

A05-1167

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

William A. Anderson,

Appellant.

APPELLANT'S BRIEF

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STATE OF MINNESOTA

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vs.

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Appellant.

PROCEDURAL HISTORY

1. **September 20, 2004:** Date of charged offense.
2. **September 24, 2004:** Complaint filed in Itasca County District Court, charging appellant with: possession of a firearm by an ineligible person, in violation of Minn. Stat. §§ 609.165, subd. 1b; 609.11 (2004).
3. **September 21, 2004:** Rule 5 hearing held before the Honorable Jon A. Maturi.
4. **September 27, 2004:** Rule 8 hearing held before Judge Maturi.
5. **November 1, 2004:** Pretrial hearing held before Judge Maturi.
6. **November 8, 2004:** Contested omnibus hearing held before Judge Maturi. Not guilty plea entered.

7. **November 17, 2004:** Omnibus order entered by Judge Maturi.
Appellant's motion to suppress evidence is denied.
8. **November 30, 2004:** Pretrial hearing held before Judge Maturi.
9. **January 4, 2005:** Pretrial hearing held before Judge Maturi.
10. **January 7 -11, 2005:** Jury trial held before Judge Maturi. Appellant found guilty as charged.
11. **January 31, 2005:** Hearing on appellant's motion for a new trial held before Judge Maturi.
12. **February 8, 2005:** Continued hearing on motion for a new trial.
13. **February 17, 2005:** Motion for a new trial is denied by Judge Maturi.
14. **March 14, 2005:** Sentencing hearing held before Judge Maturi.
Appellant's motion for a downward dispositional departure is denied and he is sentenced to a 60-month executed term.
15. **June 8, 2005:** Appellant's notice of appeal filed with the Clerk of Appellate Courts.
16. **July 8, 2005:** Transcripts ordered.
17. **September 7, 2005:** Completed transcripts delivered via U.S. Mail.
18. **November 9, 2005:** Order filed by the Court of Appeals granting an extension of the time to file and serve appellant's brief.
19. **November 22, 2005:** Substitution of appellate counsel and motion for

an extension of time to file and serve appellant's brief filed.

20. **November 23, 2005:** Order filed by the Court of Appeals granting substitution of counsel and an extension of the time to file and serve appellant's brief.
21. **March 6, 2006:** Briefing completed in the Court of Appeals.
22. **September 12, 2006:** Appellant's conviction affirmed by the Court of Appeals.
23. **October 4, 2006:** Petition for further review filed.
24. **November 22, 2006:** Petition granted.
25. **December 20, 2006:** Appellant's Brief and Appendix filed and served.

ISSUES PRESENTED

ISSUE I:

Does a misdemeanor burglary conviction qualify as a predicate “crime of violence,” as defined by Minn. Stat. § 624.712, subd. 5 (2004), for purposes of the firearm prohibition statute?

• Rulings Below:

The trial court was not asked to rule. The lower appellate court ruled that a misdemeanor burglary conviction was a predicate “crime of violence” for purposes of the firearm prohibition statute.

• Apposite Authority:

State v. Moon, 463 N.W.2d 517 (Minn. 1990)
Minn. Stat. § 624.712 (2004)
Minn. Stat. § 609.165 (2004)
Minn. Stat. § 609.13 (2000)

ISSUE II:

When evidence is seized during a warrantless residential search, which is conducted pursuant to an agent-imposed probationary search condition, must the evidence be suppressed?

• Rulings Below:

The omnibus court denied appellant’s motion to suppress and ruled that: 1) the probationary search condition was reasonable; and 2) the search was based on a reasonable suspicion that appellant was engaged in criminal activity. The lower appellate court affirmed on the same grounds.

• Apposite Authority:

United States v. Aguirre, 214 F.3d 1122 (9th Cir. 2000)
State v. Earnest, 293 N.W.2d 365 (Minn. 1980)
State v. Henderson, 527 N.W.2d 827 (Minn. 2005)

STATEMENT OF THE CASE

Appellant William A. Anderson was found guilty following a jury trial of possession of a firearm by an ineligible person (Minn. Stat. §§ 609.165, subd. 1(b) and 609.11 (2004)), in Itasca County District Court, the Honorable Jon A. Maturi presiding. Judge Maturi sentenced appellant to an executed 60-month term. The lower appellate court affirmed appellant's conviction on direct appeal. *State v. Anderson*, 720 N.W.2d 854 (Minn. App. 2006). This Court granted further review and appellant now submits this brief in furtherance of his direct appeal.

STATEMENT OF THE FACTS

Background

A) Prior convictions

On November 21, 1995, appellant pleaded guilty to second-degree burglary, in violation of Minn. Stat. § 609.582, subd. 2 (1994). *See* Complaint (Appendix at 1-3) and Plea-hearing transcript (Appendix at 4-15) in district court file K0-95-779. Imposition of sentence was stayed and appellant was placed on probation for up to five years. *See* Sentencing-hearing transcript dated January 8, 1996 (Appendix at 16-23). On January 9, 2001, appellant successfully completed probation, was discharged without a prison sentence, and his conviction was ordered converted to a misdemeanor. Discharge Order (Appendix at 24). The discharge order also imposed a firearm prohibition on appellant.

On October 6, 2003, appellant pleaded guilty to, *inter alia*, fifth-degree controlled substance crime, in violation of Minn. Stat. § 152.025, subds. 2(1) and 3(a) (2002). *See* Plea-hearing transcript in district court file KX-03-1176 (Appendix at 25-41). Adjudication of guilt was stayed and appellant was placed on probation for five years. *See* Sentencing-hearing transcript dated November 24, 2003 (Appendix at 42-51). As a condition of probation, appellant was required to submit to random, indiscriminate, and warrantless searches of his residence. Probation Agreement (Appendix at 52, 53).¹

¹ Documents pertaining to district court files K0-95-779 and KX-03-1176 are included in the appendix to appellant's brief. These documents were not introduced in the district court, but because they are public record evidence, which conclusively reflect appellant's prior convictions, the Court should consider them for purposes of the record on appeal. *In re Objections and Defenses to Real Property Taxes*, 335 N.W.2d 717, 718 n. 3 (Minn.

