MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

VI

The Essence of Brady
- Darcy Sherman
p. 5

Julie Jonas, Lifetime Achievement Award
- Shauna Kieffer
p. 10

Save the Date for Annual Dinner and Auction
p. 24

Marijuna in Minnesota: Past and Future - Noah M. Johnson
p. 29

MACDL Updates and Upcoming Events
p. 47

Jill A. Brisbois
Editor

Minnesota Association of Criminal Defense Lawyers
Publisher

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President, MACDL

Jill Oleisky
Executive Director, MACDL

VI Magazine is published by MACDL, a Minnesota nonprofit corporation. MACDL works to advance the advocacy skills of MACDL members, inspire and motivate aggressive, ethical, and effective defense for all accused, and connect the criminal defence community in Minnesota.

Articles express the opinion of the contributors and not necessarily that of VI Magazine or MACDL. Headlines and other material outside the body of articles are the responsibility of the Editor. VI Magazine accepts letters and unsolicited manuscripts about the practice of criminal defense or the trial of criminal cases.

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MACDL VI Magazine

Features

President's Corner
By Patrick Cotter 3

Editor's Column
By Jill Brisbois 4

The Essence of Brady
By Darcy Sherman 5

Dear MACDL Members
By Jill Oleisky 9

Julie Jonas, Lifetime Achievement Award
By Shauna Kieffer 10

Join a MACDL Committee 12

MACDL Board of Directors 2023 13

Marijuana in Minnesota: Past and Future
By Noah M. Johnson, Koch & Garvis, LLC 15

Sample Rule 901 Demand for Disclosure 20

Save the Date for our Annual Dinner & Auction! 24

Thank you to Outgoing Members 26

Torgerson Amicus Brief 29

Updates and Upcoming Events 47

President’s Column

Patrick Cotter

MACDL Members:

I have had the privilege of serving as your MACDL President this past year. Thank you for the honor to represent this remarkable group of professionals. During this past year, while the world around us continued to evolve and present us with new opportunities for growth, so did our organization. The examples of this are worth reflecting upon as I believe they have made our organization stronger.

We are grateful that one of our own, Jill Oleisky, was ready and willing to step into the role of executive director when the role became vacant. While undergoing this transition, our organization continued to expand its reach to its membership with the Google Group listserv. The forum has provided countless opportunities for our membership to learn, grow and share together. It also exposed our humanity and the struggles that can arise with free expression in a cyber space. We have worked to foster a space to share and learn while also respecting one another and our differences of opinion. That has not been easy but certainly valuable. We continue to grow stronger as a community of both private and public attorneys working toward our common mission. For as long as I have been involved in MACDL, we have wanted to bridge the gap between public defense and the private bar. We are now sharing more ideas and work product on the listserv. We collaborate regarding important Amicus issues and work at the Legislature. In September, we all came together and hosted a successful and sold-out annual dinner and celebration. We recognized some of the heroes amongst us and raised the critical money needed to support our mission and operate as a robust organization. As I stated at this event, the polarization we have seen in our society only highlights the critical work that criminal defense attorneys provide. We are collectively stronger than we are as individuals. We will continue to change and evolve as we champion our mission. I am proud to report that the state of this organization is strong. This year demonstrated that we are poised to take on challenges that lay ahead. Thank you for being a member and supporting MACDL. ■

MACDL 2022-2023 President Patrick Cotter, Executive Director Jill Oleisky, and 2023-2024 President David Valentini

Editor's Column

Jill Brisbois, The JAB Firm

It has been a year and half since our last issue, and the viability and vitality of *VI* has been debated among the MACDL Board at practically every meeting since that time. Each meeting we delayed getting an issue together or making a decision to end its run. The question that was repeatedly asked was: is the publication still relevant, considering the popularity of the Google Group of Friday round-up? The reality is that these two ways of communicating with the membership are far easier than convincing our members to volunteer their precious time to agree to write *and* finish articles.

Today, I was emailing with the longtime heart of the publication, Ryan Garry, about his time serving as the *VI* editor (formerly the Challenger). He made this comment about the *VI* "I know it's a dinosaur, but I wish it would keep going on."

Ultimately, we decided to keep the publication in an electronic form. It was started as a PDF and will no longer be sent out in print form. Maybe I will find someone that can put together the fancy emails with links that we receive from other bar organizations, maybe I won't. Nonetheless, the Board acknowledges how important well thought-out and intentional articles are to our profession. The interviews are how we get to know our members, rather than through funny quips on the Google Group. For example, during our last debate, someone brought up the issue of *VI* that contained closing arguments from over a dozen of our colleagues, and noted that they still keep it handy for reference. Read it. It is the Spring 2014 issue, which can be found on the MACDL website. In fact, if you have some spare time, go through all the old issues. It's worth it. Contained in those issues is a wealth of information, knowledge, and pictures of our friends enjoying the comradery of this

amazing group. I found this decade old picture of myself, Rebecca Waxse and Wolanda Shelton that I had no idea existed.

So, as we try to remaster the DNA of the *VI* dinosaur, we ask that you contribute your knowledge, expertise, time, and effort to make the new iteration of the *VI* a better model of the print version. ■

About Jill Brisbois

For more than 15 years, attorney Jill Brisbois has provided skillful, fearless representation to Twin Cities clients. She defends clients against a vast spectrum of charges, including sex crimes. Because the Minnesota State Bar Association has certified her in criminal defense, other attorneys throughout the state seek her counsel regarding criminal law, family law, personal injury and other civil matters.

The Essence of Brady

By Darcy Sherman

Darcy has been a public defender in Hennepin County for nearly ten years. She works in the conflicts unit, handling cases ranging from misdemeanors to murders. She is a magna cum laude graduate of the University of Minnesota Law School and a former Judicial Law Clerk in Hennepin County. She is also a union steward, representing her colleagues in Teamsters Local 320. Darcy has seen both Wilco and GWAR more than ten times.

Like all workplaces, the "normal" day-to-day activities in the public defender's office halted abruptly in March of 2020. With courts temporarily closed/reduced, my colleagues and I had the rarest of resources available to public defenders: time. Then came the murder of George Floyd, in circumstances we all recognized from countless body-worn camera, squad, and surveillance videos. When the Minnesota Attorney General prosecuted the four officers, I began reviewing the pleadings out of boredom, anger, and a morbid curiosity. In the extraordinary volume of pleadings from all sides, one motion stood out. The AG filed a *Spriegl* notice, citing misconduct from the officers' personnel files. While the public focused on the many violent incidents Derek Chauvin had been involved in, the truly astonishing disclosures was for Officer Tou Thao, as follows:

- In a 2012 incident, he wrote in a police report that he conducted a canvass for a suspect, and his supervisors determined that was a lie. He admitted to lying.
- In a second 2012 incident, he tried to manipulate a domestic violence victim to avoid having to create a domestic violence report, actions labeled "dishonest" by his supervisors. The day after, his Field Training Officer (FTO) reported that he frequently forgot details and "guesses and add things into his reports that are wrong."
- In a third incident, he lied to his FTO about avoiding responding to incidents that required a police response. The FTO found he "lacked candor."
- Weeks later, he again attempted to manipulate a domestic violence victim to avoid writing a report, which resulted in a complaint to Office of Police Conduct Review.

After these incidents, Officer Thao remained on patrol, participated in an unknown number of investigations and arrests, and this information was never disclosed to any defendant or defense counsel. Specific findings by MPD management that Thou repeatedly lied in police reports was hidden from view. Finally, we had definitive proof that constitutionally necessary information existed in police personnel records, and prosecutors were *not* providing it to the defense. We set out to develop a new strategy for *Brady* demands.

What is *Brady* Evidence?

