[redacted]

STATE OF MINNESOTA
COUNTY OF CLAY

IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

[redacted],

Defendant.

Court File No. [redacted]

POST-HEARING BRIEF

INTRODUCTION

Law enforcement's investigation of [redacted] was fundamentally flawed. It began poorly and only got worse, resulting in multiple serious constitutional violations. First, the warrant used to search his home should have never been granted. Next, the officers who executed this warrant searched and seized a cell phone of [redacted] that was outside the scope of the warrant. Finally, to try cure this unconstitutional conduct, the officers called [redacted] probation officer and asked for permission to seize the *already seized* phone. The officer gave the green light, but by then it was too late, the damage was done. The officer also lacked the authority to order the phone's seizure, so law enforcement's purported permission wasn't really permission at all. For these reasons, the Court should suppress [redacted] phone, its contents, and all evidence derived from its illegal search and seizure, including the SD card found during a subsequent search.

[redacted]

DISCUSSION

1) The "gun warrant"[1] is void because Detective [redacted] secured it by making deliberate statements in reckless disregard for the truth.

According to the Minnesota Supreme Court, "a search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause."[2] This is essentially the state's version of the Supreme Court's test in *Franks v. Delaware*. Thus, when a defendant seeks to invalidate a warrant, the two-prong *Franks* test requires a defendant to show, by a preponderance of the evidence,[3] that (1) the affiant deliberately made a statement that was false or in reckless disregard for the truth, and (2) the statement was material to the probable cause determination.[4] This test applies to material misrepresentations only; innocent or negligent ones will not invalidate a warrant.[5] A misrepresentation is material if probable cause to issue the search warrant no longer exists once the misrepresentation is omitted.[6]

[1] The "gun warrant" was the one signed by Judge [redacted] on May 10, 2021.

[2] *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010).

[3] *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. Ct. App. 2005).

[4] *State v. McDonough*, 631 N.W.2d 373, 390 (Minn. 2001).

[5] *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989).

[6] *Andersen*, 784 N.W.2d at 327.

[redacted]

Applying this here, the issue is with the test's first prong—whether the affiant, Detective [redacted], deliberately made a statement in reckless disregard for the truth. The relevant statement is Detective [redacted] claim that he *knew* [redacted] couldn't possess a firearm because of his "previous felony conviction."[7] He claimed to know this for four reasons:

- The convictions listed on [redacted] criminal history report, including "numerous felony convictions out of the state of Virginia."[8]
- [redacted] probation status, including his signing of a document "acknowledging his inability to possess a firearm."[9]
- Statements made by [redacted] probation officer, including his belief that [redacted] had "felony convictions through the state of Virginia."[10]
- Statements made by a local ATF agent, including his belief that [redacted] was prohibited from possessing a gun "both federally and within the state of Minnesota."[11]

Now at first blush, this information seems to bolster Detective [redacted] claim that he knew [redacted] couldn't possess a firearm. But here's the wrinkle: [redacted] *could* possess a firearm because he *doesn't* have felony convictions from

[7] Exhibit 1 (Gun Warrant Affidavit) at 3.

[8] Exhibit 2 (Omnibus Hearing Transcript) at 22:5-6.

[9] *Id.* at 14:24.

[10] *Id.* at 15:14.

[11] *Id.* at 24:24-25.

[redacted]

Virginia.[12] The Court is thus left with a situation like *United States v. Finley*, an Eighth Circuit Court of Appeals case in which the court framed the issue this way:

> The government does not contest that ¶ 19 contains a literal falsehood, and Finley does not argue that the falsehood was deliberate. Rather, the question presented . . . is whether Finley has shown that the falsehood in ¶ 19 of the affidavit was made with reckless disregard for the truth.[13]

But unlike the Eighth Circuit, which has a specific test for determining whether a statement was made with reckless disregard for the truth, Minnesota courts do not. And so the best method of analysis is for the Court to simply analyze what Detective [redacted] did versus what he could or should have done, with the goal being to discern his state of mind and intent when he wrote the false statement about [redacted] in the gun warrant affidavit.[14]

First, any knowledge Detective [redacted] claimed to garner from [redacted] probation status or the probation documents he signed is a red herring and should be disregarded. That's because Minnesota law is clear that search warrants cannot

[12] That's because none of his Virginia convictions qualify as felonies under Minnesota law. *Compare* Exhibit 2 at 44:24–52:24 (testimony establishing that all Virginia sentences examined by Detective [redacted] had no more than one year), *with* Minn. Stat. Ann. § 609.02, subd. 2 ("felony" means a crime for which a sentence of imprisonment for more than one year may be imposed).

[13] 612 F.3d 998, 1002 (8th Cir. 2010).

[14] *See State v. Randa*, 342 N.W.2d 341, 343 (Minn. 1984) (court must make findings on whether misrepresentations are intentional based on the evidence received at the omnibus hearing).

[redacted]

depend only on probation violations.[15] So this precludes any argument that Detective [redacted] knew [redacted] couldn't possess a gun because of his probation status or the probation-related documents he signed.

With this gone, only three reasons remain. These can be lumped into two buckets: (1) information from [redacted] criminal history report, and (2) information from other law enforcement officers. So what we're really talking about is Detective [redacted] doing two things. First, he looked up [redacted] criminal history. When he did, he saw some convictions from Virginia that he thought might be felonies.[16] But he wasn't sure. And we know this because of what he did next—he called two different law enforcement officials to get their thoughts. Had he been sure the convictions were felonies, he never would have felt the need to consult them.

But he did. The first call was to [redacted] probation officer, the second to a local ATF agent. Neither were lawyers, nor did they know the intricacies of Minnesota gun law. Both corroborated what Detective [redacted] thought but wasn't sure of, that [redacted] seemed to have Virginia felonies that prohibited him from possessing a

[15] Minn. Stat. Ann. § 626.07; *see also* Exhibit 2 at 52:25–54:10.

