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NO. A07-1492

State of Minnesota
In Court of Appeals

Dean Carl Mertins,

Appellant,

v.

Commissioner of Natural Resources,

Respondent.

APPELLANT'S REPLY BRIEF

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LEGAL ISSUES

I. Whether a temporary pre-hearing seizure of his commercial licenses is a violation of Appellant's right to procedural due process.

II. Whether Respondent's position that the criminal trial satisfies procedural due process contradicts its argument that the pre-hearing seizure is only temporary in nature and results in bad public policy.

III. Whether Appellant properly preserved the issue of probable cause for appeal.

IV. Whether this Court has jurisdiction to consider Appellant's challenges to the constitutionality of Minnesota Statute § 97A.420.

V. Whether Appellants' commercial fishing license is a protected property interest which cannot be revoked without due process of law.

VI. Whether the district court abused its discretion when it determined that Respondent had probable cause to conclude that Mr. Mertins' wantonly wasted the fish in the pond.

ARGUMENT

I. A temporary pre-hearing seizure of Mr. Mertins' commercial licenses is a violation of his right to procedural due process.

Throughout its brief, Respondent repeatedly urges this Court to believe that a pre-hearing seizure of Mr. Mertins commercial fishing license under Minnesota Statute § 97A.420 is acceptable because it is only temporary in nature.[1] What Respondent fails to consider is that there is no temporal allowance in the due process clause, which allows the seizure of a protected property interest prior to a hearing. The only factor to be considered is the significance of that protected property interest. Whether it is one day, six weeks or three years, any deprivation of a significant property interest prior to a hearing is a violation of the right to procedural due process.[2]

Respondent cites *Gilbert v. Homar* in support of its position that a pre-suspension hearing satisfies the requirements of due process. However, the United States Supreme Court's decision in *Gilbert* rested upon whether the State of Pennsylvania had "a significant interest in immediately suspending, when felony

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[1] Respondent's position in this regard is wholly dependent upon whether this Court concludes that the post-seizure probable cause hearing outlined in Minnesota Statute § 97A.420 satisfies the requirements of due process or whether the criminal trial on the underlying wanton waste charge satisfied the requirements of due process. This will be addressed later in this brief.

[2] Respondent specifically argues that the seizure is only temporary because the post-seizure hearing must be held within sixty days after the date the licensee files their petition for appeal. (Resp't Br. p.9) Even if the licensee files their petition on the day after their license is seized, this means the "temporary" deprivation of their license could last at least sixty days prior to receiving a hearing. Under no one's

charges are filed against them, [without a pre-suspension hearing] employees who occupy positions of great public trust and high public visibility, such as police officers." *Gilbert v. Homar*, 520 U.S 924, 931 (1997). In support of its decision the Supreme Court cited its decision in *FDIC v. Mallen*, 486 U.S. 230 (1988), in which it concluded the Federal Deposit Insurance Corporation (hereinafter "FDIC") could suspend an indicted bank employee without a prior hearing.

The factual circumstances in both *Gilbert* and *Mallen* are completely different than the facts in this case. In *Gilbert* the employee was a police officer charged with felony drug possession and in *Mallen* the employee was an official of a federally insured bank indicted by a federal grand jury for making false statements to the FDIC. Clearly, in both those cases the State of Pennsylvania and the FDIC had a significant interest in suspending the employees because of the visibility of their positions and the high level of public confidence placed in both persons.[3]

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definition can such a lengthy deprivation be considered temporary when the commercial license serves as the only basis for the licensee's livelihood.

[3] There are many other cases in which the United States Supreme Court has upheld the deprivation of a property interest without a hearing; however those cases generally involve a wartime emergency, direct threat to the health, safety and welfare of the public and positions involving the public trust. *See Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921) (Congress has the power to seize the property of the enemy during war); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (the Food and Drug Administration has the authority to seize, without a hearing, misbranded drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (removal by the Federal Home Bank Loan Commissioner, without a hearing, of an officer of a federal savings and loan to prevent injury to the bank's members, creditors and the general public). Obviously, Mr. Mertins' commercial fishing

Unlike the police officer in *Gilbert*, the bank official in *Mallen* and the persons in the many other cases cited by Mr. Mertins, he was only a commercial fisherman harvesting rough fish that the State wants out of its public waters.[4] The public is not aware of Mr. Mertins and his activities and he is not a threat to the health, safety and welfare of the general public. It is inconceivable that the public's confidence in Respondent would have been affected at all had Mr. Mertins received a pre-seizure hearing because there is no way the general public would even know about Mr. Mertins or his case.

