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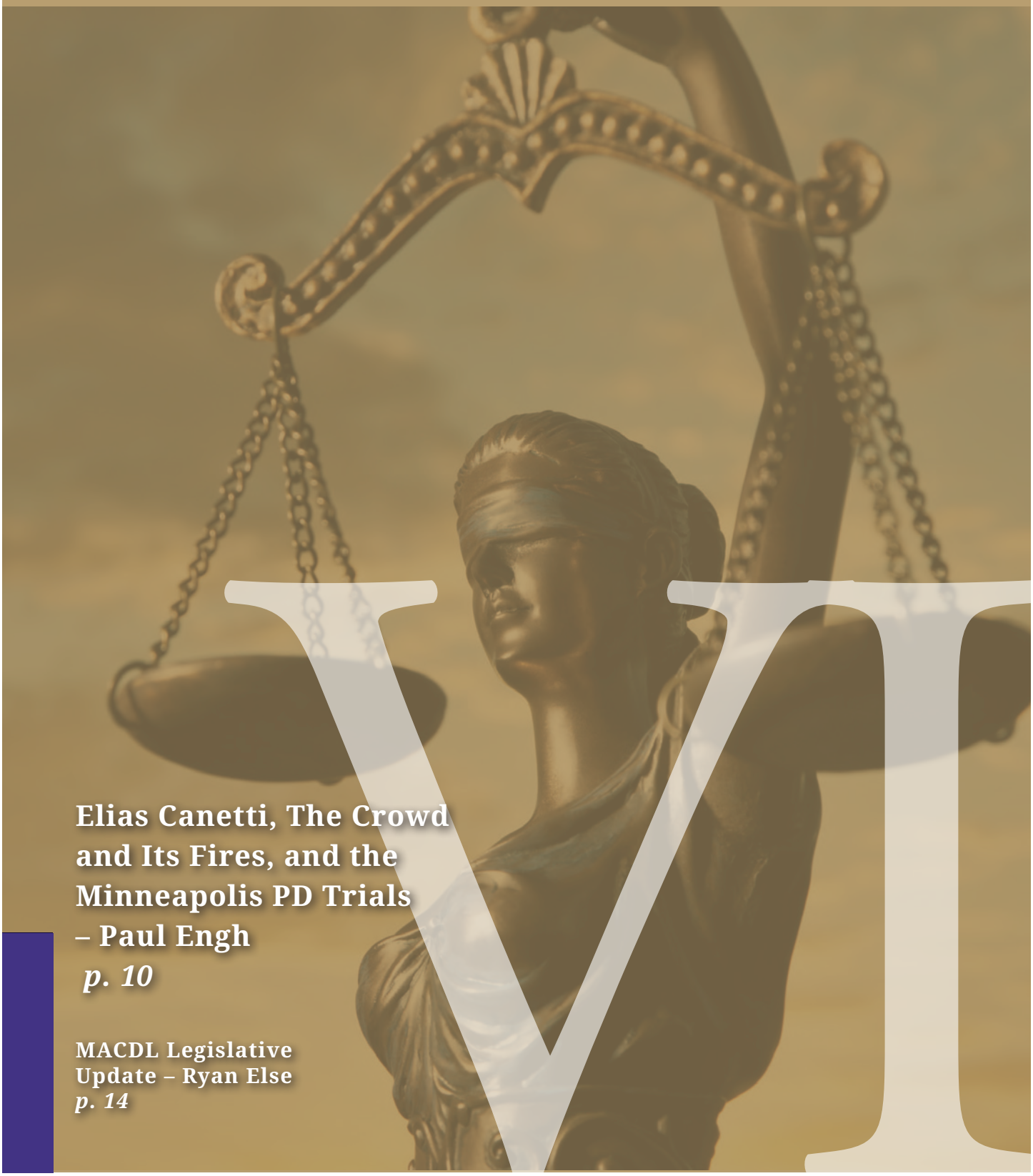

# VI

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**Stephen Foertsch**
Editor

**Minnesota Association of Criminal Defense Lawyers**
Publisher

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President, MACDL

**Piper Kenney Wold**
Executive Director, MACDL

**VI Magazine Committee**
Patrick L. Cotter
Dan Guerrero
Adam Johnson
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**Contact**
Stephen Foertsch, Attorney
Bruno Law, PLLC
4272 Dahlberg Drive
Golden Valley, MN 55422
(763)545-7900 (Office)
(651)246-2103 (Cell)
stephen@brunolaw.com

# MACDL VI Magazine

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# President's Column

*Andy Birrell*

2020 has been a very strange and challenging year to be a criminal defense lawyer. The COVID-19 pandemic and ensuing lockdown has had dramatic effects on the practice. After being on lockdown for several months, the court systems in Minnesota were strained. Despite a decreased number of charges, the backlog in criminal cases was increasing as cases were just not resolved. In the past few months, the court systems in Minnesota have opened up a bit, bringing new challenges to the practice of criminal law.

