-for test wasn't satisfied:

> Because law enforcement had no prior knowledge of Leonard, the background check, the "knock and talk," and the subsequent warrant

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[84] Add. 56-57.

[85] 943 N.W.2d 149, 153–54 (Minn. 2020).

> were simply logical results—not interruptions—of the illegal search of the guest registry. Stated otherwise, if the officers had not searched the guest registry, they could not have run a background check, would not have known where to find Leonard for a "knock and talk," and could not have applied for a search warrant.[86]

Because ████ jail calls were also "simply logical results—not interruptions—of the illegal search" of his phone, his evidence deserves the same treatment as Leonard's: suppression.[87]

d) Temporal proximity of illegality and fruit of illegality.

The fourth factor is the temporal proximity between the two—meaning how much time passed between the police's illegal conduct and their discovery of the challenged evidence. The court held "the discovery of the SD card was far removed from the illegal seizure of the phone."[88] It doesn't put that into context, however, nor does it give a timeline or timeframe. It just says it and therefore it must be so. That's judicial fiat, not analysis. In truth, the seizure of the phone and discovery of the SD card were closer in time than the trial court makes it seem.

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[86] *Id.* at 162.

[87] *Id.*

[88] Add. 57.

About 12 hours passed between police's illegal seizure of [redacted] phone and their seizure of [redacted] SD card.[89] While this is longer than some fruit of the poisonous tree cases, which state a "close temporal proximity favors exclusion,"[90] it's not like 12 hours is some crazy, "far removed" amount. In *Bergerson*, for example, the court held that "although the officers did not execute the search warrant for Bergerson's car until the next day, upon Bergerson's arrest, they immediately seized another ingredient in the manufacture of methamphetamine, saw other suspicious items, and took custody of the car containing the evidence."[91] That's like what happened here. While police didn't execute the second warrant for [redacted] house until 12 hours later, upon [redacted] arrest, they immediately seized his phone and took custody of it. *Bergerson* said these circumstances "weigh in favor of suppression."[92] They should in [redacted] case, too.

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[89] Add 59-60.

[90] *State v. Olson*, 634 N.W.2d 224, 229 (Minn. Ct. App. 2001).

[91] 659 N.W.2d at 799.

[92] *Id.*

For these reasons, as well as those ███ made to the trial court,[93] the evidence the police found because of the illegal phone seizure, including the SD card, was fruit of the poisonous tree. The exclusionary rule should apply.

4) The trial court illegally sentenced ███

After losing his suppression challenge, ███ agreed to a stipulated-facts trial to preserve his right to appeal Judge ███ decision. But shortly after denying ███ motion, Judge ███ moved her chambers to a new county. So a judge named Judge ███ took over ███ case. She found him guilty at trial and, over trial counsel's vehement objection, sentenced him to 99 months in custody.

First, procedurally, ███ challenge to his sentence is permissible even though it's outside the scope of the parties' Rule 26 agreement. That's because a Rule 26 agreement deals with preserving pretrial issues for appeal, not sentencing issues.[94] How could ███ have preserved this sentencing issue *before* he was sentenced? He couldn't, so he's allowed to appeal his sentence.[95]

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[93] Add. 20-22, 34-39.

[94] *See* Minn. R. Crim. P. 26.01, subd. 4(f).

[95] *See, e.g.*, *State v. Maurstad*, 733 N.W.2d 141, 146–48 (Minn. 2007) (defendant allowed to appeal alleged sentencing error despite failing to argue against it, attempting to correct it, or even objecting to it at his trial court sentencing hearing).

Next, substantively, the trial court's sentencing error in ████ case occurred when it incorrectly gave him a misdemeanor sentencing point. This transformed his case from a "presumptive stay" to a "presumptive commitment,"[96] which seemingly allowed the judge to stack his sentences to arrive at 99 months. In other words, but for the incorrect misdemeanor point, ████ sentence would have been 18 or 36 months stayed, not 99 months executed.

Under Minnesota law, ████ case straddled the line between going to prison and not going to prison. To be nudged over the line, two things had to happen: (1) he needed one more "misdemeanor point;" and (2) he needed four "misdemeanor units" to get the misdemeanor point.[97] These terms come from the Minnesota Sentencing Guidelines, whose mission is to sentence people in a fair, universally applicable way.[98] To that end, broadly speaking, a prior conviction gets a person a certain number of units; the more units they have, the more points they get; and the more points they have, the longer their sentence.[99] Here, the issue is how many units ████ prior convictions from Virgina should have received. The trial court

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[96] Minn. Sent. Guidelines §§ 1.B(13)(a)(1) and (a)(2).

[97] *Id.* at § 2.B.3.

[98] *Id.* at § 1.A.

[99] *Id.* at §§ 2.B.101 (Comment), 2.B.103 (Comment).

said 32; ███ said at most 3. Minnesota caselaw and the Sentencing Guidelines support ████ conclusion.

For ███ to get a misdemeanor point, he needed four misdemeanor units.[100] There's no dispute ███ had one misdemeanor unit for a prior battery conviction. There is serious dispute, however, as to how many units ███ should get for his misdemeanor convictions out of Virgina. The trial court gave him 31 units—1 for each conviction.[101] This is wrong for two reasons.

