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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

David Serges

Defendant-Appellant.

MSC No. 167154

COA No. 355554

Genesee County Circuit Court
Case No. 18-042951-FC

David Serges's
Reply Brief

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Arguments

I. The officer in charge testified that Mr. Serges was arrested "on suspicion of homicide." Where the police lacked probable cause to arrest Mr. Serges for homicide, his pants should be excluded as the result of an unreasonable seizure under US Const, Am IV and Const 1963, art 1, § 11.

This Court directed the parties to address whether Mr. Serges "was unlawfully arrested such that his pants should be excluded as the result of an unreasonable seizure under US Const, Am IV or Const 1963, art 1, § 11." *People v Serges*, 20 NW3d 864 (2025). The government complains that this Court's question "violates the principle of party presentation and this Court's rules of issue preservation." Appellee's Supplemental Brief, p 20. But "addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Mack v City of Detroit*, 467 Mich 186, 207-208 (2002), citing *Legal Services Corp v Velazquez*, 531 US 533, 549 (2001) (majority and dissent both stating that whether to address an issue not briefed or contested by the parties is left to discretion of the Court), and *Seattle v McCready*, 123 Wash 2d 260, 269 (1994) (indicating that the court "is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent").

This Court may choose not to strictly apply preservation requirements where the issue raised is of constitutional significance or is significant to the fair administration of justice. *Napier v Jacobs*, 429 Mich 222, 233 (1987) (a court may grant relief, even if an error is unpreserved, to prevent a miscarriage of justice); *People v Piper*, 223 Mich App 642, 644 (1997) (waiving the preservation requirement where the case presented a constitutional issue of significance and first impression). See also *Walters v Nadell*, 481 Mich 377, 387 (2008); *People v Farmer*, 380 Mich 198, 208 (1968) (criminal issues of significance to the fair administration of justice warrant looking past preservation failures).

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This Court directed the parties to brief Issue I based on its view of the complete record, which includes facts and arguments that have developed over time. While litigating Mr. Serges's motion for new trial and in the briefs on appeal, the parties agreed that Mr. Serges was arrested on an outstanding warrant for failure to appear for arraignment for an ordinance violation. After hearing oral argument, the Court of Appeals remanded for an evidentiary hearing. The government called Detective Eric Freeman as a witness at the evidentiary hearing. During the prosecutor's direct examination, Detective Freeman testified that Mr. Serges was arrested "on suspicion of the homicide." EH, 22, 24. Freeman admitted that the police report said Mr. Serges was arrested on an outstanding warrant. EH, 41. Freeman claimed the police report was incorrect. EH, 41. Freeman never corrected the report. EH, 41.

Because of Freeman's evidentiary hearing testimony, Mr. Serges's arrest became a point of discussion. The government newly argued that Mr. Serges was arrested for murder. Mr. Serges argued that, if he was arrested for murder, his arrest was unconstitutional because it was not supported by probable cause, and the fruits of that arrest were inadmissible; or, if he was arrested on the bench warrant, the seizure and search of his clothing were unconstitutional because no exception to the warrant requirement justified the intrusion. This Court chose to address Issue I to promote the fair administration of justice and to properly adjudicate the constitutional issues in this case.

In its supplemental brief, the government claims for the first time, in a footnote, that "there was probable cause for Detective Freeman to arrest Defendant for suspicion of homicide." Appellee's Supplemental Brief, p 22 n 10. Detective Freeman testified that he had been employed with the Burton Police Department for about 16 years and a detective for nine of those. EH, 19. Detective Freeman—an experienced law enforcement officer—testified that Mr. Serges was arrested "on suspicion for the homicide." EH, 22, 24. Detective Freeman never testified that he had probable cause to arrest Mr. Serges for homicide, because he did not. See Mr. Serges's Supplemental Brief, p 21-23.

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II. Assuming Mr. Serges was lawfully arrested, the police violated his rights under US Const, Am IV and Const 1963, art 1, § 11, by seizing his pants and testing them for DNA without a warrant.

The police seized Mr. Serges's effects by taking them from the jail property room and transporting them to the police station for the purpose of investigating a crime. Then, 51 days after his arrest, the police sent Mr. Serges's pants to the lab, where law enforcement searched the pants using forensic technology. No warrant authorized the seizure or the search. The police had ample time to seek a warrant but did not. The evidence obtained from Mr. Serges's pants is admissible only if both the seizure *and* the search fall within the "few specifically established and well-delineated exceptions" to the warrant requirement. *Katz v United States*, 389 US 347, 357 (1967). See also *People v Champion*, 452 Mich 92, 98 (1996). But neither does.

