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OCTOBER 3, 2018  
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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State of North Dakota,

Appellee,

vs.

Steven Gardner,

Appellant.

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**SUPREME COURT NO. 20180239**

District Court No. 09-2017-CR-04617

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ON APPEAL FROM ORDER DEFERRING IMPOSITION OF  
SENTENCE, ENTERED JUNE 11, 2018, CASS COUNTY  
DISTRICT COURT  
EAST CENTRAL JUDICIAL DISTRICT  
STATE OF NORTH DAKOTA  
THE HONORABLE WADE L. WEBB, PRESIDING

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**APPELLANT'S REPLY BRIEF**

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Luke T. Heck (#08133)  
lheck@vogellaw.com  
Drew J. Hushka (#08230)  
dhushka@vogellaw.com  
**VOGEL LAW FIRM**  
Attorneys for Appellant  
218 NP Avenue  
PO Box 1389  
Fargo, ND 58107-1389  
Telephone: 701.237.6983

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## **LAW AND ARGUMENT**

### **I. The Evidence Before the District Court Showed Mr. Gardner Possessed a Reasonable Expectation of Privacy in the Package**

[¶1] The State explicitly agrees a person may have a legitimate “expectation of privacy in packages shipped to another address bearing the name of another person.” See Appellee’s Br., at 26. Nevertheless, the State argues Mr. Gardner’s<sup>1</sup> reasonable expectations of privacy were not implicated in this case. The State’s argument is without merit.

[¶2] Primarily, the State argues there is no evidence in the record regarding the ownership of the package at issue. The State avers Mr. Metcalf, Mr. Metcalf’s brother, and Mr. Gardner all “had knowledge of who ‘owned’ the package of methamphetamine,” but that “[n]one of those persons testified at the evidentiary hearing.” Appellee’s Br., at ¶ 18. The State’s argument reveals a complete misunderstanding of the North Dakota Rules of Evidence. As clearly outlined by the North Dakota Rules of Evidence, the evidentiary rules are relaxed at criminal preliminary hearings. N.D.R. Evid. 1101(d)(3)(C). This includes the rules against hearsay. Cf. State v. McAvoy, 2008 ND 204, ¶ 11, 757 N.W.2d 394 (“Hearsay evidence is admissible at probation revocation hearings.” (citing N.D.R. Evid. 1101(d)(3))). Therefore, Metcalf’s statements that he merely acted as a “middle” for when his brother sent packages to Mr. Gardner, and that the intercepted package was for Mr. Gardner, while entered through Sgt. Christensen’s testimony, were still admissible evidence. App., at 8:24-10:1. In other words, plainly, there was evidence in the record regarding the true ownership of the package—

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<sup>1</sup> Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to them in Appellant’s Brief.

Mr. Gardner's ownership. The North Dakota Rules of Evidence did not require that Mr. Metcalf, Metcalf's brother, or Mr. Gardner testify personally to establish ownership. The uncontradicted statements regarding ownership actually entered into evidence established that Mr. Gardner was the true owner of the package.

[¶3] Nevertheless, the State cites State v. Adams, 2018 ND 18, 905 N.W.2d 758, as establishing that Mr. Gardner did not have an expectation of privacy in this case. The State's reliance is misplaced. In Adams, law enforcement received a tip of suspicious behavior of a number of individuals moving backpacks from a Nissan into a Cadillac. Id. at ¶ 2. When law enforcement arrived, three men were in the Cadillac, and Adams was in the Nissan. Id. Law enforcement searched the vehicles, and seized more than 80 items relating to drug use in the Cadillac. Id. Adams moved to suppress evidence seized from the Cadillac. Id. at ¶ 3. This Court denied Adams's attempt to suppress, finding that Adams actually denied ownership of the relevant backpack, and that he did not own the Cadillac. Id. at ¶ 12. This Court additionally found there was no evidence presented at the evidentiary hearing regarding Adams's expectations in the backpacks seized from the Cadillac. Id. But unlike Adams, there is no evidence in the record that Mr. Gardner ever denied an ownership interest in the package, and evidence was presented regarding Mr. Gardner's interests in the package through Mr. Metcalf's statements, as well as the fact that he went to the apartment and picked up the package at the time he was alerted that it had arrived. Adams does not control the present case.