Additionally, if the seizure of Mr. Mertins commercial licenses was so important to protecting the State's natural resources so as to justify a pre-hearing seizure of his licenses, it begs the question of why Respondent waited almost seven months from the date he was accused of allegedly committing the wanton waste until the date it seized his licenses. During those seven months Mr. Mertins was allowed to continue to operate as a commercial fisherman. However, according to the arguments in Respondent's brief, Mr. Mertins was such a tremendous threat to its natural resources it was justified in seizing his licenses prior to a hearing.

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activities do not meet the standard established in these cases for a seizure of his licenses prior to a hearing.

[4] This is evidenced by the fact that, unlike game fish such as walleye and northern pike, the season on buffalo fish continues year-round and there is no daily or possession limit on buffalo fish. Minnesota Dept. of Natural Resources, Fishing Regulations (2007).

Respondent wants to have it both ways. It wants this Court to believe that Mr. Mertins was such a threat to the State's natural resources it had to seize his licenses without a hearing. It also wants this Court to forget about the seven months it allowed Mr. Mertins to operate as a commercial fisherman on the State's waters after he was initially accused of wanton waste of the buffalo fish. It is impossible for this Court to reconcile these two facts. The only reasonable conclusion one can draw is that at the time he was initially accused, Respondent cared so little about the impact of Mr. Mertins upon the State's natural resources that, unlike the police office in *Gilbert* and the bank official in *Mallen*, it did not move more quickly to seize his licenses. However, now that the constitutionality of its license seizure statute is in question, it wants this Court to conclude Mr. Mertins was an imminent threat to the State's natural resources.

Unlike the *Gilbert* and *Mallen* cases cited by Respondent, a different United States Supreme Court case, *Fuentes v. Shevin*, 407 U.S. 67 (1972), more closely resembles the facts of Mr. Mertins' case. The *Fuentes* case dealt with two companion cases out of Florida and Pennsylvania that allowed, by statute, "the summary seizure of goods or chattels in a person's possession under a writ of replevin." *Id.* at 69. The two statues in question in those cases allowed "for the issuance of writs ordering state agents to seize a person's possessions, simply upon the ex parte application of any other person who claims right to them and posts a security bond." *Id.* at 69-70. Neither of the two statutes provided for the

persons possessing the property to receive notice of the seizure or the right to challenge the seizure at any sort of prior hearing. *Id.* at 70.

Specifically, the Florida statute allowed anyone to obtain a writ of replevin if they filed a complaint "initiating a court action for repossession and reciting in conclusory fashion that he is 'lawfully entitled to the possession' of the property, and that he file a security bond." *Id.* at 74. Once the writ was issued, it commanded an officer to replevy the property "and to summon the defendant to answer the complaint." *Id.* at 74. "Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ." *Id.* at 75.

Both the Florida and Pennsylvania statutes allowed for a hearing, but only after the property had been seized via the writ of replevin. The central issue to be decided by the Supreme Court in the *Fuentes* case was whether "procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another." *Id.* at 80.

As was noted in Mr. Mertins' first brief to this Court, "the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* at 80 (citing *Armstrong v. Manzo* 380 U.S. 545, 552).

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possession can

> be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Id. at 81-2 (citing *Stanley v. Illinois*, 405 U.S. 645, 647). While the Supreme Court noted that due process allows different forms of a pre-seizure hearing depending upon the property interests involved, "the Court has traditionally insisted that, whatever its form, opportunity for that hearing *must be provided before the deprivation at issue takes effect.*" *Id.* at 82 (emphasis added, citations omitted).

In *Fuentes* the Supreme Court noted that even though the states of Pennsylvania and Florida argued that the property deprivation was only temporary because their statutes provided for post-seizure hearings,

> it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337; *Bell v. Burson*, 402 U.S. 535. Both Sniadach and Bell involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them. Yet the Court firmly held that these were deprivations of property that had to be preceded by a fair hearing.