The seizure was not justified by the inventory exception

The scope of a government intrusion must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v Ohio*, 392 US 1, 19 (1968) (quotation marks and citations omitted). The government first argues the inventory exception to the warrant requirement justified the police conduct here. Appellee's Supplemental Brief, p 26. Assuming the seizure of Mr. Serges's effects was lawful at its inception, the seizure changed in character and became unreasonable when Detective Freeman removed all of Mr. Serges's effects from the jail property room and moved them into an evidence locker. See *US v Jacobsen*, 466 US 109, 124 (1984) ("a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests").

The inventory exception permits law enforcement to seize and search an arrestee's clothing and personal items to ensure safety within the jail and to secure the property for safekeeping. *Illinois v Lafayette*, 462 US 640, 642 (1983). Here, after the administrative process was complete, law enforcement seized and searched Mr. Serges's clothing for the purpose of investigating a crime. This exceeded the scope of an inventory

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search. *South Dakota v Opperman*, 428 US 364, 376 (1976) (noting that an inventory search may not be used as a pretext for investigation); *People v Toohey*, 438 Mich 265, 276 (1991) (same).

The government is simply incorrect in stating, "The police had custody of [Mr. Serges's] pants and, thus, the police could take, examine, and preserve the pants as evidence, as they were normally permitted to seize evidence of a crime when it is lawfully encountered." Appellee's Supplemental Brief, p 27. Each stage of a warrantless government intrusion must be properly justified. *Terry*, 392 US at 19. Detective Freeman's seizure of Mr. Serges's effects from the jail was not authorized by a warrant or justified by any exception to the warrant requirement. Seizing Mr. Serges's clothing as evidence in the murder investigation violated the Fourth Amendment and Article 1, § 11 of the Michigan Constitution. The pants, and the evidence obtained by searching them, are fruit of the poisonous tree and must be suppressed.

Searching the pants was likewise unreasonable

Because the seizure issue is dispositive, this Court need not decide whether searching Mr. Serges's pants was unconstitutional—but it was. Extracting and testing biological material from Mr. Serges's pants was both a trespass and a violation of his reasonable expectation of privacy in his effects.

In *US v Jones*, 565 US 400 (2012), law enforcement installed a GPS tracking device on the underside of Mr. Jones's Jeep to investigate his whereabouts. This was a trespass and therefore a Fourth Amendment search, even though the Jeep was parked in a public parking lot when the FBI affixed the GPS, the GPS did not interfere with possession of the Jeep or its operations, and the Jeep's location—the information the GPS tracked and transmitted to the government—was knowingly exposed to the public. *Jones*, 565 US at 403. Where law enforcement physically intruded on the Jeep for investigative purposes, their conduct was a search, and a warrant was required.

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The same is true here. Law enforcement physically intruded on Mr. Serges's effects by confiscating them from the jail; holding them as evidence; and subjecting them to physical manipulation, sampling, and forensic testing. "That the officers learned what they learned only by physically intruding on [Mr. Serges's] property to gather evidence is enough to establish that a search occurred." *Florida v Jardines*, 569 US 1, 12 (2013). See also *Johnson v VanderKooi*, 509 Mich 524, 537-538 (2022) (fingerprinting was a search because it involved physical trespass onto a constitutionally protected area)[1]; *People v Gingrich*, 307 Mich App 656, 659-663 (2014) (applying *Jones* and *Jardines* and holding that search and seizure occurred where Best Buy employee, directed by law enforcement, opened suspicious files on laptop).

Because *Jones* governs, this Court need not decide whether Mr. Serges had a reasonable expectation of privacy in the biological material embedded in his clothing—but he did. Mr. Serges did not "knowingly expose to the public" the forensic information within the fibers of his pants. *Katz*, 389 US at 351. As the *Katz* Court discussed, a person reasonably expects that a conversation they have inside a phone booth will be private. *Id*. at 511-512. Likewise, a person reasonably expects to have privacy in the genetic material embedded in the fabric of their clothing.

