A18-0205

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Nigeria Lee Harvey,

Appellant.

APPELLANT'S REPLY BRIEF

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Appellant Nigeria Harvey respectfully submits the following by way of reply to the arguments contained in respondent's brief (RB).

1. **Harvey preserved, and in any event this Court should consider, the issue of the legality under state law of the search of Harvey's cell-site location information.**

Respondent does not argue that the police lawfully obtained, under Minnesota law, Harvey's cell-site location information (CSLI). Respondent argues only that this Court cannot consider that issue. (RB at 17-18). Respondent is mistaken for two reasons.

First, Harvey did not forfeit a challenge to the legality, under Minn. Stat. §§ 626A.28 or 626A.42, of the search of his CSLI. The state has the burden of proving that police lawfully obtained evidence the state wishes to introduce at trial. *State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992); *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13-14 (Minn. 1965). To put the state to that burden, a defendant need only "specify, with as much particularity as is reasonable under the circumstances, the grounds advanced for

suppression in order to give the state as much advanced notice as possible as to the contentions it must be prepared to meet." *Needham*, 488 N.W.2d at 296.

Harvey did that. He filed a motion to suppress the CSLI "pursuant to...Minn. Stat. §§ 626A.28, 626A.42 (2014)." (Doc ID # 79 at 1). That motion put the state on notice that it had to explain how the evidence had been gathered in compliance with those two statutes. If there was any doubt, Harvey's memorandum in support of his motion likewise asked for suppression "pursuant to...Minn. Stat. §§ 626A.28, 626A.42 (2014)," and described those statutes as creating "one of the strictest requirements in the country related to governmental access to electronic communication and device location information." (Doc ID # 82 at 1, 5). That the memorandum focused on arguments for suppression under other sources is of no moment, because the burden was on the state to show that the search was lawful under sections 626A.28 and 626A.42.

The state has not tried to meet its burden. Presumably this is because it cannot do so. The search was plainly illegal under sections 626A.28 and 626A.42, and this Court should hold as much.

Second, even if this Court finds fault with trial counsel's attempt to raise the issue, this Court should consider the merits of the issue. This Court has long recognized that "it is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be 'diluted by counsel's oversights, lack of research, failure to specify issues or cite relevant authorities.'" *State v. Hannukesela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (citation omitted). This Court recently exercised that authority to

consider a search-and-seizure issue the prevailing party had not even raised. *Ries v. State*, 920 N.W.2d 620, 628 n.4 (Minn. 2018). It should do the same here.

As in *Ries*, "[t]he record is developed sufficiently for [this Court] to resolve this question and the matter does not depend on disputed issues of fact." *Id.* As in *Ries*, "the party appealing [the issue] raised the...issue in his brief to [this] court and the State has had an opportunity to respond to that argument." *Id.* The state makes no argument that it has been unfairly surprised by the issue. The fact that the state chose to make only a forfeiture argument – again, presumably because it has no merits argument to make – does not deprive this Court of the ability to decide the issue. It should do so.

This Court has, on several occasions, reversed convictions on grounds not raised at all, at trial or on appeal. In *State v. Williams*, 525 N.W.2d 538 (Minn. 1995), this Court reversed a conviction based upon unobjected-to evidentiary rulings and alleged prosecutorial misconduct, even though the unobjected-to evidentiary issue was a question of first impression. In *State v. Welch*, 675 N.W.2d 615 (Minn. 2004), this Court reversed a kidnapping conviction based upon a fact-specific argument the defendant had not raised, even though the state had not been given the opportunity to address the issue.

Reversing on this issue will be far less radical than was reversing in *Williams* or *Welch*. The state had the opportunity to address the merits of this issue. The facts are clear and undisputed. The relevant statutes are equally clear, and were in effect for one year before the search at issue occurred.[1] The search was plainly illegal under state law. The

[1] Because the statutes at issue were in place well before the search, considering this issue will not work any unfair surprise on law enforcement.

state does not contend otherwise, and this Court should say so. *See also State v. Hill*, 871 N.W.2d 900, 905 n.4 (Minn. 2015) (considering "purely legal issue" not raised to district court because of lack of prejudice to state).