[16] But even this is hard to believe if we are to take Detective [redacted] omnibus hearing testimony seriously. That's because on cross-examination he admitted that he knew both that (1) none of [redacted] Virginia sentences were more than one year, and (2) a Minnesota felony sentence had to be for one year and a day or more. *See* Exhibit 2 at 44:24–52:24. So unless Detective [redacted] perjured himself at the hearing, he should have *never even thought* the Virginia convictions might be Minnesota felonies.

[redacted]

gun. But these conclusions were based on the same rudimentary search of [redacted] criminal history that Detective [redacted] did. Meaning that although two more people agreed with Detective [redacted] hunch that [redacted] was a prohibited person based on his criminal history, it wasn't some sort of thoughtful, reasoned analysis. Instead, it was the unconsidered lay opinion of two nonlawyers. All told, the three men conducted the same simple analysis and reached the same simple conclusion—that [redacted] criminal convictions seemed to count for prohibition purposes. While this sometimes might be enough to withstand *Franks* scrutiny, it shouldn't be here for two reasons.

First, the gun warrant affidavit rises or falls on this determination. If [redacted] Virginia convictions are not felonies, then there's no probable cause to grant the gun warrant. That's because gun ownership on its own is not a crime, and so it would be illegal to authorize a warrant to search for and seize legally owned guns. And Detective [redacted] knew this. He knew his only chance to get a warrant to search [redacted] house for guns was if [redacted] was a prohibited person. So he went shopping for the answer he wanted. Fearing what the prosecutor assigned to the investigation might say,[17] Detective [redacted] instead reached out to two law

[17] In hindsight, these fears were well-founded, as the prosecutor who handled [redacted] felon in possession case ultimately dismissed the charge. *See* State's Rule 30.01 Dismissal Notice in [redacted], filed with this brief as "other document."

[redacted]

enforcement buddies he knew he could count on for the "right" answer. But in doing so, he created more work for himself, which suggests an intent to deceive. That's because rather than calling the relevant prosecutor and putting the question definitively to rest, Detective [redacted] instead called two nonlawyers in search of the only answer he would accept. He got it, but the way he did so speaks volumes.

Next, Detective [redacted] knows better than to be so sloppy. He's not a beat cop or a rookie fresh out of the academy, whose inability to properly determine whether an out-of-state conviction is a felony can be understandably excused. This is his job. He's a detective. He lives and breathes these sorts of tough questions every day. And so it would be a cop-out for the Court to allow him to avoid accountability by claiming the falsehood in the affidavit was simply an accident. Detective [redacted] has been with the Moorhead police for 14 years. He's written countless warrant affidavits. If by now he doesn't know that the first call he should make when he has a question about a suspect's prior conviction is to the prosecutor in charge of the investigation,[18] then perhaps the admittedly serious remedy of voiding the warrant is needed to make it abundantly clear.

[18] Exhibit 2 at 57:16-20.

[redacted]

This is especially true after the Minnesota Supreme Court's 2020 decision in *State v. Martin*.[19] As here, *Martin* dealt with whether an out-of-state conviction applied in Minnesota.[20] The court held that in making this determination, law enforcement must carefully compare the out-of-state statute of conviction with the comparable in-state one.[21] Applying this here, it would make the most sense to ask the relevant prosecutor—not a probation officer or ATF agent—to conduct such a law-intensive analysis. This is another reason that cuts against Detective [redacted] approach. *Martin* makes clear that out-of-state convictions deserve special attention and analysis.[22] This is best done by lawyers, not lawmen.

In sum, Detective [redacted] deliberate decision to avoid the objectively correct method of seeking out the answer to a question as important as the one at issue is no accident. Nor is it mere negligence. The multiple, calculated steps he took to make it look like he was searching for the right answer, but in reality completely avoiding it, constitutes reckless disregard for the truth.

[19] 941 N.W.2d 119 (Minn. 2020).

[20] *Id.* at 120.

[21] *Id.* at 124.

[22] *Id.* at 126.

[redacted]

With the first prong satisfied, the second prong is assumed. That's because the gun warrant depended entirely on [redacted] being unable to possess firearms, meaning it was the only identifiable probable cause of a crime in the entire gun warrant affidavit. So if it's removed, the affidavit crumbles.[23] The affidavit's premise is that a warrant is needed to enter [redacted] home to search for and seize his guns and ammunition because he's not allowed to possess either. But if he is allowed to possess them, then no warrant can be granted to search for and seize legally owned items. Since the first prong of the test is satisfied, the second prong must be too, because nothing in the affidavit establishes probable cause except for the false statement that [redacted] was a prohibited person. While it's true that he was on probation, a warrant can't depend only on a probation violation.[24] So if the false statement that [redacted] can't possess a firearm is removed, the warrant is void.

2) Even if the gun warrant isn't void, the search and seizure of [redacted] phone was beyond its scope and therefore illegal.

If for some reason the Court doesn't invalidate the gun warrant, law enforcement still illegally exceeded the warrant's scope when it searched and seized [redacted] phone. In Minnesota, "a search pursuant to a warrant may not exceed the

[23] *See Andersen*, 784 N.W.2d at 327 (if probable cause doesn't exist after the misrepresentation is removed from the warrant affidavit, the warrant is void).

[24] Minn. Stat. Ann. § 626.07.

scope of that warrant."[25] The test for whether a search has exceeded the scope of the warrant is one of reasonableness.[26] To decide whether the conduct of the officers executing a search under a warrant is reasonable, "the court must look at the totality of the circumstances."[27] Applying this here, the question is whether law enforcement's search and seizure of [redacted] phone during the execution of the gun warrant was reasonable given the totality of circumstances. It wasn't.

Nothing in the gun warrant authorized officers to look for cell phones, let alone search and seize them. Instead, it listed three things they could look for:

- Black and Silver Glock Model 48 with Serial Number BLSB553
- Pistol Case for Glock Pistol and spare magazines
- Ammunition [28]

Notably absent from this list is anything related to cell phones. For this reason alone, the search and seizure of [redacted] cell phone during the execution of a warrant that didn't permit such a search and seizure is per se unreasonable and therefore illegal. And Minnesota case law supports this straightforward conclusion.