The government claims that harvesting and testing DNA from one's clothing does not implicate one's reasonable expectation of privacy. Appellee's Supplemental Brief, p 30 (asserting that "there are very few privacy concerns with the type of DNA testing performed by the police here"). Methodically examining a person's clothing, extracting samples, and subjecting those samples to forensic testing raises a variety of privacy concerns. DNA contains deeply personal, intimate information. See Brief of Amici Curiae The American Civil Liberties Union Fund of Michigan and the American Civil Liberties Union Foundation, p 7-11. And it is the *potential* for intrusion that has constitutional significance,

[1] The *Johnson* Court separately held that the fingerprinting also exceeded the scope and duration of a *Terry* stop. *Johnson*, 509 Mich at 540-541.

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not how the government actually uses the information sought. *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 616-617 (1989) (urine testing was a search where "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic"); *Kyllo v United States*, 533 US 27, 38 (2001) ("[l]imiting the prohibition of thermal imaging to 'intimate details' would not only be wrong in principle; it would be impractical in application").

Further, the Court of Appeals opinion below authorized the police to conduct any forensic test, no matter how intrusive, where it held that a person has "no reasonable or justifiable expectation of privacy in [their clothing] after [it is] taken by the jail." *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 12. Contra *People v Custer*, 465 Mich 319, 343 (2001) ("we do *not* conclude that, once the police lawfully seize an object from an individual, that individual's reasonable expectation of privacy in that object is *altogether* lost." (emphasis in original)). The Court of Appeals' holding is a dangerous misstatement of the law. This Court must correct it.

The government cites *Sheffield v United States*, 111 A3d 611 (DC, 2015), a non-binding case where the Court upheld a warrantless search of a suspect's bloody clothing. Appellee's Supplemental Brief, p 29. But it is worth noting that the *Sheffield* Court found that "[t]he extraction of blood from [the suspect's] clothing and the subsequent forensic testing of the blood *are both searches subject to scrutiny under the Fourth Amendment*." *Sheffield*, 111 A3d at 621 (emphasis added). This is consistent with Mr. Serges's position.

Sheffield differs from Mr. Serges's case in several important respects. In *Sheffield*, the police were investigating a shooting that had just occurred. *Id.* at 616. The police learned that a person was admitted to the hospital for treatment of a gunshot wound less than an hour after the shooting was reported. *Id.* The police arrived and observed bloody clothing in a biohazard bag. *Id.* at 620. They knew that the clothing had been worn close in time to the crime. By contrast, Mr. Serges was arrested days after the homicide—the date of which was unknown—and

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the blood on his pants was not obvious. PE, 45; EH, 27, 52-54. The clothes Mr. Serges was wearing when he was arrested were different from other clothes he wore on the days surrounding the homicide. T VI, 44, 45. See also Trial 6/4/19, 101.[2] Given these important factual differences, *Sheffield* is inapt.

Further, the police seized all of Mr. Serges's effects: a piece of rope, a wallet, cigarettes, a lighter, a hat, a pair of socks, a belt, a pair of gloves, a coat, boots, two shirts, two pairs of pants, and two pairs of pants. EH, 43. The authorities in *Sheffield* seized only the obviously bloody bag of clothing, which the *Sheffield* Court found was permitted by the plain view doctrine. *Sheffield*, 111 A3d at 620. Plain view does not apply here, where the blood was not visible, its incriminating nature was not immediately apparent, and the police seized all of Mr. Serges's effects as evidence. And, in cases where it does apply, plain view can only justify a seizure, never a search. *Champion*, 452 Mich at 101 ("No searching, no matter how minimal, may be done under the auspices of the plain view doctrine.").

The government suggests that this case is similar to *Raynor v State*, 440 Md 71 (2014), where the police swabbed the chair Mr. Raynor sat in while being interviewed at the police department. Appellee's Supplemental Brief, p 31. Mr. Raynor had no privacy or possessory interest in the chair. He discarded his DNA onto a piece of furniture that did not belong to him, and the police collected it later. The police did not seize any of his belongings. *Raynor* bears no relevant similarities to Mr. Serges's case.

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[2] The government asserts that Mr. Serges was wearing similar clothing at the Admiral gas station and when he was arrested. Appellee's Supplemental Brief, p 6-7. Detective Freeman testified that Mr. Serges was *not* wearing the same clothes at Admiral and upon arrest. T VI, 45; Trial 6/4/19, 101. Freeman testified that the jeans Mr. Serges wore when he was arrested were darker than the jeans he wore at Admiral. T VI, 45; Trial 6/4/19, 101. The prosecutor argued in closing that Mr. Serges changed his clothes after the crime. T VI, 135.