Id. at 84-5. In *Fuentes*, the Supreme Court went onto conclude,

> [t]he Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process clause. While the length and consequent severity of a deprivation

> may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

Id. at 86.[5]

As in *Fuentes*, Minnesota Statute § 97A.420 allowed Respondent to seize Mr. Mertins' commercial licenses without prior notice and prior to providing him with any sort of hearing.[6] Like the property owners in *Fuentes*, Mr. Mertins received the notice of revocation of his licenses at the same time he received his citation for wanton waste. Contrary to Respondent's assertion that the "length and finality of the deprivation must be taken into account" before deciding whether the process in Minnesota Statute § 97A.420 violated Mr. Mertins' right to due process, the Supreme Court's decision in *Fuentes* indicates that, absent some significant interest in an immediate suspension, the length of the pre-hearing deprivation is irrelevant. Any deprivation of a significant property interest prior to

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[5] In *Fuentes*, the Florida property owner was dispossessed of her stove and record player, while the Pennsylvania property was dispossessed of a bed, a table and other household goods. *Id.* at 70-1. If a property owner is entitled to notice and a hearing prior to the taking of minor household goods, it is difficult to imagine a scenario in which the basis of a person's livelihood is not entitled to at least the same level of procedural due process.

[6] Attorneys in the State of Minnesota do not even face the possibility of a pre-hearing seizure of their licenses to practice law. Under Rule 15(B) of the Minnesota Rules for Admission to the Bar, if the Minnesota Board of Law Examiners renders an adverse determination regarding an attorney's character, fitness or eligibility to practice law, the attorney has twenty days to appeal that adverse determination. It is only after that twenty-day period expires without the attorney filing an appeal that the decision of the Board becomes final. Rule 15(B) Minnesota Rules for Admission to the Bar. It is hard to believe that Mr. Mertins occupies a position requiring such higher public trust than an attorney that, unlike an attorney, he should suffer a pre-hearing seizure of his licenses.

receipt of notice and without a hearing is an unconstitutional violation of the right to procedural due process.

II. Respondent's position that the criminal trial satisfies procedural due process contradicts its argument that the pre-hearing seizure is only temporary in nature and it results in bad public policy as well.

A. Based upon Respondent's argument, the appeal procedure in Minnesota Statute § 97A.420 means the pre-hearing seizure is not temporary in nature.

While Respondent argues in its brief that the pre-hearing seizure of a licensee's commercial license may only be temporary, the reality is that the seizure could last up to several years because the final determination on revocation of the license is not made until the underlying criminal matter has been resolved.[7] Assuming the probable cause hearing in Minnesota Statute § 97A.420 passes constitutional muster[8] for the "temporary" seizure of a licensee's commercial licenses, by Respondent's own admission, that licensee does not receive full procedural due process until the criminal matter has been resolved. (Resp't Br. p.26)

If the State of Minnesota is able to demonstrate probable cause for the seizure of the licensee's license at the probable cause hearing, pursuant to

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[7] This also begs the question of if, as Respondent suggests the seizure is only temporary in nature and the final decision regarding revocation of the commercial licenses is not made until the conclusion of the underlying criminal matter, does Respondent really have a significant interest in temporarily seizing Mr. Mertins' commercial licenses.

[8] Mr. Mertins vigorously denies this as was noted in his first brief that a simple determination of probable cause is not a sufficient basis for even a "temporary" seizure of his licenses.

Minnesota Statute § 97A.420, Subd. 6, the only way that licensee can get their license back is upon the "acquittal, dismissal or determination not to charge a person for a violation . . . ." If, at the conclusion of the probable cause hearing, the judge determines Respondent had probable cause to revoke a licensee's commercial licenses it is highly doubtful that Respondent will dismiss the underlying charges. This means the only way the licensee can get their license back is via acquittal by incurring the significant time and expense related with going to trial.

Despite Respondent's assertions that the underlying charges can be dealt with quickly, making an appeal such as this moot, as this Court is surely aware going to trial does not happen quickly. This is especially true in these types of commercial fishing license cases.

In the average misdemeanor wanton waste case, even if the defendant is found guilty, at most they are facing minor fines with little chance of jail time. In the average misdemeanor wanton waste case it is doubtful the case would ever go to trial. Respondent and the defendant would simply strike an acceptable plea bargain and the defendant would most likely only be responsible for paying restitution and small fines.

However, in cases where the wanton waste case serves not only as the avenue for criminal punishment, but also the civil punishment related to the 5-year revocation of commercial fishing licenses, the potential civil punishment is far worse than the possible criminal punishment. Given the potential loss of their

commercial licenses for 5-years, the licensee is forced to go to trial as, at that point, acquittal is the only way by which they can get their licenses returned.

