The Minnesota Association of Criminal Defense Lawyers

Challenger

Fall 2013

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NEWS RELEASE

May 22, 2013
Contact: Jessica Thomas 612-278-6318
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Subject: **Three Attorneys Named Certified Criminal Law Specialists**

The Minnesota State Bar Association announces the certification of Brett Corson, Fillmore County Attorneys Office; Catherine Turner, Catherine Turner Attorney at Law, LLC; and Peter Wold, Wold Morrison Law; as MSBA Board Certified Criminal Law Specialist. This Certification program is administered by the MSBA and approved by the State Board of Legal Certification.

The certified specialist designation is earned by leading attorneys who have completed a rigorous approval process, including an examination in the specialty area, peer review, and documented experience. Certified attorneys have demonstrated superior knowledge, skill and integrity in their specific field and can use the designation of specialist to advertise their credentials. The MSBA has been accredited as an independent professional organization for certifying attorneys as Criminal Law Specialists, Real Property Law Specialists, Civil Trial Law Specialists and Labor and Employment Law Specialists. This achievement has been earned by fewer than 3% of all licensed Minnesota attorneys. More information about Certified Legal Specialists is at http://www2.mnbar.org/certify.

With over 16,000 members, the MSBA is the state's largest and most influential voluntary organization of attorneys, providing continuing legal education and public service opportunities for lawyers, and assistance to the legal system. The MSBA has been accredited as an independent professional organization for certifying attorneys as Criminal Law Specialists since 2009.

Minnesota State Bar Association
Certified ▲ Specialist

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Challenger Contents

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Challenger is published two to three times a year by MACDL, a Minnesota nonprofit corporation. Its mission is to advance the advocacy skills of MACDL members, to inspire and motivate aggressive, ethical,and effective defense for all accused, and to connect the criminal defense community in Minnesota.

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

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Features

Departments

Issue Editor's Column

Ryan Garry

Dear Fellow Criminal Defense Lawyers:

Attorneys David Risk, Chuck Ramsey, Dan Kohler and Derek Patron examine the possibilities of what McNeely and Brooks v. State could bring to the thousands of pending Minnesota DWI cases and the uncertain future of Fourth Amendment DWI law. Ever wonder what to tell the client who has a DWI conviction that now wants to go on that family fishing trip to Canada ... Canadian lawyer Marisa Fell discusses what you can do to help. Recent law school graduate and now lawyer Anthony Bussa gives a perspective of a fresh face entering the daunting world of criminal defense. Fresh off a not guilty verdict, attorney Patrick Cotter gives a perspective of handling a complex arson case and the challenges you will face.

Finally, this issues contains pictures of the new, the seasoned, and the great lawyers to be remembered in our small community. Where does time go? Looking back at these pictures makes me hopeful that we can continue the tradition started long ago of keeping a united front in perhaps the most difficult and unforgiving type of law practice that exists. More importantly, especially for some of us running our own practice, the friendship and camaraderie of having each other to bounce ideas off and just vent about what the hell we are doing is perhaps the most important aspect of our organization ... at least it is to me.

Thanks for your patience. The Challenger is going through some changes ... and between life, family, kids and trials, sometimes this is the last thing to get done when the sun has set. Were back on track. So see you soon.

Ryan

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portfolio


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Chronic or intermittent back pain can be draining and make your life miserable. Most symptoms are attributed to poor muscle tone, muscle tension, spasms, ligament or muscle tears and joint problems. There are many alternatives for pain management, and many resort to prescription medication, injections and even surgery without knowing there is a natural approach to relief.

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Entering Canada After a Conviction Remains A Hurdle Despite New Policy

Marisa Feil

The Canadian government announced a new policy in March of 2012 regarding Temporary Resident Permits (TRP) for persons seeking entry into Canada who have a criminal record. The rule change does not, however, alter the rules for admissibility. It simply allows individuals who have been convicted of a DUI/DWI/OWAI (or certain other minor offences) to obtain a fee-exempt TRP (i.e. avoid the $200 processing fee) on a one-time basis, and only if they have a single conviction for which no jail time was imposed.

Before travelling to Canada, individuals with a criminal history should verify whether their entry might be prohibited. A foreign national is inadmissible on the grounds of criminality if convicted outside of Canada of an offence that, if committed in Canada, would constitute an ***indictable*** offence under an Act of Parliament. Canadian Immigration and Refugee Protection Act § 36.

Canadian immigration law does not distinguish between misdemeanor and felony offences. Instead, offences are considered either summary or indictable, and if the offense can be treated as either (a "hybrid offense"), it is considered indictable for Canadian immigration purposes.