While the vast majority of court appearances are now conducted remotely by zoom, jury trials are resuming on a limited basis. Jury trials are now being conducted under altered circumstances designed to mitigate COVID-19 risks. The procedures being employed raise not just logistical problems but constitutional ones: we must all be attentive to protecting our clients' rights to speedy trial, public trial, confrontation, fair juror pools, and other rights. This is in addition to trying to win our clients' cases while protecting our and our clients' safety.

From speaking with my contacts around the country, it appears to me that Minnesota is a "leader" in getting cases back to trial. In many places there are no jury trials being conducted and the plan seems to be to keep it that way for a while. We need to continue to take an active role in making sure that the efficiency of the criminal justice system is not prioritized over the rights of our clients or the safety of everyone in the courthouse.

On that note, MACDL was approached about "helping" with the backlog of cases in the Minnesota State Court system by asking members to take new cases to alleviate this backlog. The board members are discussing this request. One of the ideas was to see if we could persuade the state court administrator to give us the same MNCIS access prosecutors and public defenders enjoy so we could adequately advise clients. This was a request made previously by MACDL folks and other private lawyers. So far, the request has not gone anywhere. MACDL is of course willing to help but this issue needs to be resolved first so we can provide adequate representation under these circumstances.

The board continues to meet via zoom. We are taking input from members and planning our next steps. Notably, we are hoping to put together a virtual CLE and are planning for the possibility that our annual event may be a virtual one. Hopefully, that will not be the case.

MACDL is here for you in these difficult times. As always please feel free to contact me directly with any MACDL questions or concerns you may have. ■

# Elias Canetti, The Crowd and Its Fires, and the Minneapolis PD Trials

*Paul Engh*

Vibrant just six months ago, downtown Minneapolis feels unsafe and defeated, as if it's decaying. Almost empty skyways patrolled by the homeless, the 200,000 daily commuters workers left at home, their offices sealed off. Once bustling restaurants, the plywood canyons. The cause of this ennui was at first COVID-19, but no longer.

What occurred on Lake Street and in Downtown in early June 2020 – the abject destruction without a commensurate offer by the arsonists and looters to replace the buildings and their businesses – is the same kind of horror described in Elias Canetti's *Crowds and Power* (Noonday 1960), still in print. His study provides an explanation of what happened in Minneapolis and St. Paul, and provides guidance as to how the MACDL should respond to the forthcoming trials.

Canetti, born in Bulgaria, won the Nobel Prize for Literature in 1981 in large part for *Crowds and Power*. The genesis of this masterpiece is described in his memoirs; he found his life's work in an instant:

> . . . I have never forgotten what happened that night. The illumination has remained present to me as a single instant; now, fifty-five years later, I still view it as something unexhausted.
>
> The illumination, which I recall so clearly, took place on Alserstrasse [in 1924-25]. It was night; in the sky, I noticed the red reflection of the city, and I craned my neck to look up at it. I paid no attention to where I was walking. I tripped several times, and in such an instant of stumbling, while craning my neck, gazing at the red sky, which I didn't really like, it suddenly flashed through my mind: I realized that there is such a thing as a crowd instinct, which is always in conflict with the personality instinct, and that the struggle between the two of them can explain the course of human history. This couldn't have been a new idea; but it was new to me, for it struck me with tremendous force. Everything now happening in the world would, it seemed to me, be traced back to that struggle. . . . The fact that there was something that forced people to become a crowd seemed obvious and irrefutable to me. The fact that the crowd fell apart into individuals was no less evident; likewise, the fact that these individuals wanted to become a crowd again. I had no doubt about the existence of the tendency to become a crowd and to become an individual again. These tendencies seemed so strong and so blind that I regarded them as an instinct, and labeled them one. However, I didn't know what the crowd itself really was. This was an enigma I now planned to solve; it seemed like the most crucial enigma, or at least the most important enigma, in our world.

[1] Keep in mind that knowledge of status is not the same as knowledge of prohibition. That is, all clients have to know after *Rehaif* is that they possessed a certain status (e.g., that they were convicted of a crime punishable by more than one year). *Rehaif* does not require that clients know they are prohibited from possessing a firearm based on this status.

*The Memoirs of Elias Canetti* (Farrar, Strauss and Giroux 1999), at 387-388.

How he went about describing and then attempting to resolve that "most crucial enigma" forms *Crowds and Power*, a book made up of over one-hundred chapters. In the course of 470 pages, Canetti traced the crowd throughout history, its formation and its central attributes which include density and the seeming, if temporary, equality of its members. *Id.* at p. 29.