B) Current conviction offense

On September 20, 2004, probation officer Anthony Athmann, together with Investigator Greg Snyder and Deputy Mike Olson of the Itasca County Sheriff's Department, searched appellant's residence located at [REDACTED], in the city of Pengilly, Itasca County, Minnesota. Inside a bedroom, they found a .22 caliber CBC shotgun and a .22 caliber semi-automatic Marlin rifle. Appellant was later charged with possession of a firearm by an ineligible person, in violation of Minn. Stat. §§ 609.165, subd. 1b; 609.11 (2004). Complaint filed September 24, 2004 (Appendix at 54-56).

C) Omnibus hearing

Appellant filed a motion to suppress the firearms seized because the warrantless search of his residence was conducted pursuant to an unconstitutional probationary search condition, and without reasonable suspicion or consent. Notice of Motion to Suppress and Memorandum in Support (Appendix at 57-64); *see also* (T. 23).² The omnibus court denied the motion and ruled that the search condition was reasonable and that the search was based on a reasonable suspicion that appellant was engaged in criminal activity. Findings of Fact, Conclusions of Law, Order and Memorandum (Appendix at 65-69).³

1983). *See also State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2002) (holding that appellate courts may consider public records on appeal).

² "T." citations denote the consecutively paginated pretrial and trial transcript.

³ Testimony was not taken at the omnibus hearing. Instead, the omnibus court ruled based on reports submitted by the probation department, the sheriff's department, a defense investigator, and witness statements. (T. 25, 26).

Appellant then pleaded not guilty and a jury trial was held.

Jury Trial

Appellant and T [REDACTED] R [REDACTED] dated and resided together between June and September of 2004. (T. 134, 135). Appellant's son, Tanner Anderson and his girlfriend Amy Lane, periodically resided with appellant and R [REDACTED]. (T. 138, 139).

R [REDACTED] testified that in July of 2004, Isaac Simunovich brought a firearm to the residence, which appellant then gave to her to place in a compartment under his bed. (T. 141, 142). Within the compartment, R [REDACTED] testified that she saw a second firearm and some baseball hats. (T. 142, 144). R [REDACTED] routinely had access to the compartment and stored her own belongings in it from time to time. (T. 148).

Between September 5 and September 14, 2004, appellant was incarcerated at the Itasca County Jail on a probation violation. (T. 152, 153). On his release, appellant and R [REDACTED] traveled to Duluth, Minnesota. (T. 152). On September 19, appellant was arrested and released in Superior, Wisconsin, on an allegation of domestic assault against R [REDACTED]. R [REDACTED] later called her mother, Irene Steel, and told her that appellant had threatened her and that he had firearms under his bed. (T. 156).

On September 20, Steel called Investigator Snyder and Officer Athmann. (T. 166, 167). Steel told Officer Athmann that appellant had firearms at his residence. (T. 169). Officer Athmann then contacted Investigator Snyder and Deputy Olson to conduct a search of appellant's residence. (*Id.*).

Investigator Snyder and Officer Athmann drove to appellant's residence together, while Deputy Olson followed in his squad car. (T. 199). On East Shore Drive,

Investigator Snyder met Tanner Anderson and Amy Lane. (*Id.*). Tanner indicated that appellant was at home and followed Investigator Snyder and Officer Athmann to appellant's home. (*Id.*). Tanner tried to open the front door, but it was locked. (T. 200). Investigator Snyder then knocked on the door and it was opened by an unidentified man. (*Id.*). Investigator Snyder did not announce his entry or who he was; rather, he "stepped past" the individual and entered appellant's residence. (*Id.*).

Investigator Snyder was followed by Deputy Olson, Officer Athmann, Amy Lane, and Tanner Anderson. (*Id.*). While in the living room area, Investigator Snyder saw appellant in a hallway and asked to speak with him. (*Id.*). Officer Athmann told appellant that they were there to conduct a firearms search of his bedroom. (T. 171). Appellant pointed Officer Athmann to his bedroom. (T. 172).

Inside the bedroom, Investigator Snyder lifted a mattress and, beyond two drawers at the foot of the bed, he found a compartment containing two firearms. (T. 208). Investigator Snyder identified the firearms as a .20 gauge CBC shotgun, and a .22 semi automatic Marlin rifle. (T. 209). Appellant denied knowledge of the firearms and proclaimed to Tanner, "I thought your mother got all your guns out of here." (T. 212, 213). Investigator Snyder was unable to match any fingerprints from the firearms to appellant, but he did determine that the guns were registered to, respectively, Ivan Norris and Richard King. (T. 218-220).

Teresa Dubovich, appellant's ex-wife and the mother of Tanner Anderson, testified that in September she had brought two firearms to appellant's residence and given them to Tanner to use for hunting. (T. 250-253). Appellant maintained that this

occurred between September 5 and September 14, while he was incarcerated on the probation violation. (T. 398).

Dave Estey testified that on September 6, while appellant was incarcerated, he went to appellant's residence to return a borrowed table saw. (T. 293). Estey met with R [REDACTED] and saw two firearms in appellant's bedroom. (T. 299). Estey offered to take the firearms because appellant was prohibited from possessing them. (T. 299, 301). In response, R [REDACTED] indicated that she would take care of them. (T. 301). R [REDACTED] confirmed that Estey was at the home while appellant was incarcerated (T. 153, 154), and that he had offered to take the firearms from the residence, but she denied that the firearms belonged to Tanner. (T. 150).

Amy Lane confirmed that Dubovich had brought the firearms to appellant's residence for Tanner to use for hunting. (T. 268). She also believed that R [REDACTED] had removed the firearms prior to appellant being released on his probation violation. (T. 269).

Appellant did not testify at trial. (T. 309-313). Appellant maintained, however, that he had no knowledge of the firearms being in his residence because they had been brought by Dubovich to give to Tanner, while he was incarcerated on the probation violation. (T. 396, 400).

A) Verdict

On January 11, 2005, appellant was found guilty of possession of a firearm by an ineligible person. (T. 412, 413).

B) Motion for a new trial and sentencing

On January 24, 2005, appellant filed a motion for a new trial based upon false testimony by R [REDACTED]. Tanner Anderson testified at the motion hearing that R [REDACTED] had told him that she lied on the stand during the trial. (M.T. 11, 12).⁴ R [REDACTED] did not testify at the hearing; instead she asserted her rights under the Fifth Amendment. (M.T. 6-8). The motion for a new trial was denied. Order filed February 17, 2005.