This Court can take judicial notice of the fact that a person facing the loss of their livelihood for 5 years cannot go to trial as quickly as Respondent suggests in its brief. It would take a significant amount of time and expense to prepare for such a trial to give the licensee an opportunity to be successful at the trial. Whether the licensee is successful or not at the trial, both sides would have the right to appeal that decision to this Court. Because of the way the process is structured under Minnesota Statute § 97A.420, if Respondent is able to demonstrate it had probable cause to revoke the licensee's commercial licenses, from the date the licensee's commercial licenses are revoked, the entire license revocation appeal process could take several years before a final decision is reached.

B. Based upon Respondent's argument, the appeal procedure in Minnesota Statute § 97A.420 results in bad public policy.

In addition to this process being a violation of a commercial licensee's right to procedural due process, the appeal procedure contained in Minnesota Statute § 97A.420 is bad public policy, which should be rejected by this Court.

As this Court is aware, in order to operate efficiently our criminal justice system is based upon good faith plea bargain negotiations between the State and the defendant. It is not possible for all criminal cases to go to trial or the system would collapse. Therefore, the parties in a criminal matter are encouraged by the

courts to resolve the matter prior to trial. However, such plea bargain negotiations are not possible in these types of cases.

As acquittal is the only way by which a licensee may obtain the return of their commercial licenses, after a probable cause determination has been made to affirm the seizure of the commercial licenses, this means the licensee cannot enter into any sort of plea bargain with Respondent to resolve the criminal matter. Anything short of an outright acquittal means the licensee faces the 5-year revocation of their commercial licenses. This forces the licensee to go to trial, which compromises the integrity of our criminal justice system by forcing the licensee to incur the time and expense of going to trial to save their commercial licenses and wastes the court's time and resources on misdemeanor cases that should be resolved via plea bargains.

For this reason alone this Court should reject Respondent's arguments regarding the temporary nature of these license seizures and conclude Minnesota Statute § 97A.420 is unconstitutional as applied to commercial licenses.

III. Mr. Mertins' properly preserved the issue of probable cause for appeal.

In its brief, Respondent argues that Mr. Mertins failed to properly preserve for appeal the issue of whether there was probable cause for the underlying wanton waste citation. (Resp't Br. p.11) In support of its argument Respondent cites *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988), which stands for the basic proposition that a reviewing court can only consider the issues and arguments

presented to the trial court. However, *Thiele* also stands for the proposition that a reviewing court can review those issues "considered by the trial court in deciding the matter before it." *Id.* at 582 (citations omitted).

As Mr. Mertins noted in his first brief, in the memorandum attached to Judge Galler's Order he concluded that "[t]he Court believes it would be exceeding its statutory authority if it were to consider additional issues in this proceeding, and that any decision on the issue would be void." (App. 10) Judge Galler went on further to note in his memorandum that he clearly considered the facts and evidence presented by both sides on the issue of probable cause when he concluded, "[t]hese alleged facts are sufficient to reasonably believe that Petitioner recklessly, heedlessly, or deliberately permitted the fish to go to waste." (App. 10-11) Such a conclusion is sufficient enough for this Court to consider Mr. Mertins' arguments related to the issue of probable cause under the standard established in *Thiele*.

Additionally, in its brief Respondent concedes that, at a minimum, Mr. Mertins' attorney addressed the issue of probable cause at the oral argument. (Resp't Br. p.12-13) In addition to the oral argument, Mr. Mertins addressed the issue of probable cause via his Memorandum of Law on Temporary Injunction. (App. 1-4) Mr. Mertins also addressed the issue of probable cause for the wanton waste charge in the facts alleged in his affidavit attached to that Memorandum. (App. 1-4)

If Mr. Mertins did not sufficiently preserve this issue for appeal, this Court is not absolutely barred from considering this issue for the first time on appeal. "Appellate courts have a limited ability to address issues not properly preserved for appeal. '[O]n rare occasions' appellate courts have exercised [their] discretion to allow a party to proceed on a theory not raised at trial." *Roth v. Weir*, 690 N.W.2d 410, 413 (Minn. App. 2005) (citing *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390 (Minn. 1992)). The factors appellate courts consider in whether to review an issue for the first time on appeal are whether "the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was 'implicit in' or 'closely akin to' the arguments below; and the issue is not dependent on any new or controverted facts." *Id.* at 413-14.

A. This issue is a novel legal issue of first impression.

As far as Mr. Mertins is aware this is the first time any appellate court in Minnesota has made a determination regarding whether Respondent had sufficient probable cause to seize commercial licenses under Minnesota Statute § 97A.420.