Canetti focused on crowds *and* fire. "The dangerous traits of the crowd," he observed "the most striking is the propensity to incendiarism." *Id.* at 77. "Of all means of destruction the most impressive is fire. It can be seen from far off and it attracts ever more people. It destroys irrevocably; nothing after a fire is as it was before. A crowd setting fire to something feels irresistible; so long as the fire spreads, everyone will join it and everything hostile will be destroyed." Id, at p. 20. "The image of fire is like a scar, strongly marked, irremovable and precise." *Id.* at 76.

He could have been describing the recent tragedy of Minneapolis: "If we consider the several attributes of fire together we get a surprising picture," Canetti wrote. "Fire is the same whenever it breaks out; it spreads rapidly; it is contagious and insatiable; it can break out anywhere and with great suddenness; it is multiple; it is destructive; it had an enemy; it dies; it acts as though it were alive, and is so treated. All of this is true of the crowd." *Id.* at 77.

"The more life a thing has," Canetti added, "the less it can defend itself against fire; only minerals, the most lifeless of all substances, are a match for it. Its headlong ruthlessness knows no bounds; it wants to swallow up everything and is never sated." *Id.* at 76. "Moreover," writes Canetti, "the tendency of all human crowds to become more and more – the blind, reckless, dynamic movement which sacrifices everything to itself and which is always present in a gathering crowd – this tendency is *transferable*." *Id.* at 197 (emphasis added). Miles from the chaos on Lake Street, the police could not protect the IDS Center, the loci of Minnesota commerce, its street level windows smashed, the beginning of downtown's decline.

Canetti has not been forgotten, nor is his work considered an outlier. Here is Laszlo F. Foldenyi, from his recent collection of his essays, *Dostoyevsky Reads Hegel in Siberia and Bursts into Tears* (Yale University Press 2020): "In his book, *Crowds and Power*, Elias Canetti describes the discharge (Entadung) as the most important process that takes place within the crowd: The mass comes into being when every one of its members has been freed from differentiation and they all feel themselves to be uniform." *Id.* at p. 16.

There is a distinction still to be made today as to how the crowd is viewed by those who are not members. A crowd's violent conduct has not been defined, necessarily, by a higher nobility. Professor Foldenyi:

> For the mere fact of the existence of the crowd is threatening, the sight of it enthralling and frightening in equal measure. An atmosphere of unpredictability emanates from even the most orderly of masses. In terms of human beings, the word truly has revolutionary significance: the masses appear when universal order has temporarily been destroyed. The mass, although it wants to form a new order, creates chaos all around itself, which compels Hegel, in his lectures on the *Philosophy of Law* (written approximately a single generation after the French Revolution), to draw parallels between the masses and the mob (see Sec. 244).

*Id.* at p. 12.

When the crowd disperses, those who witnessed the fires and their destruction are not left unharmed. One byproduct of an incendiary mayhem is the deadened emotions of those who have not participated.

"Fear is the apprehension and experience of isolation," wrote Canetti. "It is one of the most universal human experiences that one in its grip feels isolated not only from the world but from his or her own self. It is not even possible to draw a sharp distinction between the two in the end. The essence

of fear is loneliness, of being left completely alone – let us just consider that one of the most frightening things is silence, muteness." *Id.* at 115.

The central feature of downtown Minneapolis today is the quiet. Those who were there in March and into June have left, many for good.

In the aftermath of the riots, store owners on Lake Street and University Avenue would like to know this much: why were those who looted and burned their businesses entitled to punish the faultless? Who has come forward and said, 'Let me pay you back?' No one who took hammers to windows, or threw the Molotov cocktails into once prosperous restaurants, a grocery store, a Target, a police station. The more immediate question posed by the innocent, then, is why was nothing done to protect the value of their properties.

The Minneapolis crowd and its riot may have been a reflection of our already diminished social order. "To many, the damage was an understandable response to years of injustice at the hands of the Minneapolis police, an explosion of anger that activists had warned was coming if the city did not reform law enforcement." Farah Stockman, "Minneapolis 'Lost Control,' and the City Burned," *New York Times,* July 4, 2020.

And it may well be, noted Attorney General Keith Ellison, that a "riot is the way the unheard get heard." CNN Transcript of 5.29.2020 Interview. But who were they, the voiceless, those who watched their life's work end in smoke? They were ones put on hold when dialing 911, receiving no response.

Whether the four Minneapolis Police Officers committed crimes against George Floyd will be decided next year, at a forum far away from the vacant lots of Lake Street, symbols now of anarchy and its twin, nihilism. As Canetti observed almost one-hundred years ago, there is such a thing today known as a "crowd instinct," which has denied already due process to hundreds of property owners by burning their buildings, and it is the same crowd instinct that calls out for convictions of these officers before a trial ever takes place.

What does all of this have to do with the MACDL? We are not prosecutors representing the victims our clients have allegedly harmed. Our function is to uphold and advocate to the community, through legislation and trial, the accused individual's right to be treated fairly, to receive due process. A goal that has never been limned by situational preference.