On March 14, 2005, appellant's motion for a downward dispositional departure was also denied and he was sentenced to an executed 60-month term. (M.T. 181).

Appellate Proceedings

Appellant's conviction was affirmed on direct appeal. *State v Anderson*, 720 N.W.2d 854 (Minn. App. 2006) (Appendix at 70-82). The lower appellate court held that: 1) appellant was subject to a firearm prohibition; 2) the omnibus court did not err by failing to suppress the firearms seized from appellant's residence; and 3) the prosecutor did not commit misconduct during closing argument.

This Court granted appellant's petition for further review on holdings one and two, and appellant now submits this brief to the Court.

⁴ "M.T." citations denote the consecutively paginated motion for a new trial and sentencing hearing transcript dated January 31, 2005, February 8, 2005, and March 14, 2005.

ARGUMENTS

I.

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE HE IS NOT SUBJECT TO A FIREARM PROHIBITION BASED ON HIS MISDEMEANOR BURGLARY CONVICTION WHICH IS NOT A LEGISLATIVELY DEFINED CRIME OF VIOLENCE.

A. Introduction

In 1996, appellant was convicted of second-degree burglary and imposition of sentence was stayed. Appellant successfully completed the stay and his conviction was converted to a misdemeanor in 2001. Because a misdemeanor burglary conviction is not a legislatively defined crime of violence, appellant is not subject to a firearm prohibition.

B. Standard of review

Statutory construction is a question of law subject to de novo review. *State v Zacher*, 504 N.W.2d 468, 470 (Minn. 1993). A reviewing court must give effect to a statute's plain meaning if the statute's language is clear and unambiguous. *State v. Furman*, 609 N.W.2d 5, 6 (Minn. App. 2000). Statutes are to be strictly construed and any doubt as to legislative intent to be resolved in favor of the defendant. *State v. Wagner*, 555 N.W.2d 752, 754 (Minn. App. 1996).

C. Analysis

1. A person who has been convicted of a crime of violence is subject to a firearm prohibition.

Minnesota has enacted two firearm prohibition statutes: Minn. Stat. § 609.165, subs. 1a and 1b (2004) and Minn. Stat. § 624.713, subd. 1(b) (2004). At issue here is section 609.165.

Minn. Stat. § 609.165, subd. 1 was enacted in 1963, and provides that an offender is restored to all civil rights upon expiration of sentence or by order of the court following a stay of imposition or execution of sentence. The right to possess a firearm is one of the restored civil rights. *See United States v. Traxel*, 914 F.2d 119, 125 (8th Cir. 1990) (holding that section 609.165, subdivision 1, restored the defendant to full civil rights without a limitation on the right to possess a firearm).

In 1986, Congress enacted 18 U.S.C. § 921(a)(20), which provided that, when determining whether a conviction for a violent felony is a predicate offense for purposes of the federal firearm prohibition law,

[w]hat constitutes a conviction of such a crime shall be determined in accordance of the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (1986).⁵

Section 921(a)(20) was enacted “to insure that when a state restored an ex-felon’s right to possess firearms, the federal government would reciprocate.” *United States v. Ellis*, 949 F.2d 952, 953-54 (8th Cir. 1991) (citing S.Rep. No. 583, 98th Cong., 2d Sess., at 7). Because section 609.165, subdivision 1 did not contain a firearm prohibition, convictions for violent felonies in Minnesota, which were later discharged and the offender restored to full civil rights, were not predicate offenses for purposes of the

⁵ The federal firearm prohibition is codified at 18 U.S.C. §§ 922(g)(1) and 924(e)(1) (2006).

federal firearm prohibition law. *Id.* at 954. In response, Minnesota amended section 609.165 to provide:

The order of discharge must provide that a person who has been convicted of a crime of violence, as defined in section 624.712, subdivision 5, is not entitled to ship, transport, possess, or receive a firearm until ten years have elapsed since the person was restored to civil rights and during that time the person was not convicted of any other crime of violence. Any person who has received such a discharge and who thereafter has received a relief of disability under United States Code, title 18, section 925, shall not be subject to the restriction of this subdivision.

Minn. Stat. § 609.165, subd.1a (Supp. 1987).

The amendment was designed to keep firearms from offenders who the legislature believed had a propensity for future dangerousness. *State v. Moon*, 463 N.W.2d 517, 520 (Minn. 1990). Currently, despite restoration of “all civil rights,” a person who has been convicted of a crime of violence is prohibited from shipping, transporting, possessing, or receiving a firearm for the remainder of the person’s lifetime. Minn. Stat. § 609.165, subd. 1a (2004).⁶

To be subject to this lifetime firearm prohibition under section 609.165, however, an offender must have a predicate conviction for a “crime of violence.” The Minnesota Legislature has specifically defined a crime of violence as a felony-level conviction:

Crime of violence. *"Crime of violence" means: felony convictions of the following offenses: sections 609.185 (murder in the first degree); 609.19 (murder in the second degree); 609.195 (murder in the third degree); 609.20 (manslaughter in the first degree); 609.205 manslaughter in the second degree); 609.215 (aiding suicide and aiding attempted suicide); 609.221 (assault in the first degree); 609.222 (assault in the second degree); 609.223*

⁶ The lifetime prohibition period replaced the previous ten-year prohibition period in 2003. See 2003 Minn. Laws ch. 28, art. 3, §§ 3, 4.