2. In the alternative, this Court should preserve Harvey's right to argue in a subsequent postconviction petition that he received ineffective assistance of counsel for failure to move to suppress the CSLI for a violation of state statutes.

If this Court holds that Harvey's attorneys forfeited Harvey's ability to argue that the search of his CSLI was illegal under state statutes, and if the Court declines to consider that issue, and if the Court affirms Harvey's convictions, then this Court should preserve Harvey's ability to petition the district court for postconviction relief on the issue of whether Harvey received ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, because his attorneys (supposedly) failed to move to suppress the CSLI under state statutes. Such a claim would be entirely proper. *See Kimmelman v. Morrison*, 477 U.S. 365, 387-91 (1986) (holding counsel's performance was deficient because counsel did not file meritorious suppression motion). This Court has used such a procedure before, *see, e.g., State v. Gustafson*, 610 N.W.2d 314, 320–21 (Minn. 2000), and it should do so here.

3. No good-faith exception "saves the evidence."

Respondent argues that "the good-faith exception save the evidence under the Fourth Amendment analysis." (RB at 19-20). Respondent is incorrect for several reasons.

First, respondent incorrectly argues that this Court is required to use the good-faith exception to admit evidence gathered in violation of the Fourth Amendment.[2] (RB at 20). It is true, of course, that state courts must follow United States Supreme Court precedent deciding when a search does, or does not, violate the Fourth Amendment. That is a "pure question of Federal law." *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008) (citation omitted). In many situations, federal law also requires state courts to exclude the fruits of a Fourth Amendment violation. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961). But the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights." *United States v. Leon*, 468 U.S. 897, 907 (1984). And, as the United States Supreme Court explained, "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Danforth*, 552 U.S. at 288 (emphasis added).

If police act in objectively reasonable reliance on a search warrant, "federal law does not require the exclusion of the...evidence" resulting from that search. *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984) (emphasis added). But federal law does not "place[] a limit on state authority to provide remedies for federal constitutional violations." *Danforth*, 552 U.S. at 288. Minnesota's courts are perfectly free to provide a particular remedy – exclusion – for a violation of the federal constitution, even if federal courts do not provide such a remedy. *See id.* at 288 (holding that "Federal law simply 'sets certain

[2] Respondent is making this argument in other cases pending before this Court (*State v. Brown*, File No. A17-0870), and before the court of appeals (*State v. Scarsella*, File No. A17-1147). This Court should take the opportunity to reject it.

minimum requirements that State must meet but may exceed in providing appropriate relief'" for federal-law violations).

Second, this Court should reject respondent's invitation to adopt the *Leon* good-faith exception. The only reason respondent posits for radically altering long-standing Minnesota law to adopt that exception is "consistency" with federal criminal practice. But "[n]onuniformity is, in fact, an unavoidable reality in a federalist system of government." *Danforth*, 552 U.S. at 280. This Court has not been troubled for the 35 years since *Leon* by any lack of consistency between state and federal courts in this area, and respondent offers no reason for it to be troubled now.

Third, the *Leon* good-faith exception would not "save" the admissibility of this evidence even if such an exception existed in Minnesota. The *Leon* exception requires reasonable reliance upon a warrant, and the officers here did not have a warrant. The document the officers did have was, to the extent it authorized them to obtain CSLI, facially invalid under Minn. Stat. §§ 626A.28 and 626A.42. *See Ferrari v. State*, ___ So.3d ___, ___, 2018 WL 6132264, *7-8 (Fla. App. 2018) (declining to apply good-faith exception to CSLI search because order used to obtain the evidence did not comply with state statutes regarding such searches). In addition, the evidence was obtained in violation of section 626A.42 and is, therefore, inadmissible under the plain language of that statute. Minn. Stat. § 626A.42, subd. 6(a).