B. The issue was raised prominently in briefing.

This was one of the main issues addressed extensively in both Mr. Mertins' and Respondent's briefs.

C. The issue was "implicit in" or "closely akin to" the arguments below.

The issue of probable cause was *the* central argument in Respondent's arguments to the district court, it was addressed by Mr. Mertins in his written

arguments, oral argument and via his affidavit to the district court and was the only basis upon which Judge Galler rendered his decision.

D. The issue is not dependent on any new or controverted facts.

Respondent argues in its brief that "[t]here is simply not a sufficient basis in the trial court record for the Court to now take up the issue of probable cause for the underlying wanton waste citation." (Resp't Br. p.14) At least twice in its brief Respondent argues that Mr. Mertins could have further developed the record had he "requested that the trial court conduct an evidentiary hearing on the probable cause issue and taken testimony from Appellant Mertins and the conservation officer." (Resp't Br. p.13) However, Respondent fails to cite any authority in support of this assertion and there is nothing in Minnesota Statute § 97A.420, which would have required Judge Galler to conduct such an evidentiary hearing regarding his probable cause determination.

Despite Respondent's argument in this regard, this Court can render a decision on the issue of whether Judge Galler abused his discretion in making his probable cause conclusion based upon the facts in the record as it is doubtful any additional facts would have been presented by either side that would have been different than the affidavits submitted to the district court.

IV. This Court has jurisdiction to consider Mr. Mertins' challenges to the constitutionality of Minnesota Statute § 97A.420.

A. As this is the first court possessing subject matter jurisdiction over the constitutional issues in this case, it is appropriate for this Court to consider Mr. Mertins' challenge to the constitutionality of Minnesota Statute § 97A.420.

In its brief Respondent argues that "[j]ust as the district court did not have jurisdiction to address the constitutional issues raised by Appellant, this Court also does not have jurisdiction to address those issues in this case." (Resp't Br. p.10) Respondent bases its simplistic argument upon the mistaken belief that the legislature can simply strip this Court of its jurisdiction by crafting legislation limiting the jurisdiction to avoid any constitutional issues. (Resp't Br. p.7-8) If it were as easy as Respondent argues for the legislature to avoid constitutional challenges to its legislation it would simply insert language into all statutes barring the courts from considering constitutional challenges to that statute. If that were the case, no matter how egregious the statute was, this Court could never conclude that it violated the constitution.

When lower courts are barred from considering the constitutionality of a statute this Court has subject matter jurisdiction to consider those constitutional challenges. *See Padilla v. Minnesota State Bd. Of Medical Examiners*, 382 N.W.2d 876 (Minn. App. 1986); *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366 (Minn. 1977); *In re Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. App. 1993). In all three of those cited cases, the lower tribunals were barred by statute from considering the constitutional challenges raised by one of the parties. This Court concluded in all three cases that when a lower court cannot consider constitutional challenges to a statute, "this court may consider a constitutional issue raised for the first time on appeal . . . when the appellant is

raising the issue at the first opportunity in a forum possessing subject matter jurisdiction." *Padilla*, 382 N.W.2d at 882. While this Court must exercise caution when considering the constitutionality of a statute, it does have subject matter jurisdiction over such a challenge when a lower court is barred from considering constitutional challenges.

B. It is appropriate for this Court to consider Mr. Mertins' argument that Minnesota Statute § 97A.420 violated his right to procedural due process because it prevented him from challenging the underlying wanton waste citation.

Once again this is another issue on which Respondent wants to have it both ways. On the one hand it argues that neither this Court, nor the district court, has the authority to consider Mr. Mertins' challenges to the constitutionality of Minnesota Statute § 97A.420. On the other hand it wants this Court to reject Mr. Mertins' argument that the appeal procedure outlined in Minnesota Statute § 97A.420 violated his right to procedural due process because it did not allow him to challenge the underlying wanton waste citation because he did not present that argument to the district court.

Respondent cannot both argue that the district court did not have the authority to consider this argument, but then also argue that Mr. Mertins cannot now raise the issue to this Court because it did not raise the issue before the district court. Even if Mr. Mertins had raised this issue to the district court, as Judge Galler noted in his Memorandum, he did not have "jurisdiction in this proceeding to decide issues of the constitutionality of the statute or whether the

Petitioner violated a statute." (App. 10) As noted above, this is the first court possessing subject matter jurisdiction and therefore it is appropriate to raise any constitutional issues to this Court.