(assault in the third degree); 609.2231 (assault in the fourth degree); 609.229 (crimes committed for the benefit of a gang); 609.235 (use of drugs to injure or facilitate crime); 609.24 (simple robbery); 609.245 (aggravated robbery); 609.25 (kidnapping); 609.255 (false imprisonment); 609.342 (criminal sexual conduct in the first degree); 609.343 (criminal sexual conduct in the second degree); 609.344 (criminal sexual conduct in the third degree); 609.345 (criminal sexual conduct in the fourth degree); 609.377 (malicious punishment of a child); 609.378 (neglect or endangerment of a child); 609.486 (commission of crime while wearing or possessing a bullet-resistant vest); 609.52 (involving theft of a firearm, theft involving the intentional taking or driving a motor vehicle without the consent of the owner or authorized agent of the owner, theft involving the taking of property from a burning, abandoned, or vacant building, or from an area of destruction caused by civil disaster, riot, bombing, or the proximity of battle, and theft involving the theft of a controlled substance, an explosive, or an incendiary device); 609.561 (arson in the first degree); 609.562 (arson in the second degree); 609.582, subdivision 1, 2, or 3 (burglary in the first through third degrees); 609.66, subdivision 1e (drive-by shooting); 609.67 (unlawfully owning, possessing, operating a machine gun or short-barreled shotgun); 609.71 (riot); 609.713 (terroristic threats); 609.749 (harassment and stalking); 609.855, subdivision 5 (shooting at a public transit vehicle or facility); and chapter 152 (drugs, controlled substances); and an attempt to commit any of these offenses.

Minn. Stat. § 624.712, subd. 5 (2004) (emphasis added).

Because “crime of violence means felony convictions,” to impose a firearm prohibition under section 609.165, subdivision 1a, a person must necessarily have a predicate felony conviction for an offense listed in section 624.712, subdivision 5.

2. Appellant is not subject to a firearm prohibition because he does not have a predicate conviction for a crime of violence.

In 1996, appellant was convicted of second-degree burglary, which is a listed offense in section 624.712, subdivision 5, but imposition of sentence was stayed. The Minnesota Legislature has provided that, notwithstanding a conviction for a felony,

the conviction is deemed to be for a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.

Minn. Stat. § 609.13, subd. 1(2) (2000).

Section 609.13 was enacted because the legislature intended “not to impose the consequences of a felony if the [district court] judge decides that the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors.” Minn. Stat. Ann. § 609.13 advisory committee comment (West 2003). Historically, the legislature has taken an expansive view of the statute’s application. For example, the legislature enacted section 609.13, subdivision 2 to permit a gross misdemeanor conviction to be deemed a misdemeanor, upon successful completion of a stay of imposition. 1971 Minn. Laws ch. 937, art. 1, sec. 21.

In 2001, appellant was discharged without a prison sentence and his burglary conviction was ordered converted to a misdemeanor by operation of section 609.13, subdivision 1(2) (2000). Discharge Order (Appendix at 24). On the 2001 discharge date, appellant no longer had been convicted of felony burglary; instead, he had been convicted of misdemeanor burglary. Upon discharge, appellant’s misdemeanor conviction was no different than if the district court had imposed an executed misdemeanor sentence in 1996. Minn. Stat. § 609.13, subd. 1 (1996). In either circumstance, appellant would have a misdemeanor conviction.

Appellant’s misdemeanor burglary conviction, which is not a felony, and thus not a crime of violence does not, therefore, subject him to a firearm prohibition and his conviction must be reversed.

3. Appellant's argument was previously rejected under an earlier version of section 624.712, subdivision 5.

In *Moon*, appellant's argument was rejected because the Minnesota Legislature had not properly invoked operation of 609.13 in the definition of a "crime of violence." *Moon*, 463 N.W.2d at 520-21. The defendant in *Moon* was convicted of felony Medicaid theft, but was successfully discharged after a stay of imposition and his conviction was converted to a misdemeanor pursuant to section 609.13. *Id.* at 518. In its discharge order, however, the district court imposed a firearm prohibition on the defendant. *Id.*

On discretionary review, the court of appeals recognized the ambiguity between sections 609.165 and 609.13: "To properly deal with the issue on appeal we must harmonize sections 609.165 and 609.13." *State v. Moon*, 455 N.W.2d 509, 511 (Minn. App. 1990). At issue was the 1990 version of section 624.712, subdivision 5, which defined a crime of violence as:

"Crime of violence" includes murder in the first, second, and third degrees, manslaughter in the first and second degrees, aiding suicide, aiding attempted suicide, felony violations of assault in the first, second, third, and fourth degrees, use of drugs to injure or to facilitate crime, simple robbery, aggravated robbery, kidnapping, false imprisonment, criminal sexual conduct in the first, second, third, and fourth degrees, felonious theft, arson in the first and second degrees, riot, burglary in the first, second, third, and fourth degrees, reckless use of a gun or dangerous weapon, intentionally pointing a gun at or towards a human being, setting a spring gun, and unlawfully owning, possessing, or operating a machine gun, and an attempt to commit any of these offenses, as each of these offenses is defined in chapter 609. "Crime of violence" also includes felony violations of chapter 152.

Minn. Stat. § 624.712, subd. 5 (1990).

The court of appeals ruled that the defendant's misdemeanor theft conviction was not a "felonious theft," and thus was not a crime of violence, under section 624.712, subdivision 5 (1990); therefore, he was not subject to a firearm prohibition. *Id.* at 511-12. On further review, the supreme court reversed. *Moon*, 463 N.W.2d at 521.

This court's analysis in *Moon* began with recognizing that the 1990 version of section 624.712 included both felony and gross misdemeanor offenses, and some of these offenses were modified with the words "felony violations" or "felonious." *See* Minn. Stat. § 624.712, subd. 5 (1990). For example, fourth-degree burglary, a gross misdemeanor offense (Minn. Stat. § 609.582, subd. 4 (1990)), was listed as a crime of violence. *See id.* Additionally, three categories of offenses: 1) theft; 2) assault; and 3) chapter 152 drug offenses were modified by the words "felony violations" or "felonious." *Id.*

The statute was silent, however, as to whether section 609.13 applied to the listed offenses, and, if so, to which offenses. Specifically, it was unclear whether the legislature intended to apply section 609.13 to only the "felony" or "felonious" modified offenses; or to all the listed offenses; or to none of the listed offenses. The *Moon* court resolved the ambiguity and held that unless the legislature modified all the listed offenses with the words "felony" or "felonious," the application of section 609.13 was not invoked. *Moon*, 463 N.W.2d at 520-21. The court concluded that a person who committed any listed offense, whether a felony or gross misdemeanor, or whether modified by the words "felony" or "felonious," was subject to a firearms prohibition. *Id.* at 520.