4. The erroneous admission of the CSLI was not harmless.

Respondent does not argue that the erroneous admission of the CSLI was harmless. It has, therefore, forfeited any such argument. *See United States v. Montgomery*, 100 F.3d

1404, 1407 (8th Cir. 1996) (holding that government forfeits harmless-error argument by not making it and that, in such situations, appellate court ordinarily should not consider whether error was harmless); *accord State v. Morrow*, 834 N.W.2d 715, 724 n.4 (Minn. 2007) (restating that court will not consider issues not briefed).

5. The district court erred by denying Harvey's *Frye-Mack* challenge.

Respondent claims that *Frye-Mack* is not the correct framework for analyzing this issue. (RB at 26). But respondent did not appeal Judge Bransford's orders granting Harvey a *Frye-Mack* hearing. Nor did respondent argue to the district court that *Frye-Mack* was not the correct standard. *Frye-Mack* is the correct standard and, in any event, is the law of this case. *See* App. Brief at 30 n.12.

Respondent also claims that "if *Frye-Mack* does not apply, the admission of the expert cell phone evidence must be affirmed." (RB at 23). Respondent is mistaken. As argued in Harvey's brief, the argument against the "foundational reliability" part of *Frye-Mack* is also a challenge to the admissibility of the evidence under Rule 702. *See* App. Brief at 36 n.14.

6. The district court violated *Batson* when it allowed the state to strike Juror 18.

Respondent misstates the standard of review when it claims the district court "did not clearly err" in its *Batson* rulings. (RB at 2, 37, 38, 39). Respondent does not address the fact that the district court in multiple ways misapplied the *Batson* test. *See* App. Brief at 47-49. Nor does respondent contend that the district court properly applied *Batson*. The district court misapplied *Batson*, and this Court reviews the issue de novo, not for clear error. *State v. Pendleton*, 725 N.W.2d 717, 724 (Minn. 2007).

Respondent's characterization of the record regarding Juror 18's distrust of police officers is inaccurate. Respondent claims that Juror 18 "compar[ed] the police – and the 'blue code' – to 'a gang.'" (RB at 38). The exchange at issue stemmed from Harvey's attorney asking Juror 18 if he thought police would be more likely than members of other professions, like painters, to lie for each other. The following exchange then occurred:

> A. Probably any other profession there is, except they would lie for another person in their profession that they may not know. I don't think a painter would like for another painter that he didn't even know.
>
> Q. Right.
>
> A. Versus a police officer would say.
>
> Q. I've heard it referred to as like a blue code or something like that?
>
> A. Yeah, sure, a gang.

(T. 347).

Two things are apparent from this exchange. First, defense counsel, not Juror 18, referred to the "blue code." Second, Juror 18's offhand, casual mention ("Yeah, sure...") of a gang came in response to defense counsel's characterization of the habit of some police officers to speak untruths. The Hennepin County Attorney's Office knows well, and has been repeatedly frustrated by, this behavior. *See* App. Brief at 52-53.

Juror 18 had the same kind of experience-based distrust in police that a large percentage of reasonable African-American people have. It is equally well-established that "[p]eople of color have a general distrust of the criminal justice system and exclusion from jury service fosters that distrust." *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System Final Report* 36 (1993). Affirming Harvey's convictions in the face of

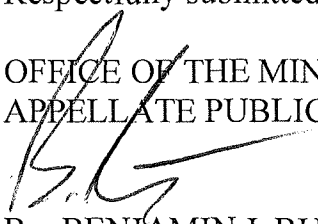
the state's exclusion of Juror 18 will continue to foster that distrust. This Court, therefore, should reverse.

CONCLUSION

This Court must reverse Harvey's convictions and remand for a new trial.

Dated: January 29, 2019

Respectfully submitted,



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