Even if this were a new issued presented to this Court, it meets the test for when this Court can consider issues not presented to the district court:

1. This issue is a novel legal issue of first impression.

This is the first time any appellate court in Minnesota has made a determination regarding whether the appeal procedure outlined in Minnesota Statute § 97A.420 violates due process because it does not allow the licensee to challenge the underlying citation that served as the basis for their seizure of his licenses.

2. The issue was raised prominently in briefing.

This is obviously one of the central issues in the briefs of both parties.

3. The issue was "implicit in" or "closely akin to" the arguments below.

The issue of the constitutionality of Minnesota Statute § 97A.420 was one of the central arguments Mr. Mertins raised at the district court, it was addressed by Mr. Mertins in his written arguments, oral argument and also addressed by Respondent in its submissions to the district court.

4. The issue is not dependent on any new or controverted facts.

The constitutionality of Minnesota Statute § 97A.420 is solely a legal question that this Court reviews de novo and requires no additional facts other than the facts submitted to the district court.

For these reasons this Court should conclude that it has the authority to determine that Minnesota Statute § 97A.420 is unconstitutional because it prevented Mr. Mertins from challenging the underlying wanton waste citation at the probably cause hearing.

V. Mr. Mertins' commercial fishing license is a protected property interest which cannot be revoked without due process of law.

In its brief Respondent cites two cases in support of its argument that Mr. Mertins' commercial licenses are not constitutionally protected property interests. Respondent cites the case, *State v. Rodman*, 59 N.W. 1098 (Minn. 1894), for the proposition that the State's police power gives it the right to "protect and preserve wild animals for all the citizens of the state" which "is taken very seriously by both the legislature and the courts." (Resp't Br. p.21)

In its brief Respondent specifically cited a passage from *Rodman* regarding the legislature's ability to pass laws related to the preservation of wild game. (Resp't Br. p.21) However, by inserting an ellipsis into the quotation, it has taken that quotation out of context and misconstrues the application of *Rodman* to Mr. Mertins' case. The full quote actually is:

> In short, the object to be attained is the preservation from extinction or undue depletion of game; and the legislature may pass any reasonable law to effect that end, *even to the extent of restricting the use of, or right of property in, the game after its is taken or killed.*

> All so-called game laws proceed upon that principle, and their constitutionality has rarely, if ever, been successfully assailed.

Id. at 1099 (emphasis added to show the portion of the quote not included in Respondent's brief).

In *Rodman*, the Minnesota Supreme Court only addressed the ability of the State to use its police powers to regulate the taking and killing of game. *Id.* Mr. Mertins does not argue that the State has the authority to regulate the taking of wild game, it clearly has that right. However, unlike Respondent argues, there is nothing in *Rodman* to suggest that a commercial fisherman does not have a protected property interest in their commercial licenses and there is also nothing in *Rodman* to suggest that the State has the ability to use its police powers to seize licenses without due process of law.[9]

Respondent goes on further in its brief to cite the case *Bohman v. Gould*, 211 N.W. 577 (Minn. 1926), in support of its argument that because the State has the authority to restrict commercial fishing in one the public's waters, it means a commercial fishing license is not a protected property interest. (Resp't Br. p.22) In *Bohman*, the legislature banned all commercial fishing on Lake Kabetogama,

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[9] Based upon Respondent's argument, it would appear that it has unlimited police powers to do whatever it needs to do to protect the State's wild game. Such a conclusion is without merit. As the Minnesota Supreme Court noted in *State v. Larsen*, 650 N.W.2d 144 (Minn. 2002), the State's police powers to protect its natural resources did not justify the warrantless entry into an ice fishing house. *Id.* at 150. The Minnesota Supreme Court went on in *Larsen* to conclude that "[w]hile the state has a strong interest in regulating and protecting its wildlife" warrantless entry into an ice fishing house was "unconstitutional under the Fourth

but did not restrict or revoke the licenses of the commercial fisherman to commercially fish all other available waters in the State.

For years the plaintiffs involved in the case had engaged in commercially fishing the lake and as a result of that they acquired a significant number of boats, docks, nets and other equipment to use in their operations. The commercial fisherman did not argue that the State deprived them of their commercial licenses without due process of law by banning fishing on the lake. Instead they argued that the ban caused a "diminution of the value of their property [the docks, nets, boats, etc.] which they can no longer use on the particular lake." *Id.* at 577. The Minnesota Supreme Court concluded that because the State has the police power to regulate the taking of wild game, the diminution of value of the fishing equipment was not a violation of a protected property interest without due process of law.[10] *Id.* at 58.

