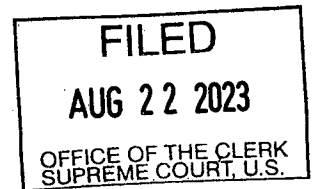


No. 23 - 6353



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IN THE  
SUPREME COURT OF THE UNITED STATES

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Robert John Virnig — PETITIONER  
(Your Name)

vs.

State of Minnesota — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

State of Minnesota Court of Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert John Virnig #229643  
(Your Name)

1000 Lakeshore Drive  
(Address)

Moose Lake, MN 55767  
(City, State, Zip Code)

NA  
(Phone Number)

**QUESTION(S) PRESENTED**

Did the District Court err in ruling that the government informant was not acting as an agent of the government when, without a warrant or an exception to the warrant requirement, informant took a photograph of, and searched, the Petitioner's home office?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

State of Minnesota vs Robert John Virnig, No. 49-CR-20-540 District Court Morrison County, Seventh Judicial District. Judgement entered July 13, 2022.

State of Minnesota, Respondent, vs Robert John Virnig, Appellant, No. A22-1294, State of Minnesota Court of Appeals. Judgement entered February 27, 2023.

State of Minnesota, Repsondent, vs Robert John Virnig, No. A22-1294, Minnesota Supreme Court. Judgement entered June 20, 2023.

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State v. Buswell, 460 N.W.2d 614, 617 (Minn. 1990)	
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## STATUTES AND RULES

Minn. R. Crim. P. 117, Subd. 3  
Minn. Stat. §152.021.2, Subd. a(1)  
Minn. R. Crim. P. 26.01, Subd. 4

## OTHER

NA

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix <sup>A</sup>\_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the <sup>NA</sup>\_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was June 20, 2023.  
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Constitution of the State of Minnesota, Article 1 Sec. 10. Unreasonable searches and seizures prohibited. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.



## STATEMENT OF THE CASE

On April 24th, 2020, Petitioner was charged by complaint in Morrison County District Court with First Degree Controlled Substance Crime - Possess 50 gram or more - Cocaine or Methamphetamine, Minn. Stat §152.021.2, Subd. a(1). On July 23rd, 2020, Petitioner moved to suppress evidence obtained during a search of his residence, arguing that the search warrant in question was only issued as a result of evidence averments obtained in violation of his Fourth Amendment Rights under the United States Constitution and corresponding Article 1, Section 10 of the Minnesota State Constitution. Petitioner argued that the clandestine entry in search of his office by a citizen- agent of the government, was done without word or exception to the requirement. The averment of the photographic evidence sent along enforcement by the citizen in the search warrant application tainted any evidence obtained during the search of the Petitioner's residence by law enforcement.

On December 14, 2021, the District Court denied Petitioner's motion to suppress, finding that the informant was not acting as an agent of the government when she entered Petitioner's house without consent to search for evidence as requested by law enforcement. On July 8, 2022, Petitioner was found guilty following a Court Trial pursuant to Minn. R. Crim. P. 26.01, Subd. 4. On August 24, 2022, Petitioner's motion for a downward dispositional departure was denied by the District Court and Petitioner was sentenced to a 105-month commit to Commission of Corrections.

On September 19, 2022, Petitioner's appeal was filed in the Court of Appeals. Oral argument was held on January 19th, 2023, via remote technology. The Court of Appeals nonprecedential opinion was filed on February 27th, 2023, affirming the District Court's order denying Petitioner's motion to suppress evidence.

On March 24, 2023, Petitioner filed a petition for review in the Minnesota Supreme Court. On June 20, 2023, the Minnesota Supreme Court entered an order denying Petitioner's review.

On August 22, 2023, Petitioner mailed writ of certiorari to United States Supreme Court which was received on September 5, 2023. The United States Supreme Court returned the petition for writ of certiorari with a cover letter dated September 12, 2023 to Petitioner to make corrections. The United States Supreme Court cover letter stated Petitioner had 60 days from the date of the letter to correct and resubmit.

D. (i) The lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the United States Supreme Court's supervisory powers.

The lower Court's ratification of the tactics used by law enforcement to obtain the search warrant in this matter represent a significant and damaging departure from precedent. On February 5th, 2020, Drug Task Force Agents asked a private citizen to search the residents of the target of their investigation. In the two months that followed, Drug Task Force Agents and the private citizen text messaged each other 737 times in furtherance of the investigation. The citizen also had phone conversations with the Task Force Agent. The subject matter of these communications included reconnaissance on the target residence, the movement of the Petitioner, and search warrant entry information regarding the target residence.

On April 24, 2020, a night when criminal activity was suspected in the residence of the Petitioner, the citizen was presented with an opportunity to make a clandestine entry into the same. The citizen's entry into Petitioner's residence was made in furtherance of the investigation. At 4:00 AM, a photograph of the Petitioner in possession of contraband was taken by the citizen as requested by law enforcement. The photograph was then promptly sent to law enforcement. Agents confirmed the timing of the photograph (4 a.m. on that same day), and a warrant to search Petitioner's residence was issued and executed.