The *Moon* court further reasoned that the definitions in section 624.712, subdivision 5 must have been intended to relate to elements of the original conviction offense; rather than a subsequent disposition by the district court. *Id.* at 521. However, the court prospectively concluded:

A person who commits an offense which is not described with the words felony or felonious in section 624.712, subdivision 5, clearly is subject to the firearms restriction even if the conviction is deemed to be a misdemeanor pursuant to section 609.13. For instance, if a person commits fourth degree burglary, he or she is subject to the firearms restriction even if the conviction is deemed to be a misdemeanor *because the definition of the offense does not include the words felony or felonious, which arguably would invoke the operation of 609.13.*

Id. at 520 (emphasis added).⁷

4. Section 624.712, subdivision 5 now clarifies that a “crime of violence means felony convictions,” and, thereby, the legislature has invoked operation of section 609.13.

Effective August 1, 2003, the Minnesota Legislature amended section 624.712, subdivision 5 to prescribe that a “crime of violence *means felony convictions.*” 2003 Minn. Laws, ch. 28, art. 3, § 7 (emphasis added). Thereby, the legislature unambiguously modified all the listed offenses with the word “felony,” which the *Moon* court recognized would invoke operation of section 609.13. *Moon*, 463 N.W.2d at 520. Appellant now asks this Court to recognize the reasoning of its opinion in *Moon*.

⁷ The *Moon* holding was followed in *State v. Caldwell*, 639 N.W.2d 64, 69 (Minn. App. 2002), and *State v. Foster*, 630 N.W.2d 1, 5 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001), which are each premised on the 2000 version of section 624.712, subdivision 5, and, thus, are not applicable to appellant’s case. Secondly, *Foster* dealt with the interplay of section 624.713, subdivision 1(b) and section 624.712, subdivision 5, which is not at issue in appellant’s case.

Additionally, the legislature removed all gross misdemeanors and misdemeanors from the offense list.⁸ For example, gross misdemeanor fourth-degree burglary is no longer listed as a crime of violence.⁹ Because of these changes, the defendant in *Moon* would no longer be subject to a firearm prohibition under the current statute, because the legislature eliminated Medicaid theft from the offense list.

While the list of “crime of violence” offenses was narrowed, the legislature increased the firearm prohibition period for these offenses to a lifetime ban. 2003 Minn. Laws ch. 28, art. 3, sec. 3. Notwithstanding the lifetime prohibition, the legislature also crafted a mechanism for a person who has been convicted of a “crime of violence” to legally possess a firearm. Specifically, the legislature amended section 609.165 to permit judicial restoration of the ability to possess a firearm by a felon. 2003 Minn. Laws ch. 28, art. 3, sec. 5.

The ambiguous “crime of violence” statute, which the *Moon* court ruled on, is no longer at issue. Amended section 624.712, subdivision 5, now clearly and unambiguously prescribes that a crime of violence “means felony convictions.” And, “[w]hen the words of a law in their application to an existing situation are clear and free

⁸ See H. 83-Research B. Summary S.F.842, 1st Sess., at 9 (Minn. 2003) (“Modifies the definition of crime of violence. Removes from the definition all gross misdemeanor and misdemeanor offenses that were previously included. Provides that felony convictions for the stated offenses are crimes of violence.” (Internal quotation marks omitted). The research bill summary may be found at: <http://3.house.leg.state.mn.us/hrd/bs/83/SF0842.html>.

⁹ Under section 624.713, subdivision 1(b), a limited list of gross misdemeanor convictions, including, fourth-degree burglary, now subjects a person to a three-year firearm prohibition period. 2003 Minn. Laws, ch. 28, art. 3, § 8.

from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16 (2006). Thus, a conviction that is deemed a misdemeanor pursuant to section 609.13, is not a crime of violence conviction, by definition.¹⁰

Based on the *Moon* court’s prospective guidance, the legislature has properly invoked operation of section 609.13, in its definition of a “crime of violence.” This Court should give effect to the unambiguous language of section 624.712 and hold that appellant’s misdemeanor burglary conviction is not a predicate “crime of violence,” for purposes of the firearm prohibition law.

5. The treatment of section 609.13 convictions in the Sentencing Guidelines and the Rules of Evidence is distinguishable.

In *State v. Clipper*,¹¹ the court held that a felony converted to a misdemeanor pursuant to section 609.13 was still assigned one point in the defendant’s criminal history

¹⁰ It is noteworthy that, when the 1987 Minnesota Legislature enacted Minn. Stat. § 609.165, subd. 1a, it did not amend Minn. Stat. § 609.13, subd. 1(2) to provide that a felony conviction later deemed to be a misdemeanor, was to be considered a “crime of violence” for purposes of section 609.165, subdivision 1a. The legislature did, however, amend Minn. Stat. § 638.02 to provide that a person convicted of a crime of violence, who was later pardoned, was still subject to a firearm prohibition. 1987 Minn. Laws ch. 276, art. 1, sec. 4. Similarly, the legislature amended Minn. Stat. § 609.168 to provide that, when a conviction was set aside by order of the court, the offender was still subject to a firearm prohibition. *Id.* at ch. 276, art. 1, sec. 2. (Section 609.168 was repealed in 1996). “The maxim that the expression of one thing indicates the exclusion of another,” indicates that the legislature did not intend persons whose felony convictions were deemed misdemeanors pursuant to section 609.13, to be subject to a firearm prohibition. Furthermore, “[w]here a statute enumerates the persons or things to be affected by its provision, there is an implied exclusion of others.” *State v. Barker*, 705 N.W.2d 768, 776 (Minn. 2005) (quoting *Maytag Co. v. Comm’r of Taxation*, 218 Minn. 460, 463, 17 N.W.2d 37, 40 (1944)).

score. 429 N.W.2d 698, 701 (Minn. App. 1988). The *Clipper* court relied on a specific provision of the Minnesota Sentencing Guidelines, which required assignment of “one [criminal history] point for every felony conviction * * * for which a stay of imposition of sentence was given * * * . Minn. Sent. Guidelines II.B.1 (1988).¹¹

The *Clipper* court determined that section 609.13 concerned “the treatment afforded the offender’s record,” while the Guidelines specified a sentencing procedure, which mandated that section 609.13 convictions be used to calculate a criminal history score. *Clipper*, 429 N.W.2d at 701. Comparatively, no mandate to include section 609.13 convictions in determining a “crime of violence” has been prescribed by the legislature. Therefore, the treatment of section 609.13 convictions in the Guidelines is distinguishable from appellant’s case.