Our collective wish always must be that jurors, despite the adverse publicity of a particular case or its characteristics, presume innocence and with that presumption in force decide whether there is evidence beyond a reasonable doubt presented of the crimes charged. To that end, may the jurors for the Minneapolis Police Officers reach a just verdict free from the influence of the crowd and its instinct to deny due process to anyone or anything in disagreement.

Our purpose as an organization is aligned with the Minneapolis Police Officers' right to a fair trial. That the officers receive unfettered and zealous representation. Which may not be a popular position to take, but it is the reason why MACDL exists. ■

## *About Paul Engh*

Paul has practiced criminal law since 1981.

# MACDL Legislative Update

*Ryan Else*

MACDL went into the 2020 Legislative Session with an ambitious agenda to pass four major reforms: (1) a five year cap on probation, (2) the Veterans Restorative Justice Act (VRJA), (3) civil asset forfeiture reform, and (4) amendment of the small amount of marijuana definition to remove the exception for resinous forms. Each of these except the small amount of marijuana definition were the product of years of negotiations with other criminal justice stakeholders such as the Chief Public Defender, Bill Ward, and the Minnesota County Attorneys Association (MCAA).

These bills were drafted through working groups that negotiated the goals and language of the bills before presenting them to legislators rather than each stakeholder presenting conflicting bills that then need to be reconciled by the lawmakers in committee. This has become a healthy trend in lawmaking as it allows the subject matter experts to privately negotiate the problem and solution prior to presenting it as a consensus solution to the legislature. These working groups also provide an opportunity for members to be involved in the legislative process.

Our lobbyists from Hylden Advocacy, who have been excellent advocates and advisors to MACDL, were optimistic that 2020 would be the year these carefully tended trees would bear fruit. However, just as most of our hopes for 2020, finalizing these bills was delayed by the COVID-19 shutdown.

Only the VRJA has be granted hearings during the monthly special sessions during the shutdown, largely because it has become a political signal of lawmakers' support of veterans in an election year due to the vigorous advocacy of the VFW and American Legion membership. It has now passed separately in both the House and Senate. Our lobbyists anticipate the VRJA will pass in mid-October and become law in Spring 2021. This bill will standardize sentencing in existing veterans courts and allow a veterans court-like approach in courts that do not have a formal specialty court. It will direct the court to grant a stay of adjudication for offenses that are severity level 7 or less and serve as grounds for a dispositional departure in more severe cases.

Probation reform and forfeiture reform should be well-positioned to pass in 2021 Session, as both still have wide support among most criminal justice stakeholders. The Marijuana definition will be revisited at that time as well but may be a moot issue if marijuana legalization becomes a reality as many lawmakers expect.

The other big legislative issue that has been before MACDL in 2020 was the police reforms in the wake of the George Floyd killing. In early June, MACDL was approached by lawmakers for our input on a package of police reforms from use of force standards to body camera requirements. The laws that passed and our stance has been made public, but what was not so public was the vast work that came together for MACDL to respond in a timely fashion to this large package of proposals. MACDL should be immensely proud of how quickly and diligently members mobilized to present opinions and proposed revisions to seven different statutes spanning hundreds of pages. In less than a week, we drafted, revised, and presented through our lobbyists a very coherent package of objections and suggestions, improving the law for our clients and the public.

This type of active member involvement in the legislative process is critical and rewarding. It is critical because we are the subject matter experts in how criminal justice laws effect the individual parties and without our input the system will continue to be shaped solely by law enforcement interests. Rewarding in that we get to shape the legal terrain on which we will fight on behalf of our clients, leading to more just results in a system that often denies justice. If this sounds appealing, please get in touch with our legislative committee to join a legislative working group or assist with testimony or advocacy. ■

## *About Ryan Else*

Ryan Else is an attorney for the Law Office of Brockton D. Hunter, PA, Legislative Chair for MACDL, and Policy Attorney for The Veterans Defense Project. He is a proud father, husband, veteran, and criminal defense lawyer.

# CRIMINAL CASE NOTES

*Samantha Foertsch, Bruno Law, PLLC*
*Stephen Foertsch, Bruno Law, PLLC*

## EVIDENCE

### IMPEACHMENT EVIDENCE IS MISUSED IF THE PARTY WHO CALLED A WITNESS WAS AWARE THE WITNESS WOULD RECANT BEFORE THE WITNESS TOOK THE STAND