Like *Rodman*, *Bohman* is clearly distinguishable from Mr. Mertins' case. In *Bohman*, the State did not restrict the commercial licenses of the fisherman, it only restricted the means by which they could take or kill wild game. No one is arguing in this case that Mr. Mertins illegally took the fish or took too many of the fish from the river. Additionally, in *Bohman* the constitutional challenge was

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Amendment of the United States Constitution and article I, § 10 of the Minnesota Constitution." *Id.* at 154.

[10] In its decision the Minnesota Supreme Court did not address the issue of whether a commercial fishing license is a protected property interest because that was not the issue in that case.

based upon the diminution in value of their commercial fishing equipment, not the loss of commercial licenses.

Despite arguing throughout is brief that the district court did not have jurisdiction to consider Mr. Mertins' constitutional challenges to Minnesota Statute § 97A.420, Respondent cites a portion of Judge Galler's memorandum in which concluded that Mr. Mertins failed to establish that his commercial licenses were a protected property interest. (Resp't Br. p.22) Respondent cites the United States Supreme Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), in support of Judge Galler's decision in this regard.

As this Court noted in its decision *Bird v. Department of Public Safety*, 375 N.W.2d 36 (Minn. App. 1985), *Roth* stands for the proposition that once a property interest has vested, it cannot be taken away without due process of law. In *Bird*, this Court addressed the issue of whether a used motor vehicle license is a protected property interest. This Court held that the continued right to a license vested once the license holder obtained the license, continued throughout the duration of the license and could only be taken away during that time by due process of law. *Id.* at 42. As this Court went onto conclude in *Bird*, "[t]his claim of entitlement is evidenced by the legislature's decision to require notice and a hearing before the Department may suspend or revoke a dealer's license." *Id.* at 42 (citing Minn. Stat. § 168.27).

The same is true for commercial licensees under Minnesota Statute § 97A.420. If Respondent chooses to revoke a license, it can only do so via the

hearing procedures outlined in Minnesota Statute § 97A.420.[11] This would seem to suggest that, as the licensees in *Bird*, Mr. Mertins had a legitimate claim of entitlement to the continuation of his commercial licenses and that entitlement is evidenced by the appeal procedures outlined in Minnesota Statute § 97A.420. This means Mr. Mertins' commercial licenses were constitutionally protected and could not be taken without due process of law.

VI. The district court abused its discretion when it determined that Respondent had probable cause to conclude that Mr. Mertins' wantonly wasted the fish in the pond.

In its brief Respondent provides factual arguments in support of its conclusion that it had probable cause to conclude that Mr. Mertins' wantonly wasted the fish in the pond. In particular Respondent argues that "the fish did not all die at once. Instead, they died over a period of two weeks. . . . If Appellant had checked on the fish, he would have noticed that they had started to die and could have salvaged the remaining fish."[12] (Resp't Br. p.18-19)

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[11] Obviously the question is whether that process satisfies the requirements of procedural due process, but, at a minimum, by establishing this license revocation procedure the State provided for the right to some sort of hearing prior to final revocation of the license.

[12] This argument by Respondent also cuts against its claim that it had probable cause to seize Mr. Mertins' licenses. The study cited by Respondent in its brief, which led it to the conclusion that Mr. Mertins wantonly wasted in excess of $5,000 worth of buffalo fish, was done after all the fish had died. There is no evidence in the record to show when enough of the fish had died to cross the $5,000 threshold to justify the seizure of all of Mr. Mertins' licenses. According to Respondent, the fish did not all die at one once; they died over a period of two weeks. Based upon Respondent's argument in this regard, this means Mr. Mertins is only allegedly responsible for wantonly wasting those fish that died after some arbitrary date by which he should have checked on the status of the fish when the

Despite Respondent's assertion in this regard, there are no facts in the record to prove that Mr. Mertins knew the fish were dying in the pond. It is conceivable that while Mr. Mertins had been checking on the fish regularly after he placed them into the pond, he did not check on them at the exact moment the fish began to die. If the facts in the record do not prove that Mr. Mertins knew the fish were beginning to die, and affirmatively continued to allow them to die, Judge Galler should not have concluded Respondent had probable cause to seize his licenses because it is impossible to conclude that Mr. Mertins wantonly wasted those fish if he did not know they were dying.