Minn. R. Evid. 609(c) provides a list of circumstances under which impeachment with a prior conviction is not permissible. The list does not include felonies which are reduced to misdemeanors pursuant to section 609.13. In *State v. Skramstad*, therefore, the court ruled that the defendant was properly impeached with his section 609.13 conviction. 433 N.W.2d 449, 452-53 (Minn. App. 1988), *review denied* (Minn. Mar. 13, 1989).

The *Skramstad* court reasoned that Minn. R. Evid. 609(a)(1) permitted impeachment based on the maximum sentence authorized at the time of conviction,

¹¹ Minn. Sent. Guidelines II.B.1 (2006), now reads that an offender is assigned “a particular weight * * * for every felony conviction * * * for which a stay of imposition was given * * * .

without regard for “the sentence which was actually given nor any subsequent alteration of the defendant’s record.” *Id.* at 453. In comparison, the crime of violence statute does not contain a similar qualification. Therefore, the treatment of section 609.13 convictions in the Rules of Evidence is also distinguishable from appellant’s case.

The use of section 609.13 convictions in the Sentencing Guidelines and the Rules of Evidence is further distinguishable. Both the Sentencing Guidelines and the Rules of Evidence are mechanisms which, respectively, establish a procedure for sentencing and the admissibility of evidence. Under the separation of powers doctrine, these procedures are judicial in nature and derive from the judiciary’s inherent authority and primary responsibility “for the regulation of evidentiary matters and matters of trial and appellate procedure.” *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001) (quoting *State v. Olson*, 482 N.W.2d 212, 215 (Minn. 1992)).

Conversely, the legislature has the authority to prescribe acts which are criminal. *State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994). At issue in appellant’s case is whether he has committed an act which is defined as criminal by the legislature. Unlike the treatment of section 609.13 convictions in the Sentencing Guidelines and the Rules of Evidence, this issue is not an interpretation of procedural matters that are inherent in the judiciary’s authority. Rather, to resolve this issue, the correct analytical framework must begin and end with the plain, unambiguous, and clear language of the crime of violence statute, which states that a “crime of violence” means only a felony conviction.

D. Conclusion

Appellant's misdemeanor burglary conviction, which by operation of section 609.13, is a not a felony and thus not a crime of violence, as defined by Minn. Stat. § 624.712, subd. 5 (2004), does not subject him to a firearm prohibition; therefore, his conviction must be reversed.

This issue was not raised in the trial court. Ordinarily, issues raised for the first time on appeal are not reviewable. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). The lower appellate court, however, ruled on the merits in the interests of justice, *Anderson*, 720 N.W.2d at 859, and appellant respectfully requests this Court to also rule on the merits of his claim. Appellant also requests a ruling on the merits given the important liberty interest at stake. *State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999).

II.

THE WARRANTLESS SEARCH OF APPELLANT'S RESIDENCE WAS UNCONSTITUTIONAL AND EVIDENCE OF THE FIREARMS SEIZED SHOULD HAVE BEEN SUPPRESSED.

A. Introduction

The omnibus court denied appellant's motion to suppress the firearms seized from the warrantless search of his residence. The court ruled that the probationary condition which authorized the search was reasonable and that the search was supported by a reasonable suspicion that appellant was engaged in criminal activity. Because the probationary search condition is unenforceable and unconstitutional, and because there was no reasonable suspicion that appellant was engaged in criminal activity, evidence of the firearms seized should have been suppressed.

B. Standard of review

A reviewing court may independently review undisputed facts to determine, as a matter of law, whether evidence should have been suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

C. Analysis

1. The Fourth Amendment and the Minnesota Constitution protect individuals against unreasonable searches.

Both the Fourth Amendment to the United States Constitution and the Minnesota Constitution protect individuals against unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I. § 10. The Fourth Amendment specifically protects an individual's residence against unreasonable searches—"physical entry of the home is the chief evil

against which the wording of the Fourth Amendment is directed.” *Payton v. New York*, 445 U.S. 573, 585 (1979) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). Subject to specific exceptions, searches conducted outside the judicial process are unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). When the search involved is a warrantless residential search, courts are reluctant to find an exception. *See Payton*, 445 U.S. at 586; *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988).

Generally, for a warrantless search of a person’s residence to pass constitutional muster, the state must show either consent or probable cause and exigent circumstances. *Payton*, 445 U.S. at 590. Absent these circumstances, a residential search is unconstitutional and any evidence seized must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also* Minn. Stat. § 626.21 (2004) (same). This Court has particularly cautioned that “law enforcement personnel and prosecutors are cautioned that this court will not look kindly upon warrantless entries of family residences.” *Othoudt*, 482 N.W.2d at 224.

With regard to searches of a probationer’s residence, this Court has concluded that “probation searches fall within the ambit of the Fourth Amendment, and must therefore comport with a standard of reasonableness.” *State v. Earnest*, 293 N.W.2d 365, 368 (Minn. 1980). This Court has not ruled on whether, under the Minnesota Constitution, an indiscriminate, suspicionless and warrantless probationary search condition—imposed and enforced by the probation department—is constitutional. This issue is presented in appellant’s case.

Appellant was on probation for a fifth-degree controlled substance offense in district court file KX-03-1176. Condition six of his probation required:

I shall, when ordered by my Agent, submit to [a] search of my person, residence or any other property under my control.

Probation Agreement (Appendix at 52).

The sentencing court did not impose the search condition.¹² *See* Sentencing-hearing transcript dated November 24, 2003 (Appendix at 49). Instead, the condition was imposed by the probation department almost four months after sentencing.

2. The search condition is unenforceable against appellant because it was imposed in violation of appellant's right to be present at sentencing; thus, evidence seized pursuant to the search condition should have been suppressed.