When we talk about *Brady* materials, we are talking about a type of evidence the state must disclose in a criminal prosecution. *Brady v. Maryland* is the seminal case. 373 U.S. 83 (1963). *Brady* evidence can take many forms, but generally it's evidence that affects the credibility of a potential prosecution witness. The undisclosed evidence in *Brady* was a confession from the co-defendant. Brady admitted to his role in the crime but asked for leniency at sentencing because of his lesser role. Instead, he was sentenced to death. Justice Douglas held that "suppression by the prosecutor of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87. *Brady* is also important because it makes the good or bad faith of the prosecutor irrelevant. *Id.*

Many Supreme Court decisions came after *Brady*,

expanding and limiting its reach in different ways. Two cases are essential to understanding *Brady*'s reach. In *Kyles v. Whitley*, the office of infamously corrupt prosecutor Harry Connick, Sr., failed to disclose inconsistent statements of a cooperating witness, as well as the witness's own criminal conduct (including his link to another murder). 514 U.S. 419 (1995). They also failed to disclose a piece of physical evidence that discredited the state's theory of the case. The Court's *Kyles* decision builds off of *Brady* to hold that prosecutors have an affirmative duty to disclose evidence "favorable to the defendant" even if the defense doesn't request it. *Id.* at 432. It also imputes an affirmative duty on prosecutors to collect favorable evidence from anyone "acting on the government's behalf in the case." *Id.* at 437.

In *Giglio v. U.S.*, one prosecutor offered leniency to a witness. 405 U.S. 150 (1972). A second prosecutor tried the case and was unaware of the offer, which was consequently never disclosed to the defense. The witness's testimony was the only evidence linking Giglio to the crime. When cross-examined about whether he received a benefit from testifying, the witness lied and said no. The case was remanded because the credibility of the essential witness was central to the case. *Id.* at 154-55.

These cases provide wonderful language about the duties of a prosecutor, and the importance of a fair trial, and we should quote liberally from them. These cases lay out expectations for pretrial discovery; that anything relevant to either guilt or punishment, regardless of admissibility or privacy concerns, held by anyone acting on the government's behalf, must be disclosed. A prosecutor has an affirmative duty to seek such information, and cannot be protected by claiming she acted in good faith but failed to provide it. The information must be provided whether the defense asks for it or not.

Sadly, this is nowhere near the standard applied upon appeal.

The tension between rule and remedy at the appellate level is laid bare in *Strickler v. Greene*, where the Supreme Court found that even if a prosecutor violates their responsibilities under *Brady*, there is no "real" *Brady* violation unless the failure to disclose was so severe it created a "reasonable probability" that disclosure of the evidence would result in a different verdict. 527 U.S. 263, 281 (1999). Thus, to receive a remedy for a *Brady* violation, an appellant has to show favorable evidence was suppressed by the state, and that the failure to disclose the evidence prejudiced the defendant's case. *Id.* at 281-82. While Giglio had his case remanded due to a failure to disclose exculpatory evidence, the Court noted a new trial was not necessary when the undisclosed evidence was "possibly useful" but unlikely to change the verdict. An appellate court's review of a potential *Brady* violation is a mixed question of law and fact, reviewed de novo. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005)

There are some bright-line *Brady* violations that will get a case overturned in Minnesota. One is a prosecutor's failure to disclose a witness was incompetent under a 20.01 finding. *State v. Hunt*, 615 N.W.2d 294 (Minn. 2000).[1] Another is failure to disclose agreements made between prosecutors and cooperating codefendant. *State v. Burrell*, 697 N.W.2d 579, 604-05 (Minn. 2005). The failure to disclose a witness's extensive criminal history of crimes of dishonesty can result in a remand, if that witness's credibility is "of critical importance" to the state's case. *State v. Soriano-Clemente*, No. A08-1159, 2009 WL 2432052, at *3 (Minn. Ct. App. Aug. 11, 2009) But not if the defense was able to successfully impeach the witness with other evidence. *State v. Miller*, 754 N.W.2d 686, 706 (Minn. 2008). In a case involving a self-defense claim, failure to disclose evidence of the decedent's alias (and therefore, his prior murder

[1] The court also found that the confidential nature of the rule 20.01 report did not excuse the prosecutor's failure to disclose. *Id.* at 301.

an evidentiary hearing. *Gorman v. State*, 619 N.W.2d 802, 807 (Minn. Ct. App. 2000).

Brady and Rule 9

Under Rule 9.01 of the Minnesota Rules of Criminal Procedure, the prosecutor must disclose all matters in their possession and control that relate to the case. Minn. R. Crim. P. 9.01.[2] This standard is both broader and more narrow than *Brady*. It is broader in that it requires disclosure of anything that "relates to" the case but facially more narrow because it puts no affirmative duty on the prosecutor to obtain the information outside of "members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office" Minn. R. Crim. P. 9.01(7).[3]

At the trial court level, remedies for a violation of Rule 9 vary. The court is given wide latitude to fashion a remedy, which is frequently as minor as a continuance. *State v. Lindsay*, 284 N.W.2d 368, 373 (Minn. 1979). On appeal, the trial court is given great deference to its Rule 9 rulings, and a new trial will only be ordered if there is a clear abuse of discretion. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). But if the Rule 9 decision violates a defendant's constitutional rights and there is a "reasonable possibility" the error contributed to the conviction, reversal may be required. *See State v. Larson,* 389 N.W.2d 872, 875 (Minn.1986) (citing *Chapman v. California,* 386 U.S. 18, 24).

Brady and Ethics

A failure to disclose *Brady* material may also form the basis of discipline for a prosecutor. Disbarment is the appropriate remedy for a county attorney's systemic and specific failures to comply with his duties under *Brady*. *In re Pertler*, 948 N.W.2d 146, (Minn. 2020). Pertler failed to implement a *Brady* policy for police discipline records and failed to properly train his staff in their *Brady* duties, and he failed to disclose *Brady* evidence given to him by the local police chief, even to his own staff. As OLPR Director Susan Humiston wrote, Professional discipline is not punishment for the attorney, but rather is imposed to protect the public, protect the profession, and deter future misconduct by the lawyer and others. How can the purposes of discipline be served if serious misconduct is not met with serious discipline?

Prosecutorial Ethics: Part Two, Bench & B. Minn., November 2020, at 8, 8–9

Brady in Practice

Despite the fact that there is no requirement defense counsel request *Brady* data, we did develop a new demand that incorporated all of these legal standards. Using this multi-prong framework helps flag concerns with prosecutors' disclosures. If a prosecutor is citing to data only within their possession and control, they might be following Rule 9, but are violating *Kyles*. An admission that there are government files the prosecutor hasn't reviewed also indicates a *Kyles* violation. When a prosecutor refuses to turn over data because it is not "relevant" to the case, they are not fulfilling their obligation under Rule 9. A prosecutor who claims they don't have a *Brady* policy is setting their office up for an ethics violation.

Prosecutors will often rely on the Minnesota Data Practices Act to refuse to provide personnel records. This

2 The Minnesota Rules of Criminal Procedure are broader than the Federal Rules, which only require the prosecutor to turn over evidence that is "material to preparing the defense…" Fed. R. Crim. P. 16(a)(1)(e)(i).
3 Although, in rare circumstances, possession and control can extend even to proprietary data held by private companies, even when the company refuses to disclose the data to the prosecution. *State v. Crane*, 766 N.W.2d 68, 72 (Minn. Ct. App. 2009).

violates the court's inherent power under the separation of powers doctrine, and as a procedural decision, statute gives way to the rules. *See, e.g. State v Lindsey*, 32 N.W.2d 652, 659 (Minn. 2001); *State v. Breaux*, 620 N.W.326, 332 (Minn. Ct. App. 2001). Additionally, the Act allows for disclosure of non-public data pursuant to a court order. Minn. Stat. § 13.43.