[¶4] Instead, below, the district court's mistakenly concluded that because Mr. Gardner's name was not on the package, that he did not have a reasonable expectation of privacy. The district court's conclusion was founded on a faulty

assumption because “[n]ot all bailment situations involve giving the bailee such control over an object that the bailor ‘must be taken to have assumed the risk that [the bailee] would allow someone else to look inside.’” United States v. Bates, 100 F. Supp. 3d 77, 84 (D. Mass. 2015) (second alteration in original) (quoting Wayne R. LaFave (5th ed. 2012) (quoting Frazier v. Cupp, 394 U.S. 731, 740 (1969))). Illustrative is United States v. Allen, 741 F. Supp. 15 (D. Me. 1990). In Allen, law enforcement seized—and searched without a warrant—a package addressed to Kurt Humphrey. Id. at 15. The package contained LSD. Id. Humphrey, however, averred that he was not the intended recipient of the package, but that he simply agreed to allow—for \$50.00—use of his name and address for packages belonging to Allen to be delivered to him. Id. When the packages were delivered to him, he would deliver the packages to Allen. Id. Allen moved to suppress the evidence obtained from the warrantless search of the package. The District Court of Maine excluded the evidence. Id. at 18. The court found the totality of the circumstances, including the historic handling of the packages between Humphrey and Allen, showed Allen was the true owner, and that he—therefore—had a legitimate expectation of privacy of the contents therein. Id. at 17-18.

[¶5] Here, the evidence in the record is: (1) the package was address to “Paulie Mccaff,” and a street address for an apartment building where Mr. Metcalf lived; (2) Mr. Metcalf admitted to acting as a “middle” for packages sent by his brother to Mr. Gardner, including this package; (3) Mr. Gardner would retrieve any packages sent to Mr. Metcalf when he was acting as a middle; and (4) Mr. Metcalf did not have an interest in the contents of the package except for a small amount of personal use drugs that Mr. Gardner would provide him for acting as a middle for the package contents. Like

Allen, because Mr. Gardner was the true owner of the package, he had a reasonable expectation of privacy in the package. See also United States v. Sheldon, 351 F. Supp. 2d 1040, 1044 (D. Haw. 2004) (defendant's "ownership interest in the parcel, along with her control and supervision of the parcel, is sufficient to manifest a subjective expectation of privacy"); United States v. Evans, No. IP 00-99-CR-01 H/F, 2001 WL 243287, at \*5-6 (S.D. Ind. Jan 31, 2001) (true owners of packages have subjective and objectively reasonable expectations of privacy in packages).

### **CONCLUSION**

[¶6] As outlined above, and previously, a person does not lose their reasonable expectations of privacy simply by entrusting their property to another. Mr. Gardner did not lose his reasonable expectations of privacy simply by entrusting his receipt of his package through UPS and Mr. Metcalf. Because law enforcement unreasonably seized an effect in which Mr. Gardner possessed a reasonable expectation of privacy, the district court's decision must be reversed.

Respectfully submitted October 3, 2018.

### **VOGEL LAW FIRM**

By: /s/ Drew J. Hushka

Luke T. Heck (#08133)

Drew J. Hushka (#08230)

218 NP Avenue

PO Box 1389

Fargo, ND 58107-1389

Telephone: 701.237.6983

ATTORNEYS FOR APPELLANT

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## CERTIFICATE OF SERVICE

[¶1] I hereby certify that on October 3, 2018, the following document:

## APPELLANT'S REPLY BRIEF

was electronically served upon:

**Mark Boening****SA-defense-notices@casscountynd.gov**

Dated this 3rd day of October, 2018.

## VOGEL LAW FIRM

/s/ Drew J. Hushka

Drew J. Hushka (#08230)

dhushka@vogellaw.com

Attorneys for Appellant

218 NP Avenue

PO Box 1389

Fargo, ND 58107-1389

Telephone: 701.237.6983