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Commonwealth v Arzola, 470 Mass 809 (2015), is likewise non-binding and distinguishable. In *Arzola*, the police were investigating a stabbing that had just occurred. Mr. Arzola matched the description of the perpetrator and the police located him mere blocks from the crime scene. *Arzola*, 470 Mass at 811. Unlike in Mr. Serges's case, a court found that there was probable cause that Mr. Arzola committed the stabbing. *Id.* at 812. Mr. Arzola did not challenge the seizure of his clothing, or the seizure or analysis of his buccal swab. *Id.* at 814. The lawfulness of the seizure was central to the Court's analysis. *Id.* at 819. Further, the *Arzola* Court applied only the *Katz* framework, not the trespass doctrine. And *Arzola* relied heavily on *Maryland v King*, 569 US 435 (2013), which held that jail staff may take a DNA sample from suspects who are booked for serious crimes. Here, Mr. Serges was arrested on a bench warrant in an ordinance violation proceeding, not for a serious crime. And *King* permitted buccal swabs as they further the state interest of identifying arrestees. That interest is not relevant to an investigatory search of an arrestee's personal belongings.

The government cites *United States v Jacobsen*, 466 US 109, 123 (1984), to argue that a chemical test that discloses what a substance is does not implicate one's reasonable expectation of privacy. Appellee's Supplemental Brief, p 30. In *Jacobsen*, employees of a private shipping company examined a damaged package, opened it, and observed a white powdery substance inside. *Jacobsen*, 466 US at 111-112. They then notified the authorities. *Id.* The Court held that law enforcement "did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct." *Id.* at 126. Where the examination and testing of Mr. Serges's pants did not involve any private conduct, *Jacobsen* is inapposite.

The search-incident-to-arrest exception did not apply

The government argues that the search-incident-to-arrest exception to the warrant requirement permitted the police to extract and test samples from Mr. Serges's pants. The crux of the government's argument is: "There is nothing that limits a search incident to arrest to

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only evidence of the crime of arrest." Appellee's Supplemental Brief, p 37. This is wrong for two reasons.

First, the government has the law backwards. "Nothing says we can't" is a losing argument where the government is required to prove that a warrantless search fits within a "specifically established," "well-delineated" exception. *Champion*, 452 Mich at 98. The scope of a search is limited by its permissible purpose. *Terry*, 392 US at 19. Warrantless searches are presumptively unconstitutional, *id.*, citing *Katz*, 389 US at 357, and "[t]he burden is always on the state to show . . . an exception exists." *People v Reed*, 393 Mich 342, 362 (1975). If the United States Supreme Court has not explicitly permitted the type of warrantless search the police conducted, the search violated the Fourth Amendment. The United States Supreme Court has never held that, incident to arrest for one crime, the police may search the arrestee's effects for evidence of another crime without a warrant. The warrantless search of Mr. Serges's pants was unreasonable per se. Mr. Serges is entitled to suppression because the government cannot meet its burden to show that the search fit within a specifically established, well-delineated exception.

Second, contrary to the government's claim, controlling case law limits a search incident to arrest to evidence of the crime of arrest. The United States Supreme Court permits searches incident to arrest for two purposes: to ensure officer safety and to secure evidence of the crime of arrest. *United States v Edwards*, 415 US 800, 802-803, 805-806 (1974). The government asks this Court to expand *Edwards*. But, as discussed above, such expansion is forbidden. The exceptions to the Fourth Amendment's warrant requirement are specific, fixed, and can be extended only by the United States Supreme Court.

Eugene Edwards was lawfully arrested for attempting to break into a post office. *Edwards*, 415 US at 801. The post office window had been pried open and there were loose paint chips on the windowsill. *Id.* at 801-802. The police had probable cause to believe that the clothes Mr. Edwards was wearing upon his arrest contained paint chips that matched the paint chips on the windowsill. *Id.* at 802. In other words,

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when Mr. Edwards was arrested, "the police had probable cause to believe that the articles of clothing he wore were themselves material evidence of the crime for which he had been arrested." *Id.* at 805. Therefore, the police seized his clothes incident to arrest. Because Mr. Edwards was arrested late at night, no replacement clothes were available until the next morning, and the police waited to take his clothing until the morning. *Id.* at 802.