[25] *State v. Soua Thao Yang*, 352 N.W.2d 127, 129 (Minn. Ct. App. 1984).

[26] *Illinois v. Gates*, 462 U.S. 213, 235–36 (1983).

[27] *State v. Thisius*, 281 N.W.2d 645, 645–46 (Minn. 1978).

[28] Exhibit 3 (Gun Warrant) at 1.

[redacted]

First, in *State v. Barajas*, the court suppressed cell phone photographs that were warrantlessly searched and seized during an unrelated police investigation.[29] There, the cops were looking into an alleged trespass at an apartment in Moorhead.[30] When officers knocked on the door, Mr. Barajas answered, but he could not communicate well in English.[31] Suspecting he might be in the country illegally, officers contacted border patrol.[32] After speaking with Mr. Barajas, border patrol asked the officers to arrest him and remove him from the apartment.[33] But before leaving, one officer "observed a red flip-style cellular telephone on the kitchen counter in the apartment . . . opened the cellular telephone and searched the digital photographs in the telephone's internal memory."[34]

Mr. Barajas challenged the search, and the court agreed, holding that suppression was appropriate because the photographs were acquired without a warrant and were unrelated to the officers' trespass and immigration investigation.[35]

[29] 817 N.W.2d 204 (Minn. Ct. App. 2012).

[30] *Id.* at 210.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 219–20.

This case is like *Barajas*. [redacted] cell phone was searched and seized without a warrant and was unrelated to the gun warrant. The Court should apply the logic of *Barajas* and suppress the phone.

Next, in *State v. Cooper*, the state suppressed cell phone photographs that were searched and seized outside the scope of the legitimate warrant in the case.[36] There, police suspected Mr. Cooper was dealing drugs, so they secured a warrant to search his residence.[37] The warrant authorized law enforcement to search the home for "cellular phones used to arrange and conduct controlled substance transactions."[38] But because Mr. Cooper had two mean dogs, officers waited for him to leave his home and then pulled him over on his way to work.[39] They presented him with the warrant and he agreed to accompany them back to his house to conduct the search.[40] But before they did, an officer "pat frisked" Mr. Cooper and found multiple items, including a cell phone.[41] With phone in hand, the officers went back to the home and

[36] No. A12-1027, 2013 WL 264430, at *1 (Minn. Ct. App. Jan. 14, 2013); *see also* Exhibit 4 (Unpublished Opinions) at 1–6.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[redacted]

began the drug-related search.[42] During the search, an officer placed the earlier-retrieved phone on a coffee table.[43] Unaware of the phone's chain of custody, another officer picked it up, looked through it, and found child pornography. [44]

Mr. Cooper challenged the search, and the court agreed.[45] It held suppression was appropriate because the warrant allowed law enforcement to search the premises for cellular phones, but when the phone was found, it was not on the premises, but on Mr. Cooper's person, and so it was outside the warrant's scope.[46] This case is like *Cooper*, but with better facts. In *Cooper*, the warrant permitted searching for cell phones at the suspect's home. Here, no such permission existed—the warrant was for guns and ammunition only. And so if the search and seizure of the phone in *Cooper* was beyond the scope of the warrant, so too must it be here.

Now the state's best response to this "beyond the scope" argument is that while it's true that officers touched the phone, it's not true that such minimal manipulation constituted a search or seizure for Fourth Amendment purposes. In

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at *5.

[46] *Id.* at *4–5.

short, the state may argue, the officers were looking for guns and ammunition in [redacted] home—which the warrant allowed them to do—and as part of that search, they came across a cell phone. It was in a drawer, folded in clothes, and so they moved it to look for gun-related contraband. In doing so, they briefly held and manipulated the phone. Not to search it, simply to move it. And during this *de minimis* handling, the officers noticed two suspicious things. First, the battery was 100%, which is not itself odd. But second, the phone was missing its SD card, which is odd for a fully charged phone. Because of these irregularities, and because officers knew [redacted] was on probation, they then called his probation officer and got permission to seize the phone.

There are two problems with this argument. First, the Fourth Amendment is not only about illegal searches; it's also about illegal seizures. So putting aside for the moment whether the officers' manipulation of the phone constituted a search, the first question is whether the officers' decision to warrantlessly secure the phone before calling [redacted] probation officer constituted a seizure under the Fourth Amendment. Basic logic dictates that it must. The officers were in [redacted] home, with a warrant, looking for guns and ammunition. During this search, they came across a cell phone belonging to [redacted] The phone was not in their possession, it was simply an item in the home. Without a warrant, an officer physically grabbed the

[redacted]

phone. At that moment, a seizure had occurred. A phone that didn't belong to police, and who didn't have permission take possession of it, was now in police custody. This is the literal definition of a seizure, that is: "the act or instance of taking possession of a person or property by legal right or process."[47] And the officers who conducted the search *do not dispute this*. Both Detective [redacted] and [redacted] probation officer admitted as much on cross-examination at the omnibus hearing.[48] This is dispositive. The police seized [redacted] phone without a warrant. That's illegal.

Next, the officers' manipulation of [redacted] phone was more intrusive, and therefore more like a search, than they'd like to admit.[49] This is especially true for the screen manipulation. When officers encountered the phone, the screen was dark and not visible, as that is how all phones rest when not being used. Thus, the only way the officers could have seen the phone's battery amount would be to manipulate the phone in some way. Specifically, they would have had to tap the phone's screen, because that's how all smart phones are brought out of the dark screen sleeping position. This tap, though minimal, is a "key strike" within the meaning and

[47] *Black's Law Dictionary* 1631 (11th ed. 2019).

[48] Exhibit 2 at 59:23–61:10, 100:15-17.

[49] *Id*. at 60:2-8.