Under the Sixth Amendment and the Rules of Criminal Procedure, a defendant has a right to be present at sentencing. *See United States v. Aguirre*, 214 F.3d 1122, 1125 (9th Cir. 2000); Fed. R. Crim. P. 43(a); Minn. R. Crim. P. 27.03, subd. 2. Secondly, the sentencing judge is required to "state the precise terms of the sentence" in the defendant's presence. Minn. R. Crim. P. 27.03, subd. 4(A).¹³

¹² The sentencing court stayed adjudication of guilt and placed appellant on probation for five years under the following terms: 1) serve 90 days at the Itasca County Jail with Huber and work release options; 2) payment of \$65 in fines and costs; 3) complete fingerprinting; 4) no use or possession of alcohol or controlled substances; 5) no entering establishments that serve alcohol; 6) urinalysis testing every two weeks; 7) remain law abiding; and 8) complete a Rule 25 assessment. Sentencing-hearing transcript dated November 24, 2003 (Appendix at 49).

¹³ "The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty. Sentencing should be conducted with the judge and defendant facing one another and not in secret. It is incumbent upon a sentencing judge to choose

Imposition of sentence includes conditions of probation, which are exclusively determined by the sentencing judge and cannot be delegated to an executive agency. *State v. Henderson*, 527 N.W.2d 827, 829 (Minn. 1995). Specifically, Minn. Stat. § 609.135, subd. 1 (2002) provides that if a defendant is placed on probation, it must be “on the terms the court prescribes, including intermediate sanctions when practicable.” If the pronounced sentence is unambiguous, then it controls over any subsequent written sentencing modification. *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002).

It is undisputed that the search condition in question here was not imposed by the sentencing judge, nor did the sentencing judge order that appellant abide by any “general conditions” of probation. Therefore, when the probation department added the search condition four months after sentencing, appellant was denied his Sixth Amendment right to be present for the imposition of this substantive condition of his sentence.

To now enforce the search condition would substantively change the pronounced sentence and further dilute appellant’s right to be present at sentencing. For these reasons, the search condition should be held unenforceable against appellant. *See United States v. Napier*, 463 F.3d 1040, 1044 (9th Cir. 2006) (vacating conditions of probation imposed in a written judgment but not pronounced at the sentencing hearing); *United States v. Martinez*, 250 F.3d 941, 941-42 (5th Cir. 2001) (per curiam) (holding that, where a written judgment included a term of probation not ordered at the sentencing hearing, the term was unenforceable against the probationer); *see also State v. Kouba*,

his words carefully so that the defendant is aware of his sentence when he leaves the courtroom.” *United State v. Villano*, 816 F.2d 1448, 1452-53 (10th Cir. 1987).

709 N.W.2d 299, 307 (Minn. App. 2006) (holding that a probationary search condition was unenforceable against the defendant because he was not validly on probation).

Furthermore, the search condition imposed on appellant is an intermediate condition which can only be imposed by a sentencing judge. *Henderson*, 527 N.W.2d at 829. Intermediate conditions include, but are not limited to:

Incarceration in a local jail or workhouse, home detention, electronic monitoring, intensive probation, sentencing to service, reporting to a day reporting center, chemical dependency or mental health treatment or counseling, restitution, fines, day-fines, community work service, work service in a restorative justice program, work in lieu of or to work off fines and, with the victim's consent, work in lieu of or to work off restitution.

Minn. Stat. § 609.135, subd. 1 (2004).

The search condition, which permits residential searches indiscriminately, without notice, without suspicion of criminal activity, and without a warrant, is similar to the restrictive elements of intensive probation and, thus, it is an intermediate sanction within the meaning of section 609.135. The condition is, therefore, beyond the authority of probation to impose and is unenforceable against appellant. *Henderson*, 527 N.W.2d at 829.

When Athmann and law enforcement entered appellant's residence, Athmann asserted the search condition as the basis to search the residence. Findings of Fact, Conclusions of Law, Order and Memorandum at ¶ 12 (Appendix at 67). The subsequent search yielded the two firearms. But, because the search condition is unenforceable against appellant, evidence of the firearms seized should have been suppressed.

Respondent may argue that appellant consented to the search condition when he signed the probation agreement, and that he consented to the search itself when he pointed Athmann to his bedroom. However, any purported consent is invalid. As this Court concluded in *State v. Ornelas*, “the fact that a probationer is aware of or believes something to be a condition of probation does not necessarily make it so.” 675 N.W.2d 74, 80 (Minn. 2004). *See also State v. B.Y.*, 659 N.W.2d 763, 769 (Minn. 2003) (holding that a curfew condition imposed by probation but not by the sentencing judge could not support revocation). The *Ornelas* reasoning can be equally applied to appellant’s case and the Court should hold that appellant’s mere acquiescence to the search condition and to the search itself—under the misapprehension that the search condition was enforceable—does not constitute valid consent.

3. Under the Minnesota Constitution, indiscriminate, suspicionless, and warrantless probationary search conditions should be ruled unconstitutional.

Minnesota has recognized that, while a probationer has a lowered expectation of privacy than the average citizen, a probationary search must still comport with a standard of reasonableness. *Earnest*, 293 N.W.2d at 368-69. The reasonableness of a search is determined “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The search condition in question here subjected appellant to indiscriminate, suspicionless, and warrantless residential searches. This type of probationary condition does meet a standard of reasonableness under the Minnesota Constitution.

In *United States v Knights*, the United States Supreme Court upheld a warrantless search of a probationer's residence because it was based on a reasonable suspicion of criminal activity and a valid probationary search condition, which was the "salient" consideration. 534 U.S. 112, 118, 121 (2001). The Court concluded that the state's interest in preventing future criminal activity and rehabilitation, when balanced against a probationer's incentive to conceal criminal activity, required no more than reasonable suspicion and a valid search condition to satisfy the Fourth Amendment. *Id.* at 120-21. In *Samson v. California*, the Court relied on *Knights* to uphold a suspicionless search of a parolee's person, based solely on a valid probationary search condition. 126 S.Ct. 2193, 2200 (2006).

Initially, it should be noted that *Knights* and *Samson* are distinguishable from appellant's case. Both *Knights* and *Samson* involved a California statute, which required all probationers and parolees to submit to a search condition as a condition of release. Unlike the California Legislature, the Minnesota Legislature has not enacted a similar statutory requirement.¹⁴ Secondly, in both *Knights* and *Samson*, the "salient" consideration for the Court's holding was the valid search condition.¹⁵ Comparatively, as argued *supra*, appellant was not subject to a "valid" and enforceable search condition.