The Sixth Circuit held that the warrantless seizure of Mr. Edwards's clothing violated the Fourth Amendment because the seizure occurred after the "administrative process" and the "mechanics of the arrest" came to a halt. *Id.* at 802 (quotation marks and citation omitted). The United States Supreme Court reversed and held, where the police lawfully arrested Mr. Edwards and searched his clothing for evidence of the crime of arrest, based on probable cause that his clothing contained such evidence, the overnight delay did not violate the Fourth Amendment. *Id.* at 806-808. Based on these facts, the Court wrote, "Nor is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial." *Edwards*, 415 US at 803-804. The *Edwards* Court spilled extra ink to clarify that *Edwards* did not give the police carte blanche to seize and search arrestees' effects: "In upholding this search and seizure, we do not conclude that the Warrant Clause of the Fourth Amendment is never applicable to postarrest seizures of the effects of an arrestee." *Id.* at 808.

The police conduct in *Edwards* fell within the search-incident-to-arrest exception because the police "had probable cause to believe that the articles of clothing [Mr. Edwards] wore were themselves material evidence of *the crime for which he had been arrested*." *Id.* at 805-806 (emphasis added).[3] The same is not true here, and the government's

[3] See also *People v Carr*, 370 Mich 251, 256 (1963) (recognizing "the power of the police to search one lawfully arrested, for articles that may be used in evidence to prove *the charge on which the prisoner has been arrested*" (emphasis added)).

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heavy reliance on *Edwards*, see, e.g., Appellee's Supplemental Brief, p 23, 26, 27, 29, 30, is misplaced. The trial court found that Mr. Serges was arrested and held on an unrelated bench warrant for failure to appear. Appellee's Supplemental Brief, p 21. The government argues that this finding by the trial court was "based on objective court records" and therefore "cannot be clearly erroneous." Appellee's Supplemental Brief, p 21. Where Mr. Serges was arrested and held on an unrelated bench warrant, the police were not permitted to search his effects for evidence of murder.

Edwards was not the first or the last time the United States Supreme Court explained that the search-incident-to-arrest exception is justified by the need to secure evidence of the crime of arrest. For instance, nearly fifty years prior to *Edwards*, the United States Supreme Court observed that the police are permitted to "search the place where the arrest is made in order to find and seize things connected with *the crime* as its fruits or as the means by which *it* was committed, as well as weapons and other things to effect an escape from custody." *Agnello v United States,* 269 US 20, 30 (1925) (emphasis added). As another example, in 1964, the Court explained that the search-incident-to-arrest exception is justified by "the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of *the crime*." *Preston v United States*, 376 US 364, 367 (1964) (emphasis added).

In 2009, the United States Supreme Court reaffirmed:

> [A] search incident to arrest may only include the arrestee's person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding *any evidence of the offense of arrest* that an arrestee might conceal or destroy.

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Arizona v Gant, 556 US 332, 339 (2009) (quotation marks and citations omitted) (emphasis added), citing *Chimel v California,* 395 US 752, 763 (1969). Justice Breyer dissented in *Gant*, but shared the *Gant* majority's understanding of the limits on searches incident to arrest. In a parenthetical, he noted that a search incident to arrest "is justified by the need to prevent harm to a police officer or destruction of evidence of *the crime*." *Gant*, 556 US at 354 (Breyer, J., dissenting) (emphasis added).

The United States Supreme Court has never suggested, let alone held, that the search-incident-to-arrest exception permits searching for evidence of *any* criminal activity. The law in this area is clear: no specific exception means no warrantless search. Warrantless intrusions are per se unreasonable and the police conduct here did not fit within a "specifically established and well-delineated" exception to the warrant requirement. *Champion*, 452 Mich at 98. This Court applied the search-incident-to-arrest doctrine properly in *People v Trudeau*, 385 Mich 276 (1971), and *People v Carr*, 370 Mich 251 (1963): a search incident to arrest does not involve looking for evidence of other crimes.

In a single sentence, the government suggests that the good-faith exception to the exclusionary rule could apply here, citing *Davis v United States*, 564 US 229 (2011). Appellee's Supplemental Brief, p 38. In *Davis*, the United States Supreme Court held that evidence should not be excluded where "the police conduct a search in compliance with binding precedent that is later overruled." *Davis*, 564 US at 232. That did not happen here. Detective Freeman did not testify that he relied on any obsolete statute or caselaw. *Trudeau* and *Carr* were controlling when Freeman seized and searched Mr. Serges's effects. Those cases remain good law today.