[redacted]

reasoning of *Barajas*.[50] And it also takes the case out of the plain view realm, which the court grappled with in *State v. Mays*, because the screen only became visible—and arguably in plain view—because of the impermissible "key strike."[51]

This reasoning has support beyond Minnesota. For example, in *United States v. Fortson*, a federal district court case from the Middle District of Alabama, the court held that an officer's seizure and manipulation of a cell phone without a warrant was impermissible.[52] The court reasoned that the "incriminating character" of a cell phone is not "immediately apparent" and so its seizure and search prior to obtaining a warrant was illegal.[53] This was despite the officer's testimony that he "did not manipulate the phone or push any buttons in order to make" it activate or the evidence "appear."[54] It thus seems that the officer in *Fortson* tried to make the same argument as the officers here—that the phone's screen simply turned on without anything being hit.[55] That argument was rejected there, and it should be here too.

[50] 817 N.W.2d at 211, 214, 216.

[51] No. A13-1187, 2015 WL 1513878, at *3–4 (Minn. Ct. App. Apr. 6, 2015); *see also* Exhibit 4 (Unpublished Opinions) at 7–11.

[52] No. 2:18-CR-416-TFM-SMD, 2019 WL 9831021, at *10 (M.D. Ala. July 31, 2019), *report and recommendation adopted*, No. 2:18-CR-416-WKW, 2020 WL 2404891 (M.D. Ala. May 12, 2020).

[53] *Id.*

[54] *Id.* at *6.

[55] Exhibit 2 at 60:4-8.

Was the touching of [redacted] cell phone screen the search of the century? No, obviously not. But it was something. And it required the deliberate key strike of an officer. Under Minnesota law, this is a search, and absent a warrant, an illegal one.

3) The illegal search and seizure of [redacted] phone wasn't cured by his probation officer granting law enforcement permission because it had already occurred by the time permission had been secured.

That law enforcement later got what it believed to be permission from [redacted] probation officer to search the phone is irrelevant and should have no bearing on the Court's analysis or decision. That's because by the time they received the purported permission, for the reasons explained above, law enforcement had already seized and searched the phone. This would be like police officers entering a home without a warrant, searching it, finding incriminating evidence, and then calling and applying for a warrant. It's nonsensical and should be rejected.

An analogous situation arose in *Barajas*. There, Mr. Barajas's cell phone was first searched without a warrant or his permission.[56] But days later, Mr. Barajas gave permission to search the already-searched phone.[57] The court conducted a "taint" analysis and determined that the taint of the illegal search was not cured by the later permission, reasoning:

[56] 817 N.W.2d at 210.

[57] *Id.*

[redacted]

> Permitting the police to obtain consent *after* conducting an unlawful search so as to circumvent the exclusionary rule, even if the police conducted the unlawful search in good faith, would undermine the constitutional limitation on unreasonable searches and the purpose of the exclusionary rule.[58]

The same analysis applies here, but with more force. In *Barajas*, Mr. Barajas eventually gave law enforcement permission to search his phone. [redacted] did no such thing. So no "taint" analysis is even necessary here. Instead, all we're left with is the *Barajas* court's forceful admonition that police should be prohibited from trying to obtain consent after conducting an illegal search in hopes of preventing the evidence from being suppressed. That's what the officers were trying to do when they called [redacted] probation officer. The Court should reject it. The search and seizure of [redacted] phone was without a warrant and wasn't cured by the later permission the officers believed they received. Suppression is appropriate.

4) The warrantless seizure of [redacted] phone was independently illegal because his probation officer didn't have the authority to order it.

While not determinative to the outcome, it's important to note that [redacted] probation officer, [redacted], didn't actually have authority to give law enforcement officials permission to seize [redacted] phone. And Officer [redacted] admitted as much during cross-examination at the omnibus hearing. First, he conceded that [redacted] had

[58] *Id.* at 219.

[redacted]

signed no Minnesota document requiring him to submit to searches.[59] He also conceded that [redacted] had no search clause as part of his Virginia probation.[60] These facts alone are evidence that he lacked the authority to order [redacted] phone be searched. While Officer [redacted] claimed that he still had authority under "the concept of the Interstate Compact transfer,"[61] because it is a "dynamic" and not "static" document,[62] this argument is unpersuasive for two reasons.

First, there's no support for it at all in the text of the Interstate Compact Agreement. It specifically makes no mention of the document being "dynamic," nor does it grant the kind of power to probation officers that Officer [redacted] claims.[63] Next, Officer [redacted] subsequent actions cast doubt on his assertion. Despite stating he had seemingly inherent authority to require [redacted] to submit to searches, and after giving law enforcement permission to search [redacted] phone, Officer [redacted] reached out to the Interstate Commission for Adult Supervision to find out whether there was a search clause in [redacted] Virginia probation conditions.[64] This is telling. Had

[59] Exhibit 2 at 103:22-25.

[60] *Id.* at 103:3-5.

[61] *Id.* at 101:7-20.

[62] *Id.* at 103:18-20.

[63] *Id.* at 110:17–111:4.

[64] *Id.* at 104:9-21.

[redacted]

Officer [redacted] really thought his power was inherent, he would not have reached out to the Commission to confirm. That he did shows even he knew his power was not as absolute as he tried to make it seem at the omnibus hearing.

In truth, Officer [redacted] got over his skis and went too far in his supervision of [redacted] He never made [redacted] sign a search clause when he began supervising him for Virginia, even though he could have done so.[65] And no search clause was present in his Virginia conditions. The only logical conclusion from these two facts is that Officer [redacted] didn't have the authority to give law enforcement permission to seize [redacted] phone. And his attempts to save his impermissible conduct are unavailing. The Court should thus not credit Officer [redacted] role or testimony in this case. His purported permission wasn't really permission, and so it does not cure the constitutional deficiencies related to the phone's illegal search and seizure.

5) The SD card found by the "phone warrant"[66] is fruit of the poisonous tree and should be suppressed.

Evidence obtained by searches and seizures in violation of the Constitution is inadmissible in court.[67] Further, evidence that is the fruit of illegal state action is

[65] *Id.* at 102:20–103:25.