A foreign conviction, for which there is an equivalent offence in the Canadian Criminal Code, is deemed an indictable offence. With some convictions, it is possible to argue non-equivalence, or equivalence to a summary offense, in order to circumvent the inadmissibility regulations and allow the individual to enter without applying for permission.

"Operation While Impaired" is an indictable offence or an offense punishable on summary conviction. The statute reads as follows:

> Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
>
> (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Canadian Criminal Code § 253.

Canadian immigration generally considers any drug/alcohol related driving offence to be equivalent to this statute, no matter how it is treated in the state where it occurred. Furthermore, most foreign statutes for reckless driving offences are equivalent to Canada's "Dangerous Operation of Motor Vehicles" statute (Canadian Criminal Code § 249). Therefore, individuals who plead their cases down from a DUI/DWI/OWAI to some other alcohol related offence, or a reckless driving offence, usually still find themselves inadmissible to Canada.

Criminal inadmissibility can be overcome permanently by Criminal Rehabilitation, or temporarily with a Temporary Resident Permit (TRP). An individual may also be rehabilitated by the passage of time (more than 10 years have passed since the completion of all of the conditions of their sentence, including the term of probation, provided they have only one conviction on their record).

Applicants may apply for a TRP at a Canadian visa office or at a port of entry. The Canadian government encourages individuals to apply well in advance if they know they must enter Canada and are inadmissible. The main requirement for obtaining a TRP is to demonstrate a significant reason to be in Canada. Usually the government is looking for a reason related to one's work, family, or an emergency situation. A TRP is required until such time as criminal inadmissibility has been removed.

Individuals who are eligible for criminal rehabilitation, but who have not yet applied for it, should not only apply for a TRP but for criminal rehabilitation as well. Criminal rehabilitation is a permanent solution to criminal inadmissibility, while a TRP is a temporary pass for it. In order to be eligible for criminal rehabilitation, five years must have passed since all sentencing terms have been completed (including the term of probation). It is therefore advisable to seek as short a term of probation as possible.

If less than ten years have elapsed since the completion of your client's sentence and/or they have more than one offence on their record, they will have to apply for criminal rehabilitation to overcome their inadmissibility. If ten years have passed from the date that they completed their sentence and there is only one conviction on their record, then they are likely to be deemed rehabilitated by the passage of time. Individuals with more than one conviction or who have been convicted of a serious offence (DUI causing bodily injury or death for example) will never be deemed rehabilitated by the passage of time.

Only a lawyer certified by one of the provincial bar associations, or a certified immigration consultant, is authorized to represent an individual in their Canadian immigration applications to the Canadian government, including Criminal Rehabilitation and Temporary Resident Permit (TRP) applications.

Attorney **Marisa Feil** attended McGill University, where she obtained her Bachelors degree. She went on to graduate from the Common and Civil Law programs at Université de Montréal, widely recognized as one of Canada's premier law schools. She is a member of the Canadian Bar Association and the Barreau du Quebec. Attorney Marisa Feil has been working in the field of Canadian immigration and successfully helping people come to Canada for several years even before becoming a member of the Barreau du Quebec and is widely regarded as an authority within the Canadian immigration industry. As the supervising attorney at FWCanada, Marisa manages day-to-day operations of the firm, oversees quality control and is the legal representative of all FWCanada clients. Attorney Marisa Feil liaises regularly with federal and provincial offices on behalf of her clients and is held in esteem by the very agencies that create the laws and policy that regulate the industry. She may be reached at (514) 316-3555 ext. 204, or marisa@fwcanada.com.

Have faith but not Good Faith

David Risk

I have heard far too many times from far too many judges and prosecutors that McNeely only applies to forced blood draws. It is cute when they say it just like when my two year old hides under her blanket during the scary parts of Mickey Mouse Club House. Cute yes, but unlikely to lead me to describe them as constitutional scholars. This simplistic take on the issue may be soothing to them, but it is time to snatch the nookie blankie from their hands. Let them tremble before the horror that is a free people protected from government intrusions solely by a piece of paper so strong that it has lasted more than two centuries despite the fact that some view it as inconvenient if not a complete fairy tale.

So have faith. This inconvenience called the Constitution applies to all searches not just those that pierce the skin. SCOTUS made this clear decades ago in the Skinner decision when it noted that urine testing was a 4th amendment search:

> Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

The Skinner court also assured us that breath testing was a 4th Amendment search as well:

> *Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis implicates similar concerns about bodily integrity and, like the blood alcohol test we considered in Schmerber should also be deemed a search.*

I am certain you are aware of these quotes and others so how can anyone argue that urine and breath do not matter? [For anyone unaware the citation is *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)].