No binding precedent authorizes the police to forensically search a person's effects for evidence of a crime unrelated to the offense of arrest. Nor does any binding precedent permit the police to arrest a person for murder without probable cause. The police conduct here flouted the established exceptions to the warrant requirement. *Davis* does not apply when an officer misunderstands or fails to apply the law.

Here, the Burton Police Department labeled Mr. Serges a "person of interest" based on a hunch. The officer in charge testified that he arrested Mr. Serges on "suspicion" of homicide—lacking probable cause. He confiscated Mr. Serges's property without authority and held it for nearly two months. His initial request to charge Mr. Serges with murder was denied. So he searched Mr. Serges's personal effects, without a warrant, and obtained the DNA evidence that gave him probable cause. Although he had ample time to seek a search warrant, he did not. This is precisely the type of case where the exclusionary rule must apply to deter unconstitutional police conduct.

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III. Trial counsel rendered ineffective assistance by failing to move to suppress the strongest evidence against Mr. Serges, which the police obtained by unconstitutionally seizing and searching Mr. Serges's pants.

Trial counsel performed deficiently

Trial counsel's failure to move to suppress was part of his overall pattern of objectively unreasonable performance. See Mr. Serges's Supplemental Brief, p 38-39. Trial counsel argued an accident theory that was not supported by any evidence. See, e.g., T III, 51, 54, 55; T VI, 144-149, 166-167. He brought a hammer and a piece of wood to trial, claiming that these items would be proper demonstrative evidence. T III, 4-6. Trial counsel did not call a witness who contradicted the prosecutor's theory and failed to address the prosecutor's misrepresentations. See Mr. Serges's Application for Leave to Appeal, p 46-52. And he did not consider moving to suppress the government's strongest evidence against Mr. Serges because he "assumed" it was admissible. EH, 9, 13. Once the damning DNA evidence came in, trial counsel argued that, if the prosecutor's theory were correct, there would be more blood on Mr. Serges's clothing. But trial counsel did not present any evidence to support his claim. Trial counsel's purportedly strategic decisions were in fact unsound, deficient performance. See *Kimmelman v Morrison,* 477 US 365, 386-387 (1986).

The government repeatedly mentions Mr. Serges's acquiescence to trial counsel's approach, as if this supports the conclusion that counsel's approach was reasonable. Appellee's Supplemental Brief, p 15-16, 42, 43. Trial counsel did not contemplate filing a motion to suppress and never presented suppression to Mr. Serges as an option. EH, 70. But see *Strickland v Washington,* 466 US 668, 680-681 (1984) ("informed legal choices can be made only after investigation of options" and, where there is more than one line of defense, counsel should investigate each substantially before deciding which to rely on at trial). Without complete information, Mr. Serges agreed with trial counsel's decision to 'embrace the pants.' EH, 66. Had trial counsel informed Mr. Serges that there was

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a basis to suppress the pants and the DNA evidence, one can only imagine Mr. Serges would have agreed with that sound strategy. After all, Mr. Serges heard the prosecutor repeatedly state that the pants were the strongest evidence against him. See, e.g., H 11/26/2018, 4; Trial 6/4/2019, 153-154. In any event, whether to file a motion to suppress is squarely within counsel's purview. Mr. Serges had neither the obligation nor the ability to identify the constitutional violations the police committed during their investigation. It was counsel's duty to spot these issues and file the proper motion.

Trial counsel's error prejudiced Mr. Serges

The police seized and searched Mr. Serges's pants without a warrant. "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *Champion*, 452 Mich at 98. The government cannot demonstrate that the government intrusions fall within any recognized exception. But for trial counsel's error, "the single most important [piece] of evidence", Trial 6/4/2019, 153-154, would have been suppressed.

Suppressing the strongest evidence against Mr. Serges creates a reasonable probability of a different result, i.e., "a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 US at 694. "No other reliable evidence linked [Mr. Serges] with this crime, either directly or circumstantially." *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 6. The first trial ended in a hung jury—even with the DNA evidence admitted.