¹⁴ In *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987), the Court upheld a probationary search condition based on the "special needs" of a Wisconsin state regulatory scheme, which permitted warrantless searches of probationers based on reasonable grounds. Conversely, the search condition at issue in appellant's case does not contain any type of "reasonable grounds" requirement and, thus, *Griffin* is also distinguishable.

¹⁵ See also *Kouba*, 709 N.W.2d at 306 (reasoning that a warrantless search, under a valid search condition and with consent, does not violate the Fourth Amendment). Unlike appellant, the defendant in *Kouba* did not challenge the search condition itself.

Third, in *Samson*, the Court specifically addressed a search of a parolee, who has “fewer expectations of privacy than probationers.” *Id.* at 2198. Appellant was not on parole status at the time of the search in question; therefore, he did not have the degree of lessened expectation of privacy as a parolee.

Furthermore, decisions of the United States Supreme Court interpreting the Fourth Amendment are persuasive but not controlling, and, therefore, Minnesota courts are free to interpret the Minnesota Constitution as affording greater protection against unreasonable searches than the United States Constitution. *State v. Askerooth*, 681 N.W.2d 353, 361 (Minn. 2004). Under the Minnesota Constitution, this Court should reject indiscriminate, suspicionless, and warrantless probationary search conditions and require a warrant to search a probationer’s residence.

These search conditions unreasonably give blanket authority, which is not subject to procedural safeguards, for indiscriminate, suspicionless, and warrantless residential searches. *See United States v. Brignoni-Ponce* 422 U.S. 873, 882 (1975) (“The reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.”). This is true while suspicionless searches are one of the chief evils the Fourth Amendment was intended to eliminate. *See Boyd v. United States*, 116 U.S. 616, 625-30 (1886).

There is nothing to prevent a probation search from being used as a subterfuge for a criminal investigation and a probation officer from functioning as a stalking horse for the police in order to evade the usual warrant and probable cause requirements of the Fourth Amendment. As the dissent in *Samson* articulated, “routine use in criminal

prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the ... program.” *Samson*, 126 S. Ct. at 2203 (quoting *Ferguson v. Charleston*, 532 U.S. 67, 79 n. 15 (2001)). The underlining goal of probation is rehabilitation. It is difficult to rationalize how a probation system will effectuate rehabilitative goals when it permits probation officers to conduct searches the police can not, and the effect is to gather evidence of a crime.

For example, in *United States v Rea*, the court held that a probation officer was required to obtain a warrant prior to conducting a search of the probationer’s residence, unless the search fell within a judicially recognized exception to the warrant requirement. 678 F.2d 382, 386 (2nd Cir. 1982). Although *Rea* involved evidence seized during a warrantless search, which was later used in a probation revocation hearing, the reasoning and conclusion of the *Rea* court is applicable to appellant’s case.¹⁶

The *Rea* court reasoned that “[w]e are unaware of any means, other than a warrant requirement, by which the right to be free of unreasonable searches can be effectively protected.” *Id.* at 387. The court observed that “although a probationer is subjected to conditions of probation which generally tend to diminish his otherwise valid expectations of privacy from intrusion by government authorities, a probationer retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him

¹⁶ The exclusionary rule does not apply to probation revocation proceedings in Minnesota. *State v Martin*, 595 N.W.2d 214, 219 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999).

by law.” *Id.* at 386 (internal quotation and citation omitted). The court concluded that requiring a probation officer to obtain a warrant prior to searching a probationer’s home would not hinder the rehabilitative goal of probation. *Id.* at 388. Moreover, the court found that indiscriminate searches would tend to undermine the rehabilitative purpose of probation. *Id.*

Given this Court’s “unkindly” view of warrantless entries into a family’s residence, the Court should require issuance of a warrant by a detached magistrate prior to the search of a probationer’s residence. This requirement is of minimal intrusiveness to the probation system because it does not prevent a probation officer from conducting a routine home visit, as is sometimes utilized to maintain a check upon probationer; thereby, the “special relationship” between the probationer and the agent is still maintained. The warrant requirement would only be applied when a search of the probationer’s residence was required.

If the Court does not uphold a warrant requirement, then the court should require that a search of a probationer’s residence can only pass constitutional muster if it is based on a valid search condition, which incorporates a “reasonable suspicion” requirement—as provision of the search condition itself. *See e.g., Griffin*, 483 U.S. at 870 (noting that the warrantless search condition authorized a search based on reasonable grounds).

If applied to appellant’s case, the “reasonable suspicion” requirement still would not purge the taint of the search because the search here was not based on a reasonable suspicion of criminal activity. Athmann received a phone call from a woman who claimed to be R [REDACTED]’s mother. Findings of Fact, Conclusions of Law, Order and

Memorandum at ¶ 5 (Appendix at 66). The woman, later identified as Irene Steel, claimed that R [REDACTED] had information that appellant had guns at his residence. *Id.* Neither Athmann’s trial testimony nor the probation search report reflects that he contacted R [REDACTED] to verify any of this information.

Athmann did confirm that appellant was arrested in Superior, Wisconsin on September 19. *Id.* at ¶ 6 (Appendix at 66). But, Athmann made no investigation into the firearms allegation to support a reasonable suspicion that appellant had firearms at his residence. Furthermore, Athmann made only one attempt at 10:00 a.m. to contact appellant to “discuss the Superior incident,” before conducting the search later that evening at 7:34 p.m. *Id.* at ¶ 7 (Appendix at 66). In the interim nine plus hours, Athmann made no attempt to investigate and verify the firearms allegation. Thus, there was no reasonable suspicion that appellant was engaged in criminal activity—possessing firearms.

D. Conclusion

The probationary search condition which permitted Athmann to search appellant’s residence is unenforceable because it was imposed in violation of appellant’s right to be present at sentencing, and because it was not imposed by the sentencing judge.

Therefore, the search itself was unconstitutional and evidence of the firearms seized should have been suppressed. Secondly, indiscriminate, suspicionless, and warrantless search conditions should be ruled unconstitutional under the Minnesota Constitution, and a warrant must be required prior to a search of a probationer’s residence. If the Court

does not find a warrant requirement, then a valid probationary search condition must incorporate a “reasonable suspicion” requirement.

CONCLUSION

For the reasons stated herein, appellant's conviction for possession of a firearm by and ineligible person must be reversed.

Respectfully submitted,

Dated this 21st day of
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).