The slightly more advanced argument is that the intrusions are not as severe with Breath and Urine and by the way Skinner said you don't need a warrant. First off, I would much rather have a phlebotomist draw blood out of my arm than urinate in front of a cop who is intentionally checking me out. Hell, I get a little stage fright at the trough in the Metrodome and those people are not supposed to be staring at me in order to assure the scientific reliability of my urination process. So don't give in on the severity of the intrusion argument but also realize it is inapplicable.

Skinner said no need for a warrant based on "special needs." Well in Skinner the issue was railroad accidents and far more people die on Minnesota roads every year due to impaired driving than due to railroad accidents so DWI obviously must be a "Special Need." WRONG. The special needs doctrine has been used in several cases to get around the need for a search warrant but DWI enforcement has one very different and important characteristic. It is enforcement. SCOTUS to the rescue once again. The case is Ferguson and it could not be more clear:

> The critical difference between those four drug-testing cases and this one, however, lies in the nature of the 'special need' asserted as justification for the

> warrantless searches. In each of those earlier cases, the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement… In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.

Ferguson v. City of Charleston, 532 U.S. 67, 79–80 (2001) (emphasis added). If you needed more clarity:

> *Respondents' assertion that their ultimate purpose—namely, protecting the health of both mother and child—is a beneficent one is unavailing. While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal. Given that purpose and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of 'special needs.' The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing prior 'special needs' cases. It also provides an affirmative reason for enforcing the Fourth Amendment's strictures.*

Ferguson at 68–69. There is ZERO legitimacy to any argument that Special Needs justifies an Implied Consent test without a search warrant and I do not care that Skinner lost.

Back to Breath and Urine maybe there is something to the argument that they are less intrusive? SCOTUS released that King decision after McNeely telling us that taking a cheek swab was no big deal so a puff of air must be no big thing and people piss away their urine all the time. Simply put, the Supreme Court does not get it right all of the time. The dissent in King is a must read and highlights this fact. It is Scalia at his cantankerous best pointing out just how poorly reasoned the majority is. The majority decided the case based on the need for a court to identify a person. They argued it is no different from a mugshot or a fingerprint. Factually, Scalia slays this assessment and in doing so makes abundantly clear that the farce of identity cannot be extended the least bit. The Majority made clear that it was only talking about serious felonies and the minor cheek swab was authorized based on the need to identify someone charged with a serious felony. Scalia points out that this is truly simply a special needs case and one that is wrongly decided:

> *It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form 'reasonableness' inquiry that the Court indulges at length today. To put it another way, both the legitimacy of the Court's method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing.*

Maryland v. King, 133 S. Ct. 1958, 1982, 186 L.Ed.2d 1 (2013)

So, *King* in many respects is nothing new. It does not matter if the cheek swab is or is not intrusive that is a complete Red Herring. What matters (at least according to the majority) is that it was used for identification purposes. Still not convinced that McNeely applies across the board? Well how about the Moser problem? Please bear with me as this one takes a little more law and sounds suspiciously like a brief but, honestly, I am merely trying to point out that whatever happens it is happening to blood and breath and urine cases.

In a consolidated case, petitioner Moser had been read the Implied Consent Advisory, which stated that refusal to take a chemical test **MAY** be a crime. At that time, however, the crime of refusal was only applicable if Moser had a previous license revocation. As she did not have a previous revocation, any refusal could not have been a crime. The Supreme Court agreed with Moser, holding that her due process rights were violated as the Implied Consent Advisory misinformed her that refusal may be a crime despite the fact that it could not be in her circumstance.

The Implied Consent Advisory currently in use does not differentiate the type of testing at issue. The Defendant is told it is a crime to refuse before the Defendant is informed of what type of test the officer would be choosing. Prior to the officer's decision about testing Defendant was also made to acknowledge understanding of the notification that refusal to take a test is a crime (**IS** a crime not even may be a crime which was a due process violation in Moser). If the Court were to find that McNeely only applies to "intrusive" tests such as blood tests then we have a Moser problem. In other words, the intrusiveness of the particular test is immaterial if one of the tests is unconstitutionally intrusive then the Implied Consent Advisory read to your client violates Due Process under the *Raley/ McDonnell-Moser* doctrine. See McDonnell, et al v. Commissioner of Public Safety, 473 N.W.2d 848 (Minn. 1991).