[66] The "phone warrant" was the one signed by Judge [redacted] on May 11, 2021.

[67] *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

[redacted]

inadmissible fruit of the poisonous tree.[68] Put another way, "evidence that would not have come to light but for police exploitation of their illegal actions is generally deemed 'fruit of the poisonous tree' and excluded from the state's use at trial."[69]

Here, the doctrine applies two ways. First, since the gun warrant was wrongly issued, the state should have never entered [redacted] house in the first place. Therefore, any evidence gathered directly or indirectly from this illegal entry should be excluded. This includes finding the phone, seizing the phone, searching the phone, taking [redacted] into custody, listening to [redacted] phone calls while in custody, the phone warrant, and the fruits of the phone warrant, including the SD card.

Second, even if the Court finds the gun warrant was properly issued, the state still violated the Constitution when it illegally searched and seized [redacted] phone without a warrant. Therefore, any evidence gathered directly or indirectly from this illegal search and seizure should be excluded. This includes knowledge of the phone's irregularities (100% battery with no SD card), listening to [redacted] phone calls while in custody (but for the illegal seizure of the phone, [redacted] would have never made SD-card related statements over the phone), the phone warrant, and the fruits

[68] *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

[69] *State v. Davis*, 910 N.W.2d 50, 54 (Minn. Ct. App. 2018).

[redacted]

of the phone warrant, including the SD card. Under either scenario, the SD card is the fruit of illegal state action and is thus inadmissible fruit of the poisonous tree.

CONCLUSION

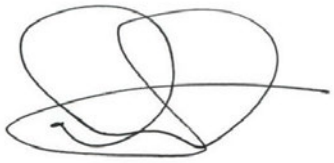
This case is about bad police work that resulted in the acquisition of illegal and admittedly distasteful evidence. But that distaste should not excuse the state's egregiously unconstitutional conduct, nor should it allow the state to win on an "ends justify the means" theory. The facts are simple:

- The gun warrant shouldn't have been issued.
- Even if it should have, the phone was outside the warrant's scope.
- All evidence gathered after that is fruit of the poisonous tree.

For any *one* of these reasons, suppression of all evidence in the case is appropriate. But when *all* these reasons are combined, suppression seems mandatory.

Dated: June 03, 2022

Respectfully submitted,



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STATE OF MINNESOTA
COUNTY OF CLAY

IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

[redacted],

Defendant.

Court File No. [redacted]

REPLY TO
STATE'S RESPONSE

INTRODUCTION

The state's response brief commits three serious errors. First, it misstates Minnesota law related to what constitutes a felony offense for purposes of gun prohibition.[1] Next, it misunderstands the relevant legal test with respect to the cell phone manipulated by law enforcement during the gun warrant.[2] Finally, it mischaracterizes and misapplies the relevant legal test with respect to "untainting" illegally obtained evidence, namely the SD card.[3] For these reasons, the Court should disregard the state's brief and grant [redacted] suppression motion in full.

[1] State's Response at 3–5.

[2] *Id.* at 5–7.

[3] *Id.* at 7–8.

[redacted]

[redacted]

DISCUSSION

1) The state's "what constitutes a felony" discussion is incorrect.

In its brief, the state claims that [redacted] Virginia convictions qualify as Minnesota felonies because "there is a difference between 'punishable' and 'punished'" and [redacted] incorrectly focused on what his "actual sentence was and not what it could have been."[4] So, in essence, since each of [redacted] Virginia sentences could have been greater than 12 months and 1 day, that's enough under Minnesota law, even if he were sentenced to just 1 day of total confinement on each. And if this expansive interpretation of Minn. Stat. § 624.713, subd. 1(10)(i) were true, it would be dispositive in the state's favor. But it's not.

The problem with the state's argument is that it's based on an incomplete examination of the law. It comes close to being right, but stumbles just before the finish line. Here's why. The statute at issue reads:

> The following persons shall not be entitled to possess ammunition or a pistol or a semiautomatic military-style weapon or, except for clause (1), any other firearm: a person who has been convicted in any court of a *crime punishable by imprisonment for a term exceeding one year*.[5]

[4] *Id.* at 5.

[5] Minn. Stat. Ann. § 624.713, subd. 1(10)(i).

[redacted]

The state then simply takes this italicized phrase at face value and offers its own definition and analysis of it.[6] In doing so, however, it commits a fatal error—it doesn't make sure there is no statutory definition for "crime punishable by imprisonment for a term exceeding one year." Because if there is, the definition might be different, and more nuanced, than the "plain reading" definition offered by the state in its brief.[7] As it turns out, there is, and it's bad for the state:

> **Crime punishable by imprisonment for a term exceeding one year.** "Crime punishable by imprisonment for a term exceeding one year" *does not include . . .* (2) *any state offense classified by the laws of this state or any other state as a misdemeanor* and punishable by a term of imprisonment of two years or less.[8]

This means that the definition of "crime punishable by imprisonment for a term exceeding one year" is not nearly as expansive as the state purports it to be in its brief. Instead, certain offenses do not qualify even if they seem to at first blush. And this is because of the public policy underpinning Minnesota gun law, which is to only prohibit gun ownership from people who have convictions that *actually qualify* as the types of offenses that the legislature has decided merit the revocation of gun rights.[9]

[6] State's Response at 4–5.

[7] *Id.* at 5.

[8] Minn. Stat. Ann. § 624.712, subd. 10.

[9] *Id.* at § 624.711.

This is where [redacted] Virginia convictions fit. While they are classified as felonies, their sentences are not felony-like sentences, and so the Minnesota legislature wrote § 624.712, subd. 10(2) basically to say, even though your out-of-state conviction is called a felony, because it doesn't carry a felony sentence under the laws of our state, we aren't going to call it a felony for purposes of revoking your gun rights, so long as certain requirements are met: 1) the out-of-state offense must qualify as a misdemeanor under Minnesota law, and 2) the out-of-state offense must have a statutory maximum of two years or less.[10]

Applied here, [redacted] Virginia convictions fit this exception. First, while the convictions were called felonies, his sentences were all for less than a year and a day.[11] And under Minnesota law, an offense is a felony only when the sentence of actual imprisonment is for more than one year.[12] So under Minnesota law, these convictions are misdemeanors. Next, [redacted] Virginia convictions have a statutory maximum of two years or less. We know this because the state inadvertently admits it:

> A Class 6 felony in Virginia is punishable by a term of imprisonment of not less than 1 year nor more than 5 years, *or in the discretion of the jury or*

[10] *Id.* at § 624.712, subd. 10(2).