Appellant was convicted of aiding and abetting second-degree murder, attempted murder, and assault, charges which arose from a gang-related drive-by shooting from a car driven by Appellant. At trial, J.G., Appellant's cell mate, testified. J.G. previously told investigators Appellant knew the shooting would take place and had given J.G. a letter stating the opposite for J.G. to give to police as his own writing. J.G. gave that letter and a second letter, written by J.G. on Appellant's behalf and consistent with the first letter, to the investigator. J.G. also told investigators he witnessed an argument between Appellant and the shooter after the shooting, during which Appellant yelled at the shooter because he was supposed to get out of the car before shooting. At trial, however, J.G. denied making these statements and testified he had not met Appellant before they shared a jail cell. Over the defense's objection, the district court permitted the State to continue questioning J.G. to elicit what the court characterized as "proper impeachment evidence." The investigator who J.G. spoke to testified about J.G.'s statements and the letters J.G. gave to the investigator were also admitted into evidence. The jury was instructed that J.G.'s testimony was impeachment, not substantive, evidence, and that the content of the letters was to be used to ascertain the author of the first letter. Appellant appeals from the denial of his postconviction petition, arguing the state violated *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978), which precludes calling a witness for the sole purpose of impeaching the witness. The parties agree the State did not know J.G. would recant his statements to police when called to testify, but Appellant argues the district court should have stopped questioning of J.G. once it was clear J.G. had chosen to recant.

The Court of Appeals concludes that no *Dexter* violation occurred. The court holds that a *Dexter* violation occurs only if the witness signifies an intent to recant prior to taking the stand. Here, there is no indication the State was aware J.G. would recant or called J.G. for the sole purpose of impeaching him. The appellate courts have not extended *Dexter* to include situations in which a party's witness does recant at trial but is still questioned thereafter, and the Court of Appeals declines to do so. Thus, the district court did not err by allowing the State to continue questioning J.G. after his recantation.

The court also finds that J.G.'s prior inconsistent statements to police were not given under oath and, therefore, were not admissible as substantive evidence. However, Minn. R. Ev*Id.* 607 permits their admission for impeachment purposes only. The court agrees with the postconviction court that J.G.'s out-of-court statements were admitted for impeachment, rather than substantive, purposes. The court also affirms the postconviction court's admission of the first letter J.G. gave to police for the jury to use in ascertaining who wrote the letter. The letter was authenticated and relevant, and the jury was instructed not to use the contents of the letter as substantive evidence.

The court also concludes that State misstated the law

regarding the presumption of innocence, but that Appellant's substantial rights were not affected. The court then rejects Appellant's arguments regarding the improper admission of other evidence and the exclusion of the testimony of two defense witnesses, finding the postconviction court did not abuse its discretion. The denial of Appellant's postconviction petition is affirmed. *Moore V. State*, A19-1522, 2020 WL 2517081 (Minn. Ct. App. May 18, 2020).

## DWI

### *MISSOURI V. MCNEELY* APPLIES RETROACTIVELY TO CHALLENGES OF FINAL CONVICTIONS FOR TEST REFUSAL UNDER *BIRCHFIELD V. NORTH DAKOTA*

In 2011, after crashing his vehicle into a median, Appellant was taken to the hospital, where police asked him to submit to a blood or urine test. Appellant refused and ultimately pleaded guilty to third-degree test refusal. In his 2017 postconviction petition, Appellant argued his conviction was unconstitutional under *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), because it was based on his refusal to submit to a warrantless blood or urine test in the absence of an exception to the warrant requirement. The district court denied Appellant's petition and he appealed, but his appeal was stayed pending the Minnesota Supreme Court's decision in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018). In *Johnson*, the court held *Birchfield* announced a substantive rule that applies retroactively to convictions that were final before the rule was announced. However, the district court was left to determine whether a warrant or an exception to the warrant requirement existed at the time of the test refusal. The district court found that the per se exigent circumstances exception (based on the dissipation of alcohol) applied and that, although this exception was invalidated in *Missouri V. McNeely*, 569 U.S. 141 (2013), *McNeely* does not apply retroactively.

The Court of Appeals finds that, in the test refusal context, *McNeely*'s rule is substantive and should be applied retroactively. "[T]he requirement that law enforcement secure a warrant or establish an exception to the warrant requirement has a critical 'bearing on the accuracy of the underlying determination of guilt," and the driver cannot be convicted of test refusal "[w]ithout constitutional justification for the blood or urine test."

The State acknowledged no warrant existed for the requested blood or urine tests, but asserted the per se exigency exception applied. However, because the Court of Appeal concludes here that the per se exigency exception does not apply to Appellant's case, the district court erred in concluding that an exception to the warrant requirement applied. Thus, Appellant's conviction was unconstitutional and is reversed. *Hagerman v. State*, No. A19-1526, 2020 WL 2828783 (Minn. Ct. App. June 1, 2020).

## HARASSMENT RESTRAINING ORDER

### VIOLATION OF A HARASSMENT RESTRAINING ORDER REQUIRES PROOF OF KNOWLEDGE OF FACTS THAT WOULD CAUSE DEFENDANT TO BE IN VIOLATION OF ORDER

Appellant was prohibited by a harassment restraining order (HRO) from having contact with M.L.B. or from being within 100 feet of her residence, but her address was not disclosed in the HRO. He was convicted of violating the HRO after walking within 100 feet of M.L.B.'s apartment building. Before the district court and on appeal, Appellant argued the State did not prove Appellant knew the location of Appellant's residence. The district court found him guilty but specifically found credible his explanation that he was walking in the area of M.L.B.'s apartment for the purpose of going to lunch and that the State did not prove beyond a reasonable doubt that Appellant had notice or knowledge of the location of M.L.B.'s residence.