So all those people out there who argue that Breath is not intrusive and McNeely does not apply please step out from behind your nookie blankie and take a seat on the couch because Mickey Mouse Club House is about to begin and this one is a real hoot.This episode is all about the Good Faith Exception and you don't want to miss it.

We may be witnessing the dawn of the Good Faith Exception in Minnesota. Minnesota has never used the Good Faith Exception and yet it, or something like it, may be used to justify the use of test results against our clients despite the constitutionally infirm process that led to the test. In United States v. Leon, 104 S.Ct. 3405 (1984), the Federal court allowed police to rely on a defective warrant because police relied on it in good faith, because its fatal errors would not have been apparent on its face to a reasonable policeman. Minnesota's Supreme Court, however, has expressly refused to adopt the good faith reliance on a defective warrant ruling of Leon. *See*, e.g., *State v. Jackson*, 742 N.W.2d 163 (Minn. 2007). Similarly, the Legislature has seen fit to codify the suppression of illegally obtained evidence. Minn. Stat. § 626.21 states:

> *a person aggrieved by an unlawful search and seizure may move the district court . . . to suppress the use, as evidence, of anything obtained on the ground that (1) the property was illegally seized, or (2) the property was illegally seized without a warrant . . . . If the motion is granted the property . . . shall not be admissible in evidence at any hearing or trial.*

Minnesota has a long and, I think, proud history of suppressing evidence when it is unconstitutionally obtained. Minnesota has not questioned the state of mind of the officer who acts in violation of the Constitution, but maybe our Supreme Court will think differently this time. Not just because this is a hot political issue and there is no support for the upholding the constitutional rights of our citizens who are impaired behind the wheel. Look at *Asher v. Commissioner of Public Safety,* 519 N.W.2d 183 (Minn. 1994). In that case,police were merely following the holding from the U.S. Supreme Court in *Michigan v. Sitz*, 496 U.S. 444 (1990), that DWI roadblocks did not offend the Fourth Amendment. The Minnesota Supreme Court, however, affirmed suppression of the evidence from a DWI roadblock stop in the implied consent case even though the Minnesota Supreme Court invented, for the first time, a ruling that

Minnesota's Constitution forbids roadblocks without individualized, particularized suspicion of criminal activity by the individual stopped. In that case, our Constitution held the Government at bay despite the fact that it was being used to protect Drunk Drivers.

The problem here is that it was not SCOTUS that led the poor law enforcement officers astray. It was the Minnesota courts including our Supreme Court who have misinterpreted *Schmerber* for 47 years. It would not be Minnesota Nice to tell the police to do it one way and then tell them they are screwed now because SCOTUS said so. Not nice at all. Even my 2-year-old would understand that. The other issue is that the Good Faith Exception would give our Supreme Court protection from a grant of certiari by SCOTUS. In the end, then, we may see the introduction of the Good Faith Exception just to convict some DWI offenders. The only good news about such a ruling is that it would make for all kinds of fun when it came to arguing about DWI cases since *McNeely* was released on 4/17/2013. A true shame because the effect would last well beyond any turbulence caused by the need for a new IC law. I am going to grab my nookie blankie because I am terrified of the Good Faith Exception hiding in the closet. Let's just hope that the Minnesota Supreme Court locks the closet door once and for all.

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Dave Risk has earned a reputation for excellence as a criminal defense attorney through his aggressive representation of thousands of clients over the past fifteen years. Dave has represented people charged with all types of crimes ranging from misdemeanor driving offenses to multiple counts of first-degree murder. Dave began his career as a public defender in Ramsey County after graduating seventh in his law school class.

In 2005, Dave joined a private criminal defense law firm where he focused much of his work on DWI and Implied Consent cases. With the opportunity of private practice Dave was able to spend significant time learning the science and technology necessary to defend criminal cases. As an example, he is one of only a handful of attorneys in the State of Minnesota who has been certified as an operator of the Intoxilyzer 5000 EN as well as the DataMaster DMT-G (the breath testing machine currently in use in Minnesota).

Dave is particularly skilled at finding novel legal issues and successfully litigating those issues. As a result his peers have named him a "SuperLawyer Rising Star" eight times.

Dave lives in Eagan with his wife and three daughters. Aside from his family, Dave enjoys nothing more than an intense cross-examination of an opposing witness.

An Aspiring Criminal Defense Attorney: Paving My Own Path

Anthony Bussa

Vanguard for justice. Trial warrior. Pillar of prosperity. The people's lawyer.