[11] [redacted] Brief at 3–4, 4 n.12.

[12] Minn. Stat. Ann. § 609.13, subd. 1(1).

[redacted]

[redacted]

> *the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.*[13]

The state focuses only on the first, unitalicized part of the statute, once again doing an incomplete analysis of the law. Because while the first part seems to suggest the statute has a 5-year statutory maximum, the word "or" in the statute means the statutory maximum is either 5 years or, in the discretion of the judge, 12 months. And since [redacted] sentences were all for 12 months, it's clear the judge in his Virginia cases opted to make the statutory maximum for his offenses 12 months, which is lower than 2 years (24 months). Therefore, [redacted] Virginia offenses are each punishable for only 12 months or less. Because both elements are met, the convictions do not qualify as "crimes punishable by imprisonment for a term exceeding one year."[14]

2) The manipulation of the phone constituted *both* a search and a seizure.

The state's arguments about law enforcement's manipulation of [redacted] cell phone during the execution of the gun warrant are meandering and contradictory. First, the state admits the cell phone was "picked up" and "moved" during the search,[15] but then just a page later reverses course and claims the phone was never

[13] State's Response at 4 (citing Va. Code Ann. § 18.2-10(f)).

[14] Minn. Stat. Ann. § 624.713, subd. 1(10)(i).

[15] State's Response at 6.

[redacted]

"physically seized."[16] The state also argues that all phone-related observations were made in "plain view,"[17] which is hard to reconcile with its previous admissions of manipulation. Finally, the state tries to walk back clear admissions made during the hearing that the phone was seized, and in law enforcement's possession, *before* [redacted] probation officer, Brad [redacted] was contacted.[18]

The truth is far simpler. Law enforcement entered [redacted] house with a warrant for guns and ammunition, not cell phones. During the search, they encountered a cell phone. Without a warrant, an officer "moved" the phone, "picked it up,"[19] and made observations about it.[20] This constituted "minor manipulation."[21] The police then seized the phone, still without a warrant, and called Officer [redacted] seeking permission to seize the already seized item, as he admitted at the hearing:

> Q. So did you ask the detective to seize the phone?
>
> A. The phone was *already seized* when I had gotten the phone call.[22]

[16] *Id.* at 7.

[17] *Id.* at 7, 8.

[18] *Id.* at 6 n.5, n.6.

[19] *Id.* at 6.

[20] [redacted] Brief at 14.

[21] Omnibus Hearing Transcript at 60:2–8.

[22] *Id.* at 100:15–17.

[redacted]

Given this, [redacted] original arguments in favor of suppression remain in full force and the state's attempts to discredit them fail. First, the state's argument that the phone was not seized until after Officer [redacted] was called should be completely disregarded.[23] Officer [redacted] *own testimony* establishes that the phone was seized before he was called. And so for the reasons set forth in [redacted] brief,[24] this constituted an illegal warrantless seizure independently justifying suppression.

Next, the state quibbles with how law enforcement saw the battery percentage on the phone's screen, arguing there's no evidence in the record establishing that a key strike occurred so as to illuminate the phone.[25] This is wrong for three reasons. First, Detective [redacted] admitted to manipulating the phone:

> Q. And you or someone under your direction manipulated that phone and determined the charge level, is that correct?
>
> A. The extent of manipulation, I can't recall how it was. I don't specifically recall hitting any buttons. I don't know if it was -- if it was moved or what, *but there would have been some manipulation, yes, minor manipulation at that.*[26]

[23] State's Response at 6 n.6.

[24] [redacted] Brief at 14–15.

[25] State's Response at 6.

[26] Omnibus Hearing Transcript at 60:2–8.

[redacted]

Second, the state can point to no evidence denying that law enforcement manipulated the phone's screen. While Detective [redacted] denied hitting any buttons on the phone, he made no such denial regarding touching the phone's screen. This is important because while the screen is not a button, for purposes of this motion, it serves the same function—it wakes up the phone from sleep mode and allows officers to see the screen that otherwise wasn't in plain view.

Third, as a practical matter, [redacted] assertion that smartphone screens can't be turned on or illuminated without some sort of manipulation—pressing a button or tapping the screen—is true and widely known. And the state offered no evidence at the hearing establishing how the screen could be illuminated *without* manipulation. The *Barajas* "key strike" test for determining whether a search occurred was thus satisfied,[27] making suppression appropriate because it was done without a warrant.

Lastly, [redacted] "minimal manipulation" arguments are bolstered by the U.S. Supreme Court case of *Arizona v. Hicks*.[28] There, Mr. Hicks' apartment was warrantlessly searched by police after a bullet was fired through the floor and struck a downstairs neighbor.[29] While in the residence looking for shooting-related evidence,

[27] 817 N.W.2d 204, 211, 214, 216 (Minn. Ct. App. 2012); *see also* [redacted] Brief at 15–17.

[28] 480 U.S. 321 (1987).

[29] *Id.* at 323.

[redacted]

officers saw an expensive stereo, which looked out of place in the otherwise squalid apartment.[30] Suspicious it might be stolen, officers—still without a warrant—picked up the stereo, manipulated it, and located its serial numbers.[31] The numbers were relayed to police headquarters and came back as a match to a missing stereo.[32] The police arrested and charged Mr. Hicks, and he challenged the warrantless touching and manipulation of the stereo.[33] The Supreme Court agreed with Mr. Hicks and suppressed the evidence.[34]

The Court first held that manipulating the stereo constituted a search, even if it was minimal, because it was unrelated to "the authorized intrusion" of the apartment.[35] In the words of Justice Antonin Scalia: "a search is a search, even if it happens to disclose nothing but the bottom of a turntable."[36] Since moving the stereo

[30] *Id.*

[31] *Id.*

[32] *Id.* at 323–24.