Knowledge of the location from which a defendant is prohibited from being is not required by Minn. Stat. § 609.748, subd. 6(a), (b). However, the general common law

rule is that proof of mens rea is required unless one of two exceptions apply: (1) the statute clearly sets forth a strict liability offense, or (2) the statute creates a "public welfare offense."

Section 609.748, subd. 6, is void of any language concerning mens rea, including any language clearly evidencing the legislature's intent to dispense with mens rea. Thus, the first exception to the common law mens rea rule does not apply.

As to the second exception, Minnesota's appellate courts "have recognized that certain crimes arising from regulatory schemes fall within the 'public welfare' or 'regulatory' category," such as keeping an unopen bottle of liquor in an automobile, DWI, serving alcohol to a minor, failing to provide proof of vehicle insurance, etc. Section 609.748, subdivision 6, is neither regulatory nor concerned with public welfare, but is, instead, concerned with physical or sexual assault and repeated incidents of intrusive or unwanted acts, words, or gestures. Thus, the court holds it is not a public welfare offense.

As neither exception to the common law rule that proof of mens rea is required applies, a conviction under 609.748, subd. 6, requires proof that the defendant had knowledge of the facts that would lead him or her to her to be in violation of an HRO. In this case, those facts included M.L.B.'s address. The record shows the State failed to meet this burden, and, therefore, the evidence is insufficient to sustain Appellant's conviction. *State v. Andersen*, No. A19-0923, 2020 WL 3041277 (Minn. Ct. App. June 8, 2020).

## PROCEDURE

### DEFENSE COUNSEL'S CONCESSION OF SOME OF THE ELEMENTS OF THE CRIMES IS NOT A CONCESSION OF GUILT WARRANTING A NEW TRIAL

Respondent, a 26-year-old, was charged with first- and third-degree criminal sexual conduct for sexually penetrating a 12-year-old and a 13-year-old. Evidence presented at trial included DNA evidence, cell phone records showing communications between Respondent and the two victims and videos of one of the assaults, and statements from the victims identifying Respondent. In written arguments to the district court following a bench trial, defense counsel conceded the victims' ages, Respondent's age, the age differential between the parties, and venue in Steele County. The district court found Respondent guilty on both counts, making specific findings as to the parties' ages, the age differential, and the county of the crimes. The Court of Appeals reversed on the grounds of ineffective assistance of counsel, finding that defense counsel's concessions of elements of the crimes conceded guilt without Respondent's consent or acquiescence.

The Minnesota Supreme Court reversed the Court of Appeals. Where ineffective assistance of counsel based on counsel's concession of guilt without the client's consent or acquiescence is claimed, a new trial is warranted without a showing of prejudice. That is, if such an improper concession was made, counsel's performance is considered deficient and prejudice is presumed.

Here, however, Respondent's counsel conceded various *elements* of the offense, not Respondent's *guilt*. While an analysis of whether guilt was conceded necessarily requires an analysis of whether elements have been conceded, the court clarifies that an uncontested-to concession on any single element does not necessarily amount to a concession of guilt. On the other hand, a concession on each and every element of the crime is not necessarily required. In this case, counsel conceded fewer than all of the elements of the offenses against Respondent, and the elements conceded were undisputed at trial. Counsel never conceded the highly contested question of whether Respondent sexually penetrated either victim. Thus, Respondent's trial counsel was not ineffective and a new trial is not warranted. *State v. Huisman*, 944 N.W.2d 464 (Minn. June 10, 2020).

## TRAFFIC VIOLATIONS

### LAWUL BASIS FOR A VIOLATION OF FAILURE TO MAKE A COMPLETE STOP BEFORE ENTERING INTERSECTION EXISTS WHEN A DRIVER

### DRIVES PAST STOP LINE OR STOP SIGN BEFORE COMING TO A COMPLETE STOP

Appellant was pulled over for failing to come to a complete stop before a white stop line at a stop sign. Based on Appellant's lack of physical identification and his answers to the officer's questions, the officer asked and was permitted to search Appellant's vehicle. The officer found blank checks, a printer, a computer, and several identification cards for various individuals. Appellant was charged with forgery and giving a false name to a peace officer. The district court found the stop unlawful and suppressed the evidence seized from the vehicle, but the Court of Appeals reversed.

Section 169.30(b) requires every driver of a vehicle to "stop at a stop sign or at a clearly marked stop line before entering the intersection…" The question is whether the statute required Appellant to completely stop before the vehicle crossed the stop line or near the stop line.