The Court of Appeals found that "[t]he record shows that on February 5th, 2020, law enforcement requested that MV take pictures of any drugs or paraphernalia in [Petitioner's] possession." However, given that the police did not ask or instruct MV to take the photo on April 24th, the District Court found that the citizen was "not acting as a government agent at the time." The District Court found, and the Court of Appeals later affirmed, that "law enforcement's request for the private citizen to provide pictures of drugs was made 79 days prior to the April 24 picture and did not instruct the citizen to conduct the search on April 24... [therefore] law enforcement did not influence on the particular search in question."

In denying Petitioner's motion to suppress, the District Court held, and the Court of Appeals affirmed, that the citizen had not acted as a government agent, reasoning that law enforcement did not know of, or participate in, the private citizen search of Petitioner's residence, and therefore no agency could be found. But this is not the law. The district and appellate courts failed to address "all relevant factual circumstances," thereby ignoring binding precedent of this Court. Using a myopic eye on the events of the night of April 23rd and the early morning hours of April 24th, both courts lost the forest for the trees.

In the case at bar, the private citizen finally found the opportunity to search the Home Office of the petitioner and "fill the order" of law enforcement. And denying petitioner's motion to suppress the lower courts ignored this court's holding in *State v. Buswell*, 460 N.W.2d 614, 617 (Minn. 1990), specifically that the search is subject to 4th amendment constraints if "in the light of all circumstances, the private individual must be regarded as having acted as an instrument or agent of the state when conducting the search." *Id.* "Whether a private party should be deemed an agent instrument of the government for 4th amendment purposes necessarily turns on the degree of the government's participation in the private party's activities." *Id.* See also *United States V Walther*, 625 F.2d 788 (9th Cir. 1981); see also *State V. Jorgensen*, 660 N.W.2d 127 (Minn. 2003).

This case significantly differs from the fact pattern in *Buswell* where private security agents, without discretion or encouragement by law enforcement, were simply "doing their job" at BIR Raceway. This is also not similar to the fact pattern in *Jorgensen* when a distraught citizen was conducting her own investigation as to the welfare of her sister. In these cases, no agency was found.

The fact pattern in the case at bar is very similar to the facts found sufficient to implicate the 4th Amendment in *Walther*, where the 9<sup>th</sup> Circuit Court of Appeals found agency. *Id.* In *Walther* and *Skinner V. RV labor executives Ass'n*, 489 U.S. 602, 614 (1989), government agents were not present *at the time of the search*, but agency was found. Encouragement was not specific as to the party searched and was dated in time. In *Walther*, two years of time had passed since the private citizen had talked to DEA agents. The “private party” in both *Walther* and *Skinner* decided who and when to search. “The fact that the government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one.” *Id.* 489U.S. 602 at 615. In *Walther*, *Skinner* and the case at bar, as opposed to *Buswell* and *Jorgenson*, law enforcement “made plain not only its strong preference for [the search] but also its desire to share the fruits of such intrusions.” See *Skinner* at 615. “These are clear indices of the Government’s encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.” *Id.*

The *Buswell* court cited *Walther* and *Skinner* holding that “relevant factors [as to agency] include “(1) whether the government knew of and acquiesced in the search and (2) whether the search was conducted to assist law enforcement efforts or to further the private party’s own ends.” *Id.* While the two- pronged test developed in *Walther* is useful in guiding the analysis, it is not dispositive, and all relevant factual circumstances should be considered. *Id.* Both lower courts took these “relevant factors” and made them dispositive, the “rule of law.” The fact that in this case the government did not know the citizen had created an opportunity to conduct a clandestine search for their benefit, no agency exists. The holding ignores “all other relevant factual circumstances” in contravention of this Court's holding in *Buswell*.

## **REASONS FOR GRANTING THE PETITION**

(ii) The question presented is an important one upon which the US Supreme Court should rule.

This court has not addressed a fact pattern like that in the case at bar; namely, a private search in furtherance of an ongoing investigation of a specific suspect.

If left uncorrected, the decision of the lower courts so departs from precedent established in the Court of Appeals, Federal Circuit Courts, and this Court, that it will "change the law" for practitioners and law enforcement alike. The decision of the lower courts stands for the premise that any law enforcement officer can find a citizen who is motivated by spite, jealousy or greed, and request that the private citizen enter the constitutionally protected area of specific suspect who is the target of their investigation. Then law enforcement may ask the citizen, after making the clandestine and warrantless search, to report with evidence in furtherance of said investigation. So long as some measure of time passes between the request and the invasion of the home, and law enforcement isn't aware of the conduct of the citizen at the time of the search, the Fourth amendment is not violated. That is not good public policy. No matter how much contraband is seized.

Law enforcement cannot be allowed to target citizen, encourage the private search, ask for the fruits, then sit back and wait for the phone to ring, thereby washing the taint of the violation of a citizen's reasonable expectation of privacy from their hands. None of us want to live in a society where that is the law of the land. Realistically, this court is the last hope to correct the mistakes made below, where the courts departed from the law of the land, Skinner, Buswell, and Jorgensen.

The wicked witch of the West was not present when the "flying monkeys" kidnapped Dorothy. But she encouraged it, and she wanted Dorothy delivered to her at once. The monkeys were the agents of the wicked witch of the West. But because she wasn't there when Dorothy was kidnapped, and didn't tell the monkeys which way to fly, the courts below would find otherwise.

For these reasons, the petitioner seeks an order granting review of the decision of the Court of Appeals.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert J. Vining

Date: November 3, 2023