Some judges and prosecutors will see *in camera* review as a useful tool. The problems are the same as we find in *Paradee* orders; namely, that the judge does not have a concrete idea of what will be helpful to the defense. A protective order should be sufficient to address any privacy concerns raised by the types of documents being disclosed. ■

Darcy with colleague and MACDL Board Member Laura Prahl.

Dear MACDL Membership:

The MACDL Board of Directors is seeking nominations of regular members interested in serving as a member of the Board. There are currently 3 vacancies that need to be filled.

The term of office is 3 years. Directors are expected to attend monthly Board meetings, take part in one committee meeting per month, and be actively involved in the governance ofMACDL. Please do not run if you are unable or unwilling to make the time commitment.

In order to submit your name as a candidate for election to the Board, you must meet the following eligibility requirements:

1. You must be a regular member ofMACDL in good standing.
2. You must have been a regular member of MACDL for at least three consecutive years.
3. Three regular members ofMACDL must nominate you (this can be done by email).
4. You must submit a short biographical statement and photo to be included with the election ballot.

Prior involvement on a MACDL committee is preferred, but not mandatory. Please submit materials to jill@macdl.legal by March 20, 2023 at 5 p.m.

The voting is open to all MACDL members. The election process will begin on Monday, March 27th and end on Friday, March 31st Those elected will begin their term of office at the annual board meeting in April.

Thank you,

Jill Oleisky

Executive Director -MACDL

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Julie Jonas, Lifetime Achievement Award

By Shauna Kieffer

We know as a society now you shouldn't comment on someone's looks- height, hair, whether they take up space or are mousy without it being a subjective judgment one should never have weighed in on. Objectively trying not to objectify, I'm going to do just that- Julie Jonas is electrifying. It could be her soul piercing eyes or her complete focus on you when you talk to her, but I think it's more likely that she's not afraid to hold those in power accountable while she pursues social justice. She's made it her life's work.

I met Julie Jonas when she was an adjunct professor. At the time she was also running the legal side of the Minnesota Innocence Project where she had been since 2003. Prior to that, she spent eight years as a public defender in Ramsey County. She recently accepted a fulltime professorship at the University of St. Thomas School of Law. Back when I met her, UST Law was a new building. The book bindings hadn't been cracked in the library, the chairs had barely been sat in. It was a place far too sterilized and stuffy for me not to second guess my decision to get a JD.
Enter Julie - she's a force to be reckoned with as seen by her success at the legislature in passing laws like the Imprisonment and Exoneration Remedies Act, legislation requiring law enforcement to use best practices in eyewitness identification procedures, and recently in tracking and regulating jailhouse informant testimony. Her class was about wrongful convictions: these are the statistics on wrongful convictions, here's how we can prevent them, and here's how we can fix what went wrong. Unlike many other professors in law school, she was on the ground, meeting with clients in prison, investigating claims of innocence, and litigating to secure their release. She showed us through her own work practical skills on how to make the world better.

The proof is in the pudding- after taking her class I won more than one motion for post-conviction relief. After a recent win, she emailed me for insight on to how it played out. My response was like that 90s commercial about the kid using drugs, "I learned it from watching you, dad [Jonas]." She's so humble she didn't recognize that I was part of the exponential brush fire her shared knowledge created and will continue to spread.

MACDL has dozens of incredibly exceptional attorneys who are qualified to receive its highest honor, the lifetime achievement award- but it was a unanimous vote for Jonas this year, and we couldn't be prouder to honor her.

Interview:

Who is YOUR inspiration?
Bryan Stevenson. I will be teaching criminal law for one of my courses next spring and plan to have the students read his work "Just Mercy."

What is your walk-on song?
She emailed me this after the interview and said it runs through

her head whenever she faces a challenge. She said it only works if you watch the video on youtube first. Try it:

https://www.youtube.com/watch?v=sJlu_xo79k8

What were some of your most pivotal moments in practice?

Aside from getting people out of prison, we had a hearing at the legislature where Mike Hansen and Koua Lee testified in support of passing legislation to compensate people who were wrongfully incarcerated. The legislators cried, grown men and women. Mike said that after the hearing, he got his first and only apology from anyone in government.

What do you think could make the system better/prevent wrongful convictions?

Fully funding public defense. This includes decreasing caseloads, pay parity, and fully funding experts and investigators. I'm writing a law review article currently about how shaken baby syndrome cases all come down to the experts. The State will get numerous doctors volunteering to testify, and to get just one doctor on the defense side is hard. Dr. Jon Plunkett, an expert I had used before he passed away, would say that "juries might not understand science - but they can count!"

Julie then told stories of the first moments of freedom for men she had helped free from prison. Listening to her felt like I was catching up with an old marine, a pirate, a miner- someone well lived. She took one of her clients to breakfast immediately after his release and he commented it was the first time he got to ordered eggs the way he wanted, and the first time eating them with a metal fork in decades. "Can you imagine?" she asked. And if you really do imagine so very many years of a system gone wrong, failing real life humans behind bars, and how hard you would have to fight for what many people would call a lost cause to get there, it's only then that you have entered Julie's world. "Terry took off his shoes to feel the grass barefoot, feel the grass- for the first time in eleven years!" Can you imagine? ■

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Join a MACDL Committee

Much of MACDL's work is done at the committee level. You do not need to be a member of the Board of Directors to help our organization and its mission by serving as either a chairperson or on the committee. In fact, we need your help. Below are our committees and a brief description of our work. Please contact the committee chair or our executive director if you are interested in volunteering your time.

- **Amicus Committee – Shauna Kieffer**
  - Review requests for amicus memorandums and advise the Board on whether the organization should petition the court to weigh in on an issue before the court.
  - Write or recruit writers for amicus briefs.
- **Annual Dinner – Chairperson David Valentini**
  - This is MACDL's biggest fundraiser that supports the work of the organization.
  - Plan the annual dinner which includes:
    - *Selecting the date and location*
    - *Coordinating with the vendors that assist with the dinner*
    - *Soliciting donations*
    - *Setting up before the event*
- **Clemency – JaneAnne Murray**
  - The Committee focuses on building the MACDL State Clemency Project which aims to recruit and train volunteer lawyers to represent clients seeking commutations and pardons before the Minnesota State Board of Pardons. The Committee will develop materials, run trainings, recruit volunteer lawyers, recruit volunteer advisory lawyers to assist the petition writers and identify candidates needing representation.
- **Communications – Chairperson Jill Brisbois**
  - VI
    - *Recruit writers for substantive articles*
    - *Assemble content for publication*
    - *Recruit advertisers*
    - *Work with content designer to assemble publication*
  - GoogleGroup
- **Continuing Legal Education – Chairperson needed, contact Shauna Kieffer if you are interested.**
  - Develop CLE and the MACDL Annual Seminar topics
  - Recruit speakers and presenters
  - Apply for CLE credits
- **Legislative/Policy – Chairpersons Ryan Else and Hannah Martin**
  - Participate in an annual roundtable discussion with members to get ideas for legislative agenda, then work to finalize that agenda with the lobbyists based on what they see as realistic.
  - During the legislative session which starts in January, spend an average of 3-5 hours a week in communication with lobbyists, negotiating with other stakeholders, meeting with lawmakers, and either testifying yourself or coordinating with MACDL members to testify
- **Membership - Chairpersons Laura Prahl and Andrew Garvis**
  - Organizing social events for the organization
  - MACDL Softball Team

MACDL BOARD OF DIRECTORS 2023

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Marijuana in Minnesota: Past and Future

Noah M. Johnson, Koch & Garvis, LLC

Noah is an associate attorney at Koch & Garvis, LLC, as well as an assistant public defender for felony cases in Scott County, and was the 2018 *Grassroots—Legalize Cannabis* candidate for Minnesota Attorney General.