The legislature defines "stop" in section 169.011, subd. 79, which, when applied to section 169.30(b), means a vehicle must make a complete cessation from movement "at" a stop sign or stop line. "At," however, is not defined. The court looks to the dictionary definition of "at," "expressing location or arrival in a *particular* place or position," as well as the common usage of "stop at" in the context of traffic control. Stop lines and stop signs are signals specifying a precise place or position at which a driver must stop to maintain traffic control and safety. Thus, under the plain meaning of the statute, the court holds that section 169.30(b) is violated when the driver of a vehicle drives past the stop sign or stop line before coming to a complete stop.

The parties do not dispute, and the record demonstrates, that Appellant failed to bring his vehicle to a complete stop before driving his vehicle past the stop line and stop sign. Therefore, the officer's traffic stop was lawful and the district court erred in suppressing evidence seized from Appellant's vehicle. *State v. Gibson*, 945 N.W.2d 855 (Minn. July 8, 2020).

## JUVENILE

### DELINQUENCY ADJUDICATION OR FELONY OFFENSES LISTED IN MINN. STAT. § 624.712, SUBD. 5, ARE "FELONY CONVICTIONS" FOR DETERMINING IF AN OFFENSE IS "CRIME OF VIOLENCE"

As an adult, Appellant was charged with possession of a firearm by an ineligible person, based on a prior fifth-degree controlled substance possession juvenile delinquency adjudication. He pleaded guilty to the firearm offense. His postconviction petition, which was denied by both the district court and Court of Appeals, argues that the fifth-degree controlled substance juvenile delinquency adjudication does not qualify as a crime of violence, because a delinquency adjudication cannot be deemed a conviction of crime under Minn. Stat. § 260B.245.

Possession of a firearm by an ineligible person requires proof that the defendant "has been convicted of, or adjudicated delinquent… for committing… a crime of violence." Minn. Stat. § 624.713, subd. 1(2). The definition of "crime of violence" includes felony convictions of chapter 152 (drugs, controlled substances). Minn. Stat. § 624.712, subd. 5. Section 260B.245, subd. 1(a), states that juvenile delinquency adjudications shall not "be deemed a conviction of crime." However, section 260B.245, subd. 1(b), provides an exception, stating that persons adjudicated delinquent for crimes of violence, as defined in section 624.712, subd. 5, are not entitled to possess firearms. Reading these subsections together, the Minnesota Supreme Court concludes that a juvenile delinquency adjudication for felony-level offenses listed in section 624.712, subd. 5, may be deemed "felony convictions" and meet the statutory definition of crime of violence.

Appellant admitted he had been adjudicated delinquent for committing fifth-degree possession of a controlled substance, which is a felony-level offense listed in section 624.712, subd. 5. Thus, there was a sufficient factual basis for Appellant's guilty plea to possession of a firearm by an ineligible person. *Roberts v. State*, 945 N.W.2d 850 (Minn. July 8, 2020).

## FIREARMS

### A MOTOR VEHICLE ON A PUBLIC HIGHWAY IS IN A "PUBLIC PLACE"

Police observed a vehicle swerving in and out of traffic on a public highway and pulled it over. The driver, Respondent, admitted to consuming alcohol and failed field sobriety tests, and was arrested for DWI. Respondent asked the officer to retrieve his wallet and keys from the vehicle, describing the phone as in the center console, next to his gun. The officer found the keys, wallet, and gun. Respondent was charged with DWI and carrying a pistol while under the influence of alcohol.

Minn. Stat. § 624.712, subd. 1, prohibits carrying a pistol on or about one's clothes or person in a public place while under the influence of alcohol and/or controlled substances. The district court granted Respondent's motion to dismiss for lack of probable cause, finding the center console of Respondent's vehicle is not a "public place."

The Court of Appeals previously held that "public place" in section 624.712, subd. 1, is ambiguous, and defined "public place" as "generally an indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation, expressed or implied, whether by payment of money or not." *State v. Grandishar*, 765 N.W.2d 901, 903 (Minn. Ct. App. 2009).

The court finds that the proper focus of the analysis is not Respondent's vehicle, but the public highway on which Respondent drove his vehicle, by looking to the "mischief to be remedied" by section 624.712, subd. 1, which is the danger to the public inherent in firearm possession while impaired. The court holds that, for purposes of section 624.712, subd. 1, a personal vehicle operated on a public highway is a mode of transportation and cannot be considered a private place. Thus, the district court erred in dismissing the charge against Respondent of carrying a firearm in a public place while under the influence of alcohol. *State v. Serbus*, 947 N.W.2d 690 (Minn. Ct. App. July 13, 2020).