The government argues that the remaining circumstantial evidence is enough to prove Mr. Serges guilty. Appellee's Supplemental Brief, p 42. The government lists several pieces of evidence it believes incriminate Mr. Serges. Many are dubious. The government notes that Mr. Serges "asked the person he stayed with for a month to shower on the Friday after Thanksgiving, which he had never done before." Appellee's Supplemental Brief, p 42. Gregory Barrett initially testified

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that Mr. Serges had not asked him to shower prior to Friday, November 24, 2017, then wavered and said Mr. Serges might have asked him to shower one other time. T IV, 118. The government also states that "the victim told her friend that she was not comfortable having a man she had do odd jobs around anymore and she was not going to give him more money." Appellee's Supplemental Brief, p 42. The victim's friend never identified this person as Mr. Serges. T IV, 21. In fact, she testified that she saw only the top of the man's head and he had "brown or dark brown" hair. T IV, 21. The jury would have been able to observe that Mr. Serges is balding, has very little hair on the top of his head, and the hair he has is gray.

The government repeatedly states that Mr. Serges was "untruthful" and "deceitful" when interrogated about his whereabouts surrounding the Thanksgiving holiday. Appellee's Supplemental Brief, p 7, 22, 42. The record does not establish that Mr. Serges intentionally lied to the police. Mr. Serges was transient and addicted to heroin. T VI, 53, 72-73.[4] Mr. Serges told Detective Freeman he had injected heroin 30 to 45 minutes before the interrogation began. T VI, 50. Detective Freeman chose to move forward with the interview. T VI, 50. Detective Freeman was not surprised that Mr. Serges could not remember his whereabouts, given his life circumstances. T VI, 53, 72-73.

Detective Freeman also testified that, while Mr. Serges was sitting alone in the interrogation room, he was "brushing the top of his legs off, which just based on my experience and my training. . . is a pretty good indicator of deception." T VI, 57. Mr. Serges challenged this testimony on appeal. See Mr. Serges's Application for Leave to Appeal, Issue II.

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[4] For a discussion of heroin's impact on memory, see, e.g., Mitrovic et al., *The Impact of Heroin on Visual Memory*, European Review for Medical and Pharmacological Sciences (May 2011) ("Memory is one of the cognitive functions which is highly sensitive to opiate toxic effects."), available at https://www.researchgate.net/profile/Sladjana-Martinovic-Mitrovic/publication/230646416_European_Review_for_Medical_and_Pharmacological_Sciences_The_impact_of_heroin_on_visual_memory/links/09e415025ff4c02840000000/European-Review-for-Medical-and-Pharmacological-Sciences-The-impact-of-heroin-on-visual-memory.pdf

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The prosecutor's claim that Mr. Serges was "untruthful" and "deceitful" is not strong or well-supported.

The remedy is a new trial where the evidence is suppressed

This Court must return Mr. Serges to the position he would have been in but for trial counsel's deficient performance. The remedy is a new trial where the fruits of the unconstitutional seizure and search are suppressed. *People v Hughes*, 339 Mich App 99, 116 (2021) (on remand from this Court, the Court of Appeals found that trial counsel was ineffective for failing to move to suppress, reversed Mr. Hughes's conviction, and remanded "for a new trial at which the fruits of the unconstitutional search may not be admitted.").

The government makes a novel, extralegal argument in the concluding paragraph of its supplemental brief. The government requests that, if this Court grants Mr. Serges relief and remands for a new trial, this Court nevertheless leave "the question of admissibility of Defendant's pants, and any evidence resulting from it (sic) . . . to the trial court and to allow police the opportunity to obtain a warrant to test Defendant's pants for the DNA of the victim." Appellee's Supplemental Brief, p 44. The government cites no authority to support its request. Elsewhere in its brief, the government acknowledges that "[t]he usual remedy if the police have seized evidence in violation of an accused's constitutional protections is to exclude that evidence from any prosecution of the accused." Appellee's Supplemental Brief, p 25.

The government's innovative approach would eliminate the exclusionary rule and replace it with a do-over rule. Controlling authority dictates the remedy here: suppression of Mr. Serges's pants and the evidence obtained from them. *Mapp v Ohio*, 367 US 643 (1961); *Wong Sun v United States*, 371 US 471, 488 (1963); *People v Marxhausen*, 204 Mich 559 (1919).

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Conclusion and Relief Requested

Mr. Serges respectfully requests that this Honorable Court reverse Mr. Serges's conviction and remand with instructions to suppress the evidence obtained through the seizure and search of Mr. Serges's pants.

Respectfully submitted,
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This Reply Brief contains 5,751 countable words. It is being filed with a motion to exceed the word limit.

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