With complete Democratic-Farmer-Labor (DFL) control of the Minnesota state government for the first time since the 2013–14 legislative session, the state appears poised to achieve a long-held goal of drug legalization activists, social justice reformers, hippies, and many defense attorneys (including yours truly) alike: the legalization of recreational possession and sale of the plant cannabis, also known in the United States as “marijuana.” According to a nonpartisan legislature-run poll of state fair attendees in August, 61.4% of Minnesotans support the legalization of recreational marijuana, up from 58.3% in the same poll in 2021, making the issue one of the relatively less divisive in the current state and national political landscape.

Indeed, nearly unique among political questions, marijuana legalization finds support across the political spectrum, from libertarians on the right, who believe it’s none of the government’s business what innocuous plant people possess, to progressives on the left, who recognize the moral harm that results from prohibition, particularly the racial and economic disparities in enforcement and sentencing. Perhaps by years’ end, if we of all political stripes can meet, as the musician Ben Harper would said, to “burn one down,” we can find open minds and common ground on more polarizing issues, too (well, at least more productively than we can when we all gather for drinks).

To appreciate how far we’ve come, let’s look to where we’ve been.

Marijuana was not always frowned upon in the United States. In the Revolutionary era, its cultivation was practically demanded by the British crown to help support the expense of colonialism, and land owners were entreated to grow acres of it. It was exported then and after the founding of the United States, used as a plentiful source of rope and fiber. George Washington raised it at his Mount Vernon estate. In the 19th century, the plant and the psychoactive effect of its constituent molecule, tetrahydrocannabinol (THC), were sold as medicine, often in the form of fluid extract, or “tincture,” and sometimes requiring a prescription. Following the tumult of the Mexican Revolution, beginning in 1910, Mexican refugees to the western and southwestern United States brought with them their habit of smoking marijuana in cigarette form to relax after long days of toil, and demand rose, ironically, during the short-lived and notoriously unsuccessful prohibition of alcohol in the United States. Later, competition between small farms and larger ones that were able to benefit from less expensive Mexican labor, combined with the lesser availability of work during the Great Depression, led to the demonization of Mexican immigrants and their culture, including the plant, which came to be referred to in American English by its Spanish name, marijuana, rather than its proper English name, cannabis, to further associate it with Mexican immigration.

Protectionist laws which targeted only imported marijuana began to develop, and evolved into a general condemnation of the plant itself. In 1930, the Federal Bureau of Narcotics was formed as a division of the Department of the Treasury, headed by the notorious Harry J. Anslinger, who believed that marijuana caused violence and interracial sexuality (in contrast to the

general consensus today that it causes peacefulness and the ordering of pizza). This sentiment in well known from propaganda films of the era like *Reefer Madness*. In 1937, the federal government effectively criminalized possession and sale of the plant nationally, with no exception for physicians' prescriptions, a move opposed by the American Medical Association (AMA). Sensationalist, yellow-journalist newspapers like those owned by magnate William

Randolph Hearst, Sr., amplified the supposed detriments of marijuana use, arguably in secret defense of the use of wood pulp by the newspaper industry from competition by cheaper hemp farming. Never totally rational, the federal prohibition of marijuana was ignored when the U.S. government encouraged the cultivation of hemp during World War II for supply reasons. In 1952, the U.S. government enacted mandatory 2–10-year sentences for first-time marijuana possession.

Perhaps in defiance of the government's attempt to control behavior, whether drug use, other "undesirable" lifestyles, or dissident literature, the use of the illegal drug gained popularity in the 1950s by the Beat Generation subculture, the forerunners of the hippie movement of the 1960s. These countercultures came to be associated with marijuana use, earning the plant further government wrath when the hippie movement converged with the anti-war activism which was generating negative publicity for the ill-conceived American war in Vietnam in the late 1960s.

When the U.S. Supreme Court struck down the 1937 ban in *Leary v. United States*, 395 U.S. 6 (1969), the U.S. government responded by passing the Controlled Substances Act, placing marijuana in Schedule I—among deadly heroin, as well as another favorite of the hippies, the likewise relatively harmless lysergic acid diethylamide (LSD)—as having high potential for abuse and no accepted medical use. Richard Nixon and later, further to the right, Ronald Reagan, stoked public fears of the drug against the backdrop of reaction to the 1960s counterculture, with Reagan presiding in the 1980s over the draconian changes to sentencing and other laws, including the death penalty for certain "drug kingpins," the definition of which now overlaps with the business of marijuana entrepreneurs.

Even so, marijuana activists pushed back beginning in the 1970s, with certain states reducing penalties for possession of small amounts. Minnesota did so in 1976. The National Association for the Reform of Marijuana Laws (NORML) aided in these efforts. Uniquely, Alaska's supreme court held in *Ravin v. State*, 537 P.2d 494 (Ak. 1975), that its state constitution's right to privacy protected the adult possession and use of small amounts of marijuana, a decision always at odds with federal policy and overridden by referendum in 1990. Even with federal prohibition firmly in place and expanding, certain major cities began to de- prioritize marijuana enforcement over the years, recognizing that the reality didn't reflect the propaganda. Then came 2012, when the first two states legalized marijuana—Colorado and Washington, followed since by 19 other states and Washington, DC. In 2013, the Obama administration issued the Cole Memorandum, recognizing the need for some form of federal permission for financial institutions to do business with legally incorporated marijuana sellers in states that had legalized. Despite campaigning in a position of apparent support of marijuana legalization, former president Donald Trump rescinded the Cole Memorandum, though that has had little practical effect in light of nearly half the country having legalized marijuana.

Minnesota long has had a strong community of marijuana activism, with dedicated supporters, consistent presence at major events like the state fair, and two political parties devoted to the issue. In the 2018 election, both of them, the Legal Marijuana Now and Grassroots—Legalize Cannabis parties, achieved enough statewide votes in at least one race each to become major political parties under state law, a label formerly applying only to the DFL and Republican parties. I was the latter's state attorney general candidate, and as a baby lawyer, garnered nearly 146,000 votes, or 5.71 percent of the total vote for attorney general. This is no credit to my political acumen, but rather to the strong support among Minnesotans for marijuana legalization, as evinced by that impressive turnout even after having

endorsed my opponent, Keith Ellison, after Ellison publicly announced his support for an end to prohibition. Ellison's narrow victory prevented the election of Republican Doug Wardlow, who surely would have opposed legalization, and whose Trumpist tendencies likely would have impeded the work of criminal defenders with regard to other subjects, as well. For example, Ellison has chosen not to appeal the expansion of reproductive rights in the state, while Wardlow surely would have taken a contrary position, despite his empty protestations during the 2018 campaign that *Roe v. Wade* was "settled law" (obviously—every law is "settled law" until it's changed), and done what he could to help make abortion a crime in Minnesota. Perhaps in some small way, this benign plant contributed to a larger landscape of justice.

Last year, Minnesota DFL lawmakers tricked Republicans in the legislature (who evidently do not feel the need to read legislation prior to voting on it) into legalizing certain low- THC marijuana products, effectively letting "the cat out of the bag." Now, with the surprise DFL victory in the state senate, and Democratic parties nationwide having reduced the threat to their vote counts by adopting the formerly fringe legalization position as their own, Minnesota's legislature is on track to make our state the 22nd to fully legalize the drug recreationally.

This is a victory not just in the obvious aspects, letting users enjoy marijuana in peace without threat of the weight of criminal law, including making felonies out of the possession of concentrates and vaporizer cartridges, which are produced legally and cause no trouble in states like California, Illinois and New York, but require the use of precious MINN. STAT. § 152.18 stays of adjudication in this state to keep clear the records of college students and others who are not frequent customers of criminal court.