## SEARCH AND SEIZURE

### WARRANT MISIDENTIFYING PERSON TO BE SEARCHED DOES NOT LACK SUFFICIENT PARTICULARITY IF WARRANT AND SUPPORTING DOCUMENTS PROVIDE SUFFICIENT CORRECT IDENTIFYING INFORMATION, THERE IS NO REASONABLE PROBABILITY THE WRONG PERSON COULD BE SEARCHED, AND THE CORRECT PERSON WAS SEARCHED

Appellant collided with another vehicle on a highway, causing the death of the other vehicle's driver and injuries to Appellant. Appellant denied drinking but admitted to smoking marijuana before the accident. Appellant was taken to a hospital while police obtained a warrant to search Appellant's blood or urine. The detective who drafted the warrant did not have Appellant's name and entered the name of the vehicle's registered owner, Appellant's father, into the warrant. The warrant also stated the person to be searched was the only occupant and driver of the vehicle, the driver admitted to smoking marijuana, and referenced the "attached affidavit." The affidavit was from the sergeant on the scene who spoke with Appellant and correctly identified Appellant. A judge issued a warrant and it was taken to the hospital. The deputy at the hospital noticed the warrant incorrectly identified Appellant and the detective left to retrieve a corrected warrant. While the detective was doing so, the deputy obtained a urine sample from hospital staff and, shortly thereafter, a warrant correctly identifying Appellant was brought to the hospital. Testing of Appellant's urine sample revealed the presence of marijuana. The district court denied Appellant's motion to suppress the urine test results, finding the error in the warrant in effect at the time Appellant's urine was collected did not invalidate the warrant, because it created no reasonable possibility the police would search the wrong person. Appellant was found guilty after a stipulated facts bench trial.

Search warrants must particularly describe the place to be searched, but errors in the description of the place to be searched do not necessarily invalidate a warrant. The

description of the place to be searched must be "sufficient so that the executing officer can locate and identify the premises with reasonable effort with no reasonable probability that other premises might be mistakenly searched." The court may consider the warrant, warrant application, supporting affidavits if they are expressly incorporated into and attached to the warrant, and the circumstances of the case, including the executing officer's personal knowledge of the place to be searched and whether the correct place was actually searched.

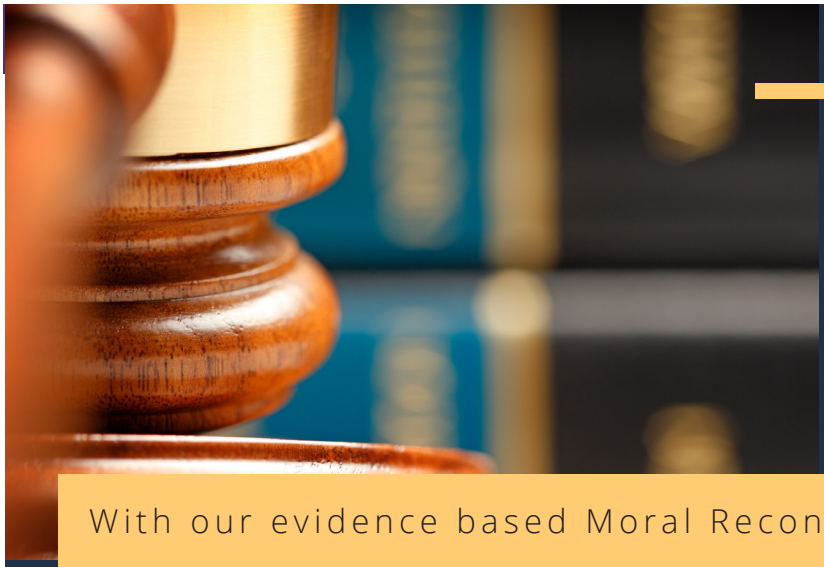
Here, the wrong person was identified in the warrant, but the warrant and its supporting documents contained correct information pointing to Appellant. The officers at the hospital also knew who was to be searched and his location, and the correct person was, in fact, searched. Thus, "the warrant's error presented no reasonable probability that the wrong person would be mistakenly searched." The warrant identified the person to be searched with sufficient particularity, and the district court did not err in denying Appellant's motion to suppress. *State v. Wilde*, 947 N.W.2d 473 (Minn. Ct. App. July 13, 2010). ■

## *About Samatha Foertsch*

Samantha Foertsch is a Partner at Bruno Law, PLLC, where she is primarily responsible for the firm's research and writing. She graduated as salutatorian from William Mitchell College of Law. Samantha writes a monthly column for the Bench & Bar magazine and a yearly chapter in the Minnesota DWI Deskbook. She has been a MACDL member since 2010, with special involvement in the Annual Dinner Committee.

## *About Stephen Foertsch*

Stephen Foertsch is a Partner at Bruno Law, PLLC. He is the Editor in Chief of VI Magazine and a member of MACDL's Board of Directors. He presents CLEs on various topics, writes a monthly column for the Bench & Bar magazine, writes a yearly chapter in the Minnesota DWI Deskbook, and has been published in the Hennepin Lawyer magazine. He graduated from William Mitchell College of Law.



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