First, the state at sentencing failed to prove that there was more than a single victim for each of the 31 convictions. And the burden is on the state, so by failing to prove this, the trial court *had to assume* the convictions involved a single victim.[102] Under that parameter, the convictions should have only counted as a single misdemeanor unit.[103] Add that to the unit for the prior battery conviction, and that's only two misdemeanor units, which is two shy of the four needed to give ███ a full misdemeanor point.

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[100] *Id.* at § 2.B.3.

[101] Add. 61.

[102] *State v. Rowland*, No. A21-0337, 2021 WL 6109558, at *3 (Minn. Ct. App. Dec. 27, 2021) (state has burden to establish the defendant's conduct involved multiple victims; court will not assume).

[103] Minn. Sent. Guidelines §§ 2.B.3(c), 2.B.305 (Comment).

Next, even if the state proved there were multiple victims for the 31 convictions, it still failed to prove at sentencing that ███ "offenses were not part of a single behavioral incident".[104] Again, the burden is on the state, so by failing to prove this, the trial court *had to assume* the convictions involved multiple victims, but constituted a "single course of conduct."[105] Under that parameter, only the two most serious convictions should have counted for misdemeanor units.[106] Add that to the unit for the prior battery conviction, and that's three misdemeanor units, which is still one shy of the four needed to give ██ a full misdemeanor point.

So under either scenario, ███ convictions from Virgina count as either 1 or 2 misdemeanor units, not 31 like the trial court held. And since this makes it so that ██ doesn't have enough units to get a full misdemeanor point, the rest of the trial court's sentencing procedure fails. Meaning without the point, ███ case never could have moved from a presumptive stay (no prison) to a presumptive

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[104] *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

[105] *State v. Smith*, No. A20-0138, 2020 WL 7688601, at *2 (Minn. Ct. App. Dec. 28, 2020) (reversing trial court's erroneous assignment of "criminal-history points for three prior convictions that were part of a single incident"); *see also Rowland*, 2021 WL 6109558 at *1–3 (state's burden to prove the defendant's offenses were not part of a "single behavioral incident"); *see also State v. Carlson*, 192 N.W.2d 421, 427–29 (Minn. 1971) (defendant's possession of "54 reels" of obscene film constituted "a single behavioral incident").

[106] Minn. Sent. Guidelines §§ 2.B.3(d), 2.B.308 (Comment).

commitment (prison), meaning he never could have received the 99-month sentence that he did. In short, the trial court miscounted how many units ███ Virginia convictions should receive. Properly counted, ██ should not have been sentenced to prison.

But that's not the outcome the trial court wanted. And so instead of following the clear import of the law, it disregarded it, and gave ██ the sentence it believed he deserved. Here's how:

- First, the court agreed with ███ trial counsel that his Virginia convictions constituted a "single behavioral incident"[107] under *Carlson*, *Bakken*, *Smith,* and *Rowland*.[108]

- Upon this finding, the court was then obligated under § 2.B.3(d) of the Minnesota Sentencing Guidelines to "assign only the two most severe offenses units in criminal history."[109]

- Despite this legal obligation, the court did no such thing.

- Instead, it assigned units for all 31 Virginia convictions.

- This seemingly gave ██ enough misdemeanor units to qualify for the misdemeanor point, which then allowed the court to

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[107] Add. 62.

[108] *Rowland*, 2021 WL 6109558 at *1–3; *Smith*, 2020 WL 7688601 at *2; *Bakken*, 883 N.W.2d at 270; *Carlson*, 192 N.W.2d at 427–29.

[109] *See also* Minn. Sent. Guidelines § 2.B.308 (Comment).

> "Hernandize"[110] his Minnesota convictions and sentence him to 99 months—the sentence it wanted to impose all along.

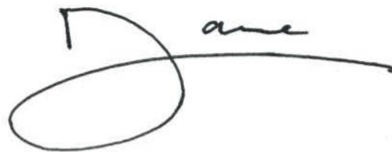
But in the words of the court in *Maurstad*: "a sentence based on an incorrect criminal history score is an *illegal sentence*."[111] The same is true here. The trial court sentenced ███ based on an incorrect criminal history score. This is illegal and should be reversed.

CONCLUSION

█████ ██████████ requests that the Court reverse the trial court's denial of his suppression motion, vacate his sentence, and order his release.

Dated: June 3, 2023

Respectfully submitted,



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[110] Minn. Sent. Guidelines § 1.B(10) (defining "Hernandize"); *see also Id.* at § 2.B.109 (Comment) (explaining rationale for allowing the "Hernandez method").

[111] 733 N.W.2d at 147 (emphasis added).

CERTIFICATE OF RULE 132.01 COMPLIANCE

This document complies with the word limit of Minn. R. App. P. 132.01, subd. 3 because this document contains less than 14,000 words.

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Dated: June 3, 2023

By: */s/ Dane DeKrey*
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CERTIFICATE OF RULE 131.03 COMPLIANCE

I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable, is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

Dated: June 3, 2023

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