More than that, legalization of marijuana will open a new frontier in Minnesota criminal law, requiring the re-litigation of long settled law here. For example, we all know that Minnesota precedent still allows the expansion of seizures and searches upon an officer's "detection" (real or contrived) of marijuana odor, since it arguably is prima facie evidence of a crime being committed. But once possession and use are legalized here, officers will be out of reach of that low-hanging fruit. After all, if a car smells like marijuana because its passenger smoked before hopping in, or the officer sees that there's marijuana in the vehicle, no crime has occurred, and the officer will need some other justification to intrude. Certainly, there will be some restrictions as to possession in motor vehicles, and the state additionally can benefit from the experiments of other states in just how to enforce marijuana DWI law. In its effects, the drug is very different from alcohol, as presence in the body does not indicate recent use, and even if it did, a frequent user may not be too intoxicated to drive after using marijuana all day, while a novice should avoid driving even after just a puff or two. A 2021 study supported by the National Institute of Justice, a federal agency, noted that "THC levels in biofluids were not reliable indictors of marijuana intoxication for their study participants." Rather than a set legal limit, like alcohol has and which some states which have legalized have done, we can take instruction from the warnings on many prescription medications: "Use care in operating vehicles or machinery until you become familiar with the effects of this drug." Of course, many medicines which carry that warning are available only by prescription, meaning Minnesota marijuana DWI law will have to blaze new trails.

As defense attorneys, we are all too familiar with situations such as a client with six or more criminal history points being caught with a vaporizer cartridge, making them presumptively bound for prison, and when you factor in the aspect that some of that criminal history and the enforcement of marijuana law is disproportionate in its effects on people of color and of lower socioeconomic status, we are at a point in our state history where we can have a real impact on the justice system as a whole.

While some prosecutors, mostly younger, are sympathetic to the plain truth that marijuana is no crime, no matter what the law says, it will be an uphill battle to forge new precedent, argue expungements, navigate the

stagnant federal marijuana legal landscape, and to make the human laws, to paraphrase James Anthony Froude, a more perfect copy of the eternal laws, so far as we can read them. It will be up to all of us—my esteemed colleagues in the Minnesota defense bar—to do it. ■

Noah with his colleague and MACDL 2023-2024 Vice President, Andy Garvis.

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State of Minnesota,
Plaintiff

vs.

____________________,
Defendant

DEFENDANT'S DEMAND FOR DISCLOSURE

TO: The Prosecuting Attorney in the above-entitled case.

PLEASE TAKE NOTICE, that pursuant to the Minn.R.Crim.P. 9.0.1, Defendant demands disclosure of and permission to inspect, reproduce or test any material or information not disclosed as follows:

1. Names and addresses of persons the State intends to call as witnesses.
2. NCIC and BCA printouts and any other record of charges and convictions for witnesses disclosed by the State.
3. Any of the following statements known to the prosecutor that relate to the case (whether or not the person who made the statement is listed as a witness):
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   b. Written summaries of oral statements;
   c. The substance of oral statements;
4. The name and addresses of the witnesses who testified before the grand jury, if any, in the case against the Defendant.
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9. Any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case.

   All results and reports of physical or mental examinations, scientific tests, experiments and comparisons made in connection with this case, including the entire BCA file regarding all laboratory examinations performed on all items of evidence submitted to the BCA's Forensic Science Laboratory (or the file of any other facility utilized by the State to examine any item of

evidence) and the entire BCA (or other facility's) file on all DNA profiling performed at said laboratory, including the computer disk record of said examinations and profiling.

YOU ARE FURTHER NOTIFIED, that the defense is hereby requesting the in-person testimony of all analysts who performed tests the results of which the State intends to introduce in evidence at trial in the above-entitled matter pursuant to Minnesota Statute § 634.15. Defendant is not waiving his right to cross-examine said analysts.

10. Defendant demands access to relevant material pertaining to the case to allow Defendant to have reasonable tests made. If a scientific test or experiment of any matter may preclude any further tests or experiments, Defendant demands reasonable notice and an opportunity to have a qualified expert observe the test or experiment performed by any prosecution agent.
11. The opinions of anyone who the State intends to call as an expert, the person's qualifications to render such opinions, and the underlying basis for his or her opinions.
12. NCIC and BCA printouts and any other record of charges and convictions of Defendant and of any defense witnesses.
13. Any material or information within the State's possession and control that tends to negate or reduce the guilt of the accused. Brady v. Maryland, 373 U.S.83, 87-88 (1963).
14. Written notice of other offenses the State intends to introduce at trial, i.e., Spreigl evidence pursuant to Minn.R.Crim.P. 7.02. State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167(1965); State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967).
15. Any evidence and identification procedures not previously disclosed pursuant to Minn.R.Crim.P. 7.01. Specifically:
    a. Evidence obtained as the result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping;
    b. Any confessions, admissions or statements in the nature of confessions made by Defendant;
    c. Any evidence against Defendant discovered as a result of confessions, admissions or statements in the nature of confessions made by Defendant;
    d. When in the investigation of the case against Defendant, any identification procedures were followed, including but not limited to lineups, showups or other observations of Defendant and the exhibition of photographs of Defendant or of any other persons;
16. Notices of existence and identity of any other material or information to which Defendant is entitled pursuant to the word or spirit of Minn.R.Crim.P. 9.01 or other Rule.
17. Jailhouse Witnesses. Pursuant to the Minn. Stat. 634.045 and the MN Rules of Criminal Procedure Rule 9, if using or contemplating the use of a jailhouse witness, the Defendant demands disclosure of the following:
    (1) the complete criminal history of the jailhouse witness, including any charges that are pending or were reduced or dismissed as part of a plea bargain;
    (2) any cooperation agreement with the jailhouse witness and any deal, promise, inducement, or benefit that the state has made or intends to make in the future to the jailhouse witness;

(3) whether, at any time, the jailhouse witness recanted any testimony or statement implicating the suspect or defendant in the charged crime and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;

(4) whether, at any time, the jailhouse witness made a statement implicating any other person in the charged crime and, if so, the time and place of the statement, the nature of the statement, and the names of the persons who were present at the statement; and

(5) any information concerning other criminal cases in which the jailhouse witness has testified, or offered to testify, against a suspect or defendant with whom the jailhouse witness was imprisoned or confined, including any cooperation agreement, deal, promise, inducement, or benefit that the state has made or intends to make in the future to the jailhouse witness that is within the possession of the county attorney's office where this case is being charged or prosecuted or is in the possession of the Minnesota Department of Corrections pursuant to Minn. Stat. 634.045 subd. 2.

Pursuant to Minn.R.Crim.P. 9.02, Subd. 2, Defendant hereby demands the State to promptly notify Defendant of any additional information, material or witnesses subject to disclosure discovered subsequent to the State's initial compliance with the rules of discovery.

All requests or demands made herein are pursuant to Minn.R.Crim.P. 9.03 and the holdings in State v. Lindsey, 284 N.W.2d 368 (Minn. 1979) and its progeny.

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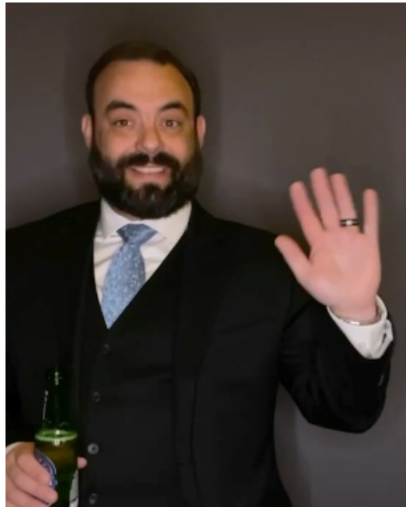
MACDL greatly appreciates the years of commitment, leadership, and contributions that Ryan Garry, Ryan Else and Dan Koehler have given. MACDL strength comes from those willing to give of their time and energies to promote the core mission of MACDL and their work and efforts have made MACDL stronger.