Respondent goes on further in its brief to note, "Appellant now claims that the weather became unseasonably warm in June and caused the fish to die." (emphasis in original). (Resp't Br. p.20) In its brief Respondent apparently stresses the word "now" in an attempt to impugn the credibility of Mr. Mertins' version of the facts. However, if Respondent had looked more closely at the affidavit submitted by Mr. Mertins to the district court, it would have seen that he testified via affidavit that, "[i]n mid June 2006 we had unseasonably hot days. What can happen is that when the water warms through the normal cold zone at

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weather turned warm. It is impossible for anyone to know for sure how many fish died before Mr. Mertins should have checked on the fish. This means the majority of the fish could have died prior to the date on which he should have checked on the fish and he is not responsible for the deaths of those fish. The record does not establish the number of fish that died after that arbitrary date, which means the $5,000 threshold may have been crossed before Mr. Mertins should have checked on those fish. It also means that based upon the record it was impossible for the

the pond bottom, the fish can die very quickly which is apparently what happened. At that point there is little that can be done." (App. 3)

Mr. Mertins has been consistent throughout this matter. He had no control over the weather and there was nothing that he could have reasonably done to save those fish once the weather turned hot. Both Judge Galler and Respondent have failed to adequately answer the question of why Mr. Mertins would have wanted those fish to die. Respondent could not answer that question before the district court and it cannot answer that question now. Without some reasonable explanation for Mr. Mertins actions in this regard, Respondent lacked the motive as to why Mr. Mertins would want to wantonly waste those fish and, without a motive, it did not have probable cause to seize his licenses.

CONCLUSION

This Court has several bases upon which it can determine that Respondent did not have the authority to seize Mr. Mertins' licenses.

The first is that based upon the facts, Judge Galler abused his discretion in concluding that Respondent had probable cause to seize Mr. Mertins' licenses. Neither Judge Galler, nor Respondent, have been able to adequately address the question of why Mr. Mertins wanted to wantonly waste the buffalo fish. He had a significant investment in those fish and wanted to sell them to earn a profit.

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district court to conclude Respondent had probable cause sufficient to justify the seizure of the licenses.

Without some sort of explanation as to why Mr. Mertins affirmatively allowed those fish to die, Respondent did not have probable cause to seize his licenses.

The second is that because Mr. Mertins' commercial licenses were a significant property interest that could not be taken away without prior notice and hearing. Respondent alleges that because the time between the seizure and the probable cause hearing was only temporary, it was justified in seizing Mr. Mertins' licenses because of the imminent threat he posed to the State's natural resources. However, there is no temporal allowance in the due process clause, which allows the deprivation of a significant property interest. Only those cases posing an imminent threat to health, safety and welfare of the general public can justify such a pre-hearing seizure. This is not one of those cases.

The third is that if this Court concludes Respondent was justified in seizing Mr. Mertins' commercial licenses prior to a hearing, the probable cause hearing for the continued deprivation of his licenses did not satisfy the requirements of due process. As it could take years for the criminal process to be resolved on the underlying wanton waste charge, a simple probable cause hearing is not sufficient to justify the continued deprivation of Mr. Mertins' licenses. Due process requires that he be able to challenge the underlying wanton waste charge at that hearing before Respondent can deprive him of his licenses prior to the outcome of the criminal process.

For of the foregoing reasons Mr. Mertins respectfully requests this Court reverse the decision of the district court and require Respondent to immediately

reinstate his commercial licenses pending the outcome of the underlying wanton waste charges.

Respectfully submitted, this 21st day of Nov., 2007.

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STATE OF MINNESOTA
IN COURT OF APPEALS

Dean Carl Mertins,

Appellant,

v.

CERTIFICATION OF BRIEF LENGTH

APPELLATE COURT
CASE NUMBER:A07-1492

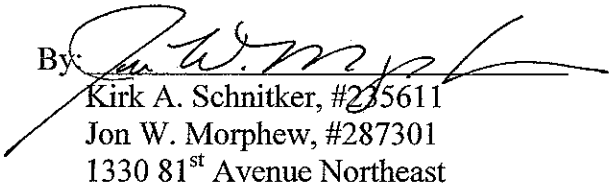
Commissioner of Natural Resources,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, Subds.1 and 3, for a brief produced with proportional 13-point font. The length of the brief is 6,528 words. This brief was prepared using Microsoft Word 2002.

DATED: November 21, 2007

SCHNITKER & ASSOCIATES, P.A.

By: 

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