[33] *Id.*

[34] *Id.* at 329.

[35] *Id.* at 325.

[36] *Id.*

constituted a search, the next question was whether it was reasonable.[37] The Court held that it wasn't because it was beyond the scope of the plain view doctrine because there wasn't probable cause to believe the stereo was stolen without manipulating it.[38] And physical touch, by definition, violates plain view. In sum, a new-looking stereo in an old-looking apartment might have given the officers reasonable suspicion it was stolen, but not probable cause, and reasonable suspicion isn't enough to justify the warrantless seizure and search of an item under the plain view doctrine.

Applied here, [redacted] phone deserves the same treatment as Mr. Hicks' stereo. First, while both involved minimal manipulation by the police, it was enough to constitute a search. Like with the stereo, "a search is a search" even if it only meant momentarily grabbing, touching, and inspecting the phone. Next, there was no probable cause that something was wrong with the phone until the officers grabbed it, illuminated the screen, and manipulated it to see that the battery was fully charged and the SD card was missing. From a plain view perspective, law enforcement simply saw a cell phone sitting in a drawer. The only permissible thing they could have done was brush the phone aside to see if guns or ammunition were under it. They did more

[37] *Id.*

[38] *Id.* at 325–26.

[redacted]

than that, however, and only upon manipulation did the phone possibly become incriminating. That's worse than the facts in *Hicks*. There, the new stereo in the old apartment provided at least reasonable suspicion of illegality. Here, by contrast, no reasonable suspicion existed at all because a cell phone, on its own, lacks suspicion. So under *Hicks*, the seizure and search of [redacted] phone is not covered by the plain view doctrine and must be rejected.

Minnesota case law also supports the application of *Hicks* here. First, in *State v. Hanson*,[39] the court declined to extend *Hicks* to a situation in which the police were able to view a stolen piece of machinery's VIN number without "moving or otherwise handling" it.[40] This contrasts with the facts here, because the phone was moved or otherwise handled, so *Hicks* applies. Next, in *Matter of Welfare of T.S.F.*,[41] the court dealt with a similar issue as here—minimal manipulation of an object by police. The state claimed no search occurred, but the court disagreed: "If the officer had inspected the items without moving them, it would not have been a search. By moving them and turning them over, however, his actions constituted a search."[42] And while the court

[39] No. C5-01-686, 2002 WL 109373 (Minn. Ct. App. Jan. 29, 2002).

[40] *Id.* at *5.

[41] No. CX-90-2615, 1991 WL 90869 (Minn. Ct. App. June 4, 1991).

[42] *Id.* at *2.

[redacted]

affirmed the search on other grounds, it reaffirmed that the *Hicks* test applies here. Finally, in *State v. Metz*,[43] the court reiterated the difference between looking at an object and touching it, and how that difference affects the plain view doctrine. There, police recorded the serial numbers on a motorcycle without moving or touching the bike in any way. The Court held this was permissible under *Hicks* because it didn't involve manipulation of the object.[44] Applied here, this again establishes that law enforcement violated *Hicks* and the plain view doctrine when it handled the phone without a warrant or probable cause.

3) The state's SD card "taint" analysis is incomplete and incorrect.

The state identifies the correct test to determine whether the SD card should be admitted despite being secured via unconstitutional conduct—the four-factor "taint" test from *State v. Sickels*.[45] But it fails to mention that the Court must also "consider these factors in light of the state's burden to prove that the evidence in question was obtained in a way sufficiently distinguishable from the misconduct."[46] It

[43] 422 N.W.2d 754 (Minn. Ct. App. 1988).

[44] *Id.* at 758.

[45] 275 N.W.2d 809, 813–14 (Minn. 1979).

[46] *State v. Howard*, No. A20-0254, 2021 WL 416726, at *3 (Minn. Ct. App. Feb. 8, 2021).

also incorrectly applies the test to the relevant facts at issue. For both reasons, the state's attempt to "un-taint" the SD card fails, and the card should be suppressed.

a) Flagrancy of misconduct.

The state's flagrancy discussion is hardly a discussion at all. It's two conclusory sentences, both of which are belied by the record. Simply calling something minimal doesn't make it so, not without supporting evidence. And here, what little is offered is unpersuasive. The unconstitutional conduct was far greater than the state lets on. It wasn't just a good-faith mistake based on the direction of a well-meaning probation officer. It was much more nefarious than that.

First, it was an officer recklessly disregarding the truth in drafting a search warrant, thereby making the warrant illegal.[47] Second, it was law enforcement illegally violating the scope of the already illegal warrant by seizing and searching a cell phone absent legal justification. Third, it was officers trying to cover up their illegal conduct by asking a probation officer to permit them to do something they had already done—illegally seized and searched the phone. Finally, it was a probation officer permitting the officers to seize and search the phone despite knowing he had no legal authority to do so. Any one is bad; all four are flagrant.

[47] [redacted] Brief at 2–9.

b) Intervening circumstances.

The state correctly identifies two intervening circumstances between the last illegal act by law enforcement and the discovery of the SD card: 1) [redacted] arrest, and 2) [redacted] time spent in jail, during which he allegedly made several incriminating phone calls. But it fails to explain that these two intervening circumstances would not have occurred *but-for* the state's illegal conduct. Meaning had the state not entered [redacted] house with an illegal warrant, they would not have found guns and ammunition, and they would not have arrested him and taken him to jail. Additionally, since [redacted] is not actually a felon for purposes of gun prohibition, he should have never been arrested in the first place. In sum, the state is now trying to exploit the intervening circumstances it illegally created in hopes of removing the taint of its illegal conduct. It's Kafkaesque logic and the Court reject it.

c) Likelihood of evidence being obtained absent illegality.