Ryan Garry is perhaps the longest serving MACDL board member. For over 10 years, Ryan Garry was the was editor of the *VI* publication. This involved writing and solicit articles from our members but also assembling the publication in a print format. The was an enormous amount of work and time. Ryan Garry is proud of the interviews that he did for the publication. One of his favorite interviews was with Judge Kate Menendez. The interview can be found in the Winter 2017 issue located under the Member Resources – VI Magazine tab. Ryan Garry went on to serve on our executive board and served as our President from 2021 through 2022. Ryan is pictured with his colleague Elizabeth Duel.

For the past seven years Ryan Else has been the chairperson of our legislative committee. This meant working with our lobbyists to advance favorable legislation and defend against the more extreme lobbying efforts of police and prosecutors. Each year, we hold an annual roundtable discussion with members to get ideas for legislative agenda, then work to finalize that agenda with the lobbyists based on what they see as realistic. During the legislative session which starts in January, Ryan Else would spend an average of 3-5 hours a week in communication with lobbyists, negotiating with other stakeholders, meeting with lawmakers, and either testifying yourself or coordinating with MACDL members to testify.

From Dan Koehler: Charlie Clippert approached me in 2012 and asked if I would like to take the reins as the chair of the amicus committee, and because it was Charlie, it was impossible to say no. In my time as chair MACDL filed approximately two dozen amicus briefs at the Minnesota Supreme Court. Many of those were on our own behalf, but as time went on, we partnered more and more with other like-minded organizations in filing joint briefs, often alongside the State Appellate Public Defender's Office. I wrote the lions share of our briefs, giving me an opportunity to learn more than I ever thought possible about a wide range of topics that needed MACDL's input: due process challenges to civil asset forfeiture, the retroactivity of our new sentencing reform laws, the standard for reviewing convictions based on circumstantial evidence, the scope of the common-law necessity defense,

and the scope of our new expungement law. We provided our guidance on the topic of what does (and does not) constitute third degree murder, when a warrant is required to obtain a blood, breath, or urine sample, and were respected enough that on occasion the Minnesota Supreme Court would specifically request that we provide a brief on topics where we had not even requested leave to participate!
It was a lot of fun, and a lot of work, and our amicus efforts continue to this day. MACDL's amicus efforts have assisted in many meaningful changes in the interpretation of our laws and our constitution, while giving interested members the opportunity for both amicus support in their own cases and the opportunity to draft an appellate brief in support of others. Our amicus committee has also forged a strong link between MACDL and the State Appellate Public Defender's Office, through collaboration on briefs, supporting the appellate cases of our members, and simply by making sure important issues did not escape our eyes.



Working as chair of the amicus committee for the past decade was incredibly fulfilling, and I would strongly urge any member with interest in appellate work to reach out to the amicus committee and let them know that they are willing and ready to step into the role as amicus author. And, as always, any member with an appeal issue that could use additional support should reach out for assistance – its one of the big ways that MACDL is able to help out its members! ■

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A22-0425

STATE OF MINNESOTA

SUPREME COURT

STATE OF MINNESOTA

Appellant,

vs.

Adam Lloyd Torgerson,

Respondent.

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TABLE OF CONTENTS

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTRODUCTION 1

ARGUMENTS 2

I. The smell of cannabis alone does not necessarily indicate criminality sufficient to justify a vehicle search. That which we call cannabis, by any other name would smell the same. 2

II. In other states the smell of cannabis is not considered probable cause to search a vehicle. 5

III. The smell of cannabis can be used as a pretext to search the vehicles of Black and East African people. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Constitutional Provisions

Minn. Const. Art. I, §10 4

Cases

Com. v. Overmyer, 469 Mass. 16, 11 N.E.3d 1054 (2014) 3, 6

Mapp v. Ohio, 367 U.S. 643 (1961) 7

Olmstead v. United States, 277 U.S. 438 (1928). 7

People v. Zuniga, 2016 CO 52, 372 P.3d 1052 6

Robinson v. State, 451 Md. 94, 152 A.3d 661 (2017) 5, 6

State v. Askerooth, 681 N.W.2d 353 (Minn. 2004) 4

State v. Burbach, 706 N.W. 2d 484 (Minn. 2005) 3, 4, 5

State v. Davis, 910 N.W.2d 50 (Minn. Ct. App. 2018) 8

State v. Fort, 660 N.W.2d 415 (Minn. 2003) 4

State v. Moore, 311 Or. App. 13, 488 P.3d 516 (2021) 6

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State v. Russell, 477 N.W.2d 886 (Minn. 1991) 8, 10

State v. Seckinger, 920 N.W.2d 963 (Neb. 2018) 5

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Statutes

Minn. Stat. §18K.02 subd. 3 2

Unpublished Decisions

Order, 27-CR-20-7960, *State v. Isaac Early*, Hennepin County District Court (Jan, 29, 2021) 9

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INTRODUCTION

The Minnesota Association of Criminal Defense Lawyers[1] ("MACDL") submits this brief in favor of Respondent. The Minnesota Association of Criminal Defense Lawyers is a non-profit state-wide organization of defense lawyers seeking to uphold Constitutional rights and ensure justice for all, particularly from unchecked power of the government against the rights of individuals.

The issue in this case is whether the warrantless search of a motor vehicle based on the smell of cannabis alone is unreasonable under Article 1, Section 10 of the Minnesota Constitution. The appellate and district courts correctly suppressed the search of a motor vehicle based on smell of marijuana alone—similar to the limits on searches based on the smell of alcohol. Cannabis is legal in Minnesota in small amounts as marijuana, and as hemp. There can be no dispute that neither a drug sniffing dog nor an officer can differentiate legal or illegal cannabis by smell alone.

Furthermore, expanded traffic stops based on the smell of marijuana alone are ripe for abuse by law enforcement as a pretext to search motor vehicles.

MACDL submits this brief in support of Respondent.

---

[1] Undersigned counsel are the sole authors of this brief and received no monetary contributions to the preparation or submission of this brief.

ARGUMENTS

I. The smell of cannabis alone does not necessarily indicate criminality sufficient to justify a vehicle search. That which we call cannabis, by any other name would smell the same.

Industrial hemp has been legal and defined as not marijuana in Minnesota by statute since July 1, 2019. Minn. Stat. §18K.02 subd. 3. Marijuana that is 5 milligrams or less of tetrahydrocannabinol (herein after "THC") recently became legal in Minnesota. Even drug sniffing dogs cannot distinguish between hemp and marijuana, nor the legal limit of THC, so how could a human? *See*, *e.g.,* Bill Bush, *Police dogs can't tell the difference between hemp and marijuana*, The Columbus Dispatch (Aug. 12, 2019); Peter Hermann and Justin Jouvenal, *Decriminalization of Marijuana is Pushing Pot-Sniffing Dogs into Retirement*, The Washington Post (July 4, 2021).