The only reason the phone warrant was drafted, and the SD card was found, was because of the state's illegal conduct related to the phone. So for the state to now claim that it would have found the SD card absent this illegality is absurd. First, the state would have never found the phone had the gun warrant not been illegally drafted. Second, the state would have never seen the phone had it not strayed outside the scope of the illegal gun warrant. Third, the state would have never seen the fully charged

battery and the missing SD card had it not illegally manipulated the phone. Finally, had the state not arrested [redacted] via an illegal warrant, for an illegal offense, he never would have been in jail, and so he never would have allegedly made any incriminating phone calls. The only way the state would have ever known about, let alone obtained, the SD card is if the Court decides that none of its conduct in the case was illegal. Otherwise, there's no plausible way the state would have ever independently learned of, searched for, and found the SD card. The state started the investigation looking for guns. It only turned to SD cards because of unconstitutional conduct. And no logical bridge connects the two in a way that purges the taint.

d) Temporal proximity of illegality and fruit of illegality.

Law enforcement executed both warrants signed by Judge [redacted] on May 11, 2021. It wasn't like the gun warrant was signed and executed, the unconstitutional conduct occurred, the police went back to the drawing board, restarted their investigation into [redacted] and then days or weeks later the phone warrant was signed and executed. They happened on basically the same day.[48] And so the state's claim that the fruits of the phone warrant were far removed from the fruits of the gun

[48] The judge issued the gun warrant on May 10th, but it wasn't executed until May 11th. Then later on May 11th, at 8 p.m., the judge issued the phone warrant, which was executed shortly thereafter.

[redacted]

warrant is misleading at best, and dishonest at worst. The back-to-back nature of the warrants makes their temporal proximity unmistakable.

e) Evidence obtained in a sufficiently distinguishable way.

Besides the four *Sickels* factors, the state must also prove the SD card was found in a way "sufficiently distinguishable" from the illegal conduct.[49] As discussed above, it can't. Simply put, there's a logical gulf between the state's initial investigation and its later discovery of the SD card. The only colorable argument the state has is that it was on high alert for anything related to child pornography during its gun warrant search, given [redacted] criminal history, and so while it was technically looking for guns, it was also on the lookout for child pornography. But the state made no such argument because it's unpersuasive and likely illegal.

This investigation was akin to an amateur fisher accidentally catching a trophy fish without a valid license. Despite being in the wrong fishing hole (illegal warrant), using the wrong bait (beyond scope of warrant), failing to set the hook (warrantlessly seizing and searching phone), and reeling too fast (asking for illegal permission), the state caught what it considers a trophy fish: evidence of child pornography. But just because the state caught a whopper doesn't make it a good angler. The ends can't

[49] *Howard*, 2021 WL 416726 at *3.

justify the means, and that's what the Court would be endorsing if it allowed the state's conduct here to stand. The state was fishing for guns and caught child pornography. To now claim it could have done so without the many illegalities it committed is ludicrous and shouldn't be believed.

4) The jail calls and their fruits are independently excludable.

Besides all the reasons set forth in [redacted] opening brief and this reply, the jails calls and their fruits (the phone warrant and the SD card) should be excluded for another independent reason. And that is that the state failed to rebut the presumption of their illegality at the omnibus hearing by any legally recognized method. That's because in Minnesota, when a defendant in a criminal case files a suppression motion alleging that the state warrantlessly searched or seized evidence, the law presumes said search or seizure to be unreasonable.[50] Thus, to rebut this presumption, the state must offer evidence establishing the reasonableness of the warrantless search or seizure.[51] At an omnibus hearing, however, this evidence cannot come via hearsay, as the Minnesota Rules of Evidence apply to suppression motions.[52]

[50] *State v. Stavish*, 868 N.W.2d 670, 675 (Minn. 2015).

[51] *Id.*

[52] *State v. Head*, No. A20-1474, 2021 WL 5550087, at *3 n.1 (Minn. Ct. App. Nov. 29, 2021); *see also* Minn. R. Evid. 1101.

[redacted]

Applied here, the state completely failed to meet its burden to rebut [redacted] motion to suppress the jail calls because they were seized without a warrant. The state called nobody from the jail establishing the authenticity of the calls, their chain of custody, who listened to them, what they said, or even if they said what the state purported. Instead, the state relied on hearsay via Detective [redacted] over the persistent objection of [redacted] counsel.[53] As *Head* makes clear, however, while hearsay is allowed in a probable cause challenge, it's not in a motion to suppress evidence—the procedural posture here.[54] Simply put, the state offered no non-hearsay evidence about the jail calls. It thus failed to rebut the presumption that the calls were illegally seized because they were done so without a warrant. And without the calls, the phone warrant lacks probable cause, meaning it would have never been issued, meaning the SD card would have never been found. So for this reason, too, the SD card was illegally obtained by the state and should be suppressed.

CONCLUSION

Despite its best effort, the state's response brief does little to rebut [redacted] arguments in his opening brief. Unrebutted, they should guide the Court's decision.

[53] Omnibus Hearing Transcript at 36:18-21, 37:3-6, 38:7-12, 39:12-23, 42:5-9.

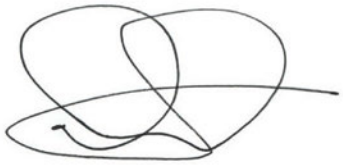
[54] 2021 WL 5550087 at *3 n.1.

[redacted]

[redacted] response to the state's arguments also bolsters his case, specifically the discussion of the applicability of *Hicks* here. Next, the state's "taint" analysis was conclusory and unconvincing, so the SD card remains fruit of the poisonous tree and should be suppressed. Finally, the jail calls should also be suppressed because the state failed to put on any permissible evidence to rebut their presumption of illegality. From the beginning of this case, the state's investigation trampled on [redacted] constitutional rights. Only the Court can remedy this misconduct. Suppression will send a clear message. The Court should order it.

Dated: June 22, 2022

Respectfully submitted,



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