In its Amicus Curiae, the County Attorneys Association points out that of 2,017 people who were seriously injured or killed in 2022, 26.5% tested positive for some form of cannabis. They note that 26.3% of that same population tested positive for alcohol.[2] The numbers are virtually the same, and the crime of being a driver while intoxicated

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[2] Marijuana is arguably much less dangerous than alcohol, in that it can provide relief for certain medical conditions. For example: The State of Minnesota's Department of Health has a government operated website detailing what conditions are treatable with medical marijuana and how to obtain it. *See* https://www.health.state.mn.us/people/cannabis/patients/index.html. There are no medical benefits to alcohol, and there are no similar state operated websites enabling people to obtain access to alcohol. The State of Minnesota lists these conditions as treatable with prescribed marijuana: Alzheimer's disease, amyotrophic lateral sclerosis (ALS), autism spectrum disorder (must meet DSM-5), cancer, chronic motor or vocal tic disorder, chronic pain, glaucoma, HIV/AIDS, inflammatory bowel disease, including Crohn's disease, intractable pain, irritable bowel syndrome, obsessive-compulsive disorder, obstructive sleep apnea, post-traumatic stress disorder (PTSD), seizures, including those characteristic of epilepsy, severe and persistent muscle spasms, including those characteristic of multiple sclerosis (MS), sickle cell disease, terminal illness with a probable life expectancy of less than one year, and Tourette syndrome.

should be treated the same—but that is not the issue before the Court. The issue is whether the smell of cannabis, now legal in some forms and amounts, should be treated any differently than when an officer illegally searches a vehicle based on the smell of alcohol alone—it shouldn't.

In *State v. Parker*, the North Carolina Court of Appeals noted:

> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant.

State v. Parker, 860 S.E.2d 21, 28-29 (N.C. Ct. App. 2021) (not addressing the issue because there were other grounds for probable cause when a Defendant admitted he just smoked a joint and showed it to the officers).

In *Commonwealth v. Overmyer*, the Massachusetts Supreme Court also found that smell is too subjective in its nature to note quality, amount, or kind of cannabis:

> The officers in this case detected what they described as a "strong" or "very strong" smell of unburnt marijuana. However, such characterizations of odors as strong or weak are inherently subjective; what one person believes to be a powerful scent may fail to register as potently for another. Moreover, the strength of the odor perceived likely will depend on a range of other factors, such as ambient temperature, the presence of other fragrant substances, and the pungency of the specific strain of marijuana present. As a subjective and variable measure, the strength of a smell is thus at best a dubious means for reliably detecting the presence of a criminal amount of marijuana.

Com. v. Overmyer, 469 Mass. 16, 21-22, 11 N.E.3d 1054, 1059 (2014) (internal citations omitted).

The smell of alcohol alone does not justify a vehicle search. *State v. Burbach*, 706 N.W. 2d 484, 489 (Minn. 2005). It may be, coupled with behavior, reason to suspect

someone is driving under the influence of alcohol to the point it affects their ability to drive safely, at which point, an officer has a justifiable reason to investigate whether that person is intoxicated to the point of impairment. *Id*. The same should be true of cannabis.

The protections against unreasonable searches and seizures in Minnesota are broader than those under the Fourth Amendment to the U.S. Constitution. Minn. Const. Art. I, §10. The Minnesota Supreme Court has held that under Article I, Section 10 of the Minnesota Constitution “the scope and duration of a traffic stop investigation must be limited to the justification for the stop.” *Burbach*, 706 N.W.2d at 488; *State v. Fort,* 660 N.W.2d 415, 418 (Minn. 2003). In Minnesota, any “intrusion not closely related to the initial justification for the search or seizure is invalid . . . unless there is independent probable cause or reasonableness to justify that particular intrusion.” *State v. Askerooth,* 681 N.W.2d 353, 364 (Minn. 2004). Moreover, the basis for the intrusion must be “particularized” and “individualized to the driver.” *Askerooth,* 681 N.W.2d at 364; *Fort,* 660 N.W.2d at 418.

Any search of a vehicle must be justified by either (1) the original purpose of the stop; or (2) a “reasonable articulable suspicion of other criminal activity.” *Fort,* 660 N.W.2d at 419. To be “reasonable,” the intrusion must be supported by an objective and fair balancing of the government's need to search against the individual’s right to personal security. *Askerooth,* 681 N.W.2d at 364-65.

The Court of Appeals held that given the totality of the circumstances, the officers did not have probable cause to suspect that Mr. Torgerson’s vehicle would reveal evidence of a crime or contain contraband. *State v. Torgerson*, No. A22-0425, 2022 WL

6272042, at 2 (Minn. Ct. App. Oct. 10, 2022) (unpublished decision), *review granted* (Dec. 28, 2022).

The officers did not note any indica of impairment of Mr. Torgerson, but said they could smell marijuana, and that the smell alone was the reason for the vehicle search. *Id*.

In *Burbach*, the smell of alcohol alone, without other evidence of criminality, was held insufficient to justify the search of the car even for an open container:

> At best, these facts provide only an attenuated inference of an open container. To allow a vehicle search solely because an adult passenger smelled of alcohol would be to permit highly speculative searches against a large group of entirely law-abiding motorists, including designated drivers. Such a rule would not comport with the substantial privacy interest in motor vehicles that the Minnesota Constitution ensures.

Burbach, 706 N.W.2d at 489; *see also State v. Wiegand,* 645 N.W.2d 125, 131 (Minn. 2002). Under an individualized and particularized analysis of the totality of the circumstances here, the smell of cannabis alone cannot justify the infringement the substantial privacy interest in motor vehicles that the Minnesota Constitution ensures. *Wiegand*, 645 N.W.2d at 131.

II. In other states the smell of cannabis is not considered probable cause to search a vehicle.

The County Attorneys Association cites *State v. Seckinger* to say, "most state and federal courts agree that the odor of marijuana alone furnishes probable cause for the warrantless search of a vehicle." 920 N.W.2d 963, 970 (Neb. 2018); *Robinson v. State*, 451 Md. 94, 99, 152 A.3d 661, 667 (2017). The County Attorneys Association fails to note an important distinction in the rational by those lines of cases—*Robinson* held that

decriminalization of marijuana, the state of the law in Maryland, was not the same as legalization in its decision to allow for a vehicle search. 451 Md. At 99. In Massachusetts, the court held that decriminalization of marijuana meant that the odor of marijuana alone was not sufficient to permit the search of a vehicle. *Overmyer*, 469 Mass. at 20, *citing Commonwealth v. Cruz*, 459 Mass. 459 (2011).

In states like Minnesota, where marijuana is legal in some amounts, most state courts agree that the odor of marijuana alone does not establish probable cause to search a vehicle. *See, e.g., People v. Stribling*, No. 3-21-0098, 1-2 (Ill. App. Ct. 2022) appeal pending, (Jan. term 2023) (unpublished decision); *State v. Moore*, 311 Or. App. 13, 15, 488 P.3d 516, 518 (2021); *People v. Nguyen*, No. H049094, 2022 WL 16848402, at 1 (Cal. Ct. App. Nov. 10, 2022); *People v. Zuniga*, 2016 CO 52, 372 P.3d 1052.

The relatively recent national shift to legalize cannabis has created a rapidly evolving body of law on this issue. Minnesota, like Oregon and Colorado, should adopt the correct legal approach. Furthermore, protections against unreasonable searches and seizures are broader under the Minnesota Constitution than the Fourth Amendment. For these reasons, the lower court decision to suppress any evidence seized by an illegal search should be affirmed.

III. The smell of cannabis can be used as a pretext to search the vehicles of Black and East African people.

In 1961, the United States Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Justice Clark, in his opinion, quoted Justice Brandeis in *Olmstead v. United States*:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

277 U.S. 438, 485 (1928). (J. Brandeis, dissenting). Over the course of the next decade, the federal government would pass the Civil Rights Act (1964), the Voting Rights Act (1965) and the Fair Housing Act (1968). Throughout the country, there was civil unrest, and the judiciary and Congress recognized a need to level the playing field between the government and its people. In the summer of 1967, the City of Minneapolis saw rioting along Plymouth Avenue North, due to a boiling up of tensions between North Minneapolis residents and their government.[3] The riots brought about community involvement and educated white residents further of Black hardship within the city limits.[4] But in the decades to come, both the local government and federal landscape would see a shift back to favoring "law and order" and the declaration of the War on

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[3] Susan Marks, *July 1967 Civil Unrest on Plymouth Avenue*, Minnesota Post (July 24, 2017), retrieved from: https://www.minnpost.com/mnopedia/2017/07/july-1967-civil-unrest-plymouth-avenue/

[4] Laura Yuen, *When Flames of Racial Strife Engulfed a Minneapolis Street*, MPRNEWS (July 19, 2017). Retrieved at: https://www.mprnews.org/story/2017/07/19/minneapolis-plymouth-avenue-riots-anniversary

Drugs. Our state's judiciary would, once again, initiate protections for the most marginalized. In *State v. Russell*, the Court struck down laws that sought harsher punishment for the possession of crack cocaine than powder cocaine, and thus, disproportionately impacting Black Minnesotans. 477 N.W.2d 886 (Minn. 1991). When other branches of the government allow for unequal treatment under the law, it is the Court that has the power to protect them from their government's overreach.

Former police officer and now Minnesota Court of Appeals Judge Kevin Ross, wrote eloquently of the tension between policing while adhering to, and honoring, the Constitution:

> We appreciate that the people, through their legislature, have entrusted police with the difficult duty to find and remove [contraband] from [people] possessing [it]. We also recognize that hunch-based policing might sporadically and infrequently uncover contraband. In fact, we assume that an officer who stops enough people based only on conjecture will occasionally find someone who, like [defendant], apparently possesses evidence of a crime. But police officers are also entrusted with the higher duty to honor the constitutional rights of those they encounter … It is the court's duty to suppress evidence unconstitutionally obtained.

State v. Davis, 910 N.W.2d 50, 59-60 (Minn. Ct. App. 2018). Law enforcement stops and searches many drivers. Presumably, oftentimes they don't find evidence to arrest or cite their suspects. They don't have to write a report in those instances, so there is very little oversight of those encounters. In most cases, challenges to contacts between these police officers and residents don't occur until an attorney reviews the evidence. When evidence is recovered, then, the judiciary should examine these intrusions carefully and protect against unseen abuses largely impossible to challenge after they occur.

The smell of marijuana used as a pre-textual reason to expand a stop to a search of a vehicle is ripe for misuse. This is shown by the expansion of stops on over 1,000 Black and East African people in a one-year period in Minneapolis where their vehicle was searched but no citation or charge was issued. Certified data of all recorded Minneapolis Police Department ("MPD") traffic stops between June 1, 2019, and May 31, 2020 that involved Black or East African drivers who were stopped for a traffic violation and had their person or vehicle searched but did not receive a citation and were released under an "advised" or "all ok" disposition code (*i.e.,* a search occurred resulting from a traffic stop but no arrests were made or citations issued) shows that 1,130 traffic stops fit the described parameters. *See* Order, 27-CR-20-7960, *State v. Isaac Early*, Hennepin County District Court (Jan, 29, 2021).

It is a logical conclusion that because there was no additional crime found, regardless of the reason the officer listed for the further intrusion, that the reason given for the expansion of the stop was not legitimate. It is also shown in a nationwide study, analyzing 100 million police stops, that Black and Hispanic persons are stopped more frequently than their white counterparts, and that those stops that resulted in searches were less likely to reveal contraband:

> Our data shows that Black and Hispanic drivers are searched at higher rates, but those searches are less likely to find contraband, so the threshold test concludes that Black and Hispanic drivers are searched at lower thresholds, suggesting discrimination.

Emma Pierson, Barr says there's no systemic racism in policing. Our data says the attorney general is wrong, The Washington Port (June 20, 2020).

This was also shown by the Minnesota Department of Human Rights investigation into Minneapolis police which found that Minneapolis police engaged in race-based policing. Minnesota Department of Human Rights: Investigation into the City of Minneapolis and the Minneapolis Police Department, Findings issued April 27, 2022. The Minnesota Department of Human Rights met with community leaders, law enforcement in Minneapolis, people who had been charged with crimes, county attorneys and public defenders to gather information, and reviewed over 700 hours of body worn cameras and over 480,000 pages of city and Minneapolis Police Department documents before making its findings. *Id*. at page 6. The report cited as evidence of what it called the department's pattern of unlawful, discriminatory practices: racial disparities in how officers "use force, stop, search, arrest, and cite people of color, particularly Black individuals, compared to white individuals in similar circumstances." *Id*. at page 8.

In 1991, the Minnesota Supreme Court recognized that there was no rational basis to treat the illegal substances of crack cocaine and cocaine differently in sentencing. *Russell,* 477 N.W.2d at 891. While Mr. Torgerson is not in a protected class and not claiming any equal protection violation, his case will disproportionately affect Black and East African Minnesotans negatively as shown by data-based evidence if the Court were to reverse the appellate court decision. Therefore, the Court should hold that there is no basis to treat the legal substances of alcohol and cannabis differently when officers are seeking to expand a stop and search a motor vehicle.

CONCLUSION

Respondent respectfully requests that the Court affirm the suppression of the evidence found in an illegal expansion of a stop of a motor vehicle.

RESPECTFULLY SUBMITTED,

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Dated: This 8th day of February, 2023.

A22-0425

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Appellant,

Certificate of Brief Length

v.

Adam Lloyd Torgerson,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. App. P. 132.01, subd. 1 and 3, for a brief produced with proportional or monospaced font. The length of this brief is 3,763 words. This brief was prepared using Microsoft Word version 2301.

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Dated: This 8th day of February, 2023.

Updates and Upcoming Events

Currently the MACDL Amicus Committee is writing briefs in support of three cases:

State v. Torgerson, A-22-0425 “That which we call a cannabis, by any other name would smell the same.” Shakespeare just kidding it was MACDL, in our brief filed in support of *Torgerson* before the Minnesota Supreme Court. The brief is available as a courtesy copy at the district court level: 47-CR-21-606 and is included in this publication. The issue before the Court is whether the smell of cannabis alone is enough to expand a stop to a search of a vehicle. MACDL requested permission to address how this issue impacts pretextual stops based on race and did so in our brief. The State submitted its reply to Respondent’s brief Feb. 21, 2023. Appellant attorneys: Melvin Welch and Cathryn Middlebrook.

State v. Carbo, A-22-1823 Defendant raised alternate perpetrator in a detailed written motion and was denied the defense at trial for murder. Appellant Attorney: Adam Lozeau. Transcripts are still pending before appellant/respondent’s initial briefs due.

State v. McNeilly, A-22-0468 Defendant, an attorney, raised scope of warrant on a search of her files and electronics. Appellant’s attorney: Robert Richman.

Upcoming CLEs and Activities

March 15, 2023 Immigration 101 Happy Hour CLE, 4-6 PM at El Nuevo Morelos Restaurant, 360 Bernard Street W, West St. Paul, MN 55118

April 21, 2023 MACDL’s Annual Spring CLE at at La Dona Cerveceria Minneapolis

June 23, 2023 37th Annual MSCJ DWI Seminar at St. Paul Saints CHS Field

Registration for MACDL’s Softball Team will be coming soon! A kick off party will be held in May where all members will be welcome to celebrate the start of the season

September 30, 2023 MACDL’s Annual Dinner at Town and Country

Front row: Lizzy Karp; Allison Chadwick; Laura Prahl and Mike Millios

“2nd Row”: Mike Brandt; Justin Duffy; Dan Koewler; Ryan Pacgya; Jill Barreto; Chelsea Knutson; Saraswati Sing

Back Row: Ben Koll; Noah Johnson; Andy Garvis; Charlie Clippert; Vanessa Rybick and Paula Brummel