These tenets guided me through law school. They helped me endure the day-to-day rigors; overcome my dejected thoughts on why I was wasting my time, energy, and money in the face of an ever-deflating legal employment market; and persevere through my many tribulations and, seemingly infrequent, triumphs. While many law school graduates simply desire employment that provides a steady paycheck so that they can pay back their student loans and begin to live their lives, such a desire is unavailing to me. To me, being a lawyer is not a job; it is a vocation that requires unyielding passion. The apotheosis of this passion personifies the work of a criminal defense lawyer—and I truly want to be one of the best. Many of my friends question why I want to defend murderers, rapists, batterers, assaulters, drunks, pornographers, drug dealers, and thieves. The answer is simple: defense of the innocent and protection of the freedoms and liberties afforded by our Constitutions. These desires marshal my vigor to unceasingly fight for the rights of each and every client that enlists my services.

Although my desires are easy to enumerate, they are difficult to enact. I have thought about becoming a public defender, but there are few jobs with many applicants that usually have the experience that makes them more desirable to employ. Therefore, I have asked myself why wait to practice private criminal defense? Why not garner the needed experience on my terms, and seek out the advice of well-respected practitioners in order to work my criminal cases the way that they need to be worked?

My trepidation is obvious: I will be a young lawyer without the clout of a seasoned criminal defense lawyer. Yet I actually have a great deal of real-world experience. I helped build the criminal defense practice of a non-profit as a student certified attorney. Most of the cases that came into the non-profit were gross misdemeanors or felonies and I had the unique opportunity to represent clients in court. I have tried and won a presumptive juvenile certification case; convinced judges to dismiss cases for lack of probable cause; had evidence suppressed; made statutory interpretation arguments; attempted to certify questions to the Minnesota Court of Appeals; submitted appellate briefs to both the Minnesota Court of Appeals and the Minnesota Supreme Court; and prepared for, and assisted in, trials.

Bob Sicoli, one of my mentors and a preeminent criminal defense lawyer, recounted his unique, and fortunate, path of becoming a prolific criminal defense attorney. In 1987, Mr. Sicoli began working as a private criminal defense practitioner with Thompson & Lundquist, one of the most revered criminal defense firms in Minnesota. Mr. Sicoli was immediately saddled with difficult and complex cases to handle on his own—it truly was a trial by fire.

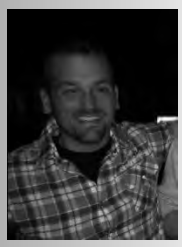
Unfortunately, most criminal defense firms do not emulate this model, where only the "names on the firm" litigate the cases and the young lawyers perform research and craft motions and memoranda of law. As an aspiring criminal defense lawyer, it is hard to be critical of this model because the clients are paying for the "names on the firm," not their associates. But, this model does not cultivate the legal skills needed to be a vanguard for justice, a trial warrior, a pillar of prosperity, and the people's lawyer. A lawyer only attains these skills through actually litigating criminal cases from start to finish; being thrust into the fire, thinking on one's feet, and creatively, zealously, and impassionedly arguing for one's

client is what develops a prolific criminal defense lawyer. _

I also understand that practicing criminal defense is a business. This business has drastically changed with the advent of social media, the internet, and the influx of many lawyers that have hung out a shingle, advertising themselves as "criminal defense lawyers." Thompson & Lundquist's business model was predicated on referrals from civil litigation firms and other criminal defense lawyers. Now, a lawyer must have an interactive website, utilize all sorts of social media outlets, such as Facebook, Twitter, and blogging, and invest in mainstream advertisements on the internet, billboards, radio stations, and television. Ryan Pacyga, who is another one of my mentors and owns Ryan Pacyga Criminal Defense, has harnessed the power of advertising better than any other criminal defense attorney. Mr. Pacyga's utilization of social media, blogging, and radio advertisements has propelled him into the echelon of prolific criminal defense lawyers. One can have the aspiration, and the tools, to be a prolific criminal defense lawyer, but if one cannot retain clients, one cannot garner the experience needed to achieve that aspiration.

On the same front, it is also imperative to generate a referral base with civil litigation firms and other criminal defense lawyers. Networking is still an extremely integral part of developing a successful criminal defense practice. Scott Seiler, managing partner of SeilerSchindel, PLLC, cut his teeth in the criminal defense arena. Mr. Seiler spent his days in court, taking almost anything at any price. He was immediately arguing motions, trying cases, and rubbing elbows with elite criminal attorneys, both defense and prosecution. Breakfast, lunch, and dinner were reserved for networking. Everyone he met was a potential referral source or a client and everyone heard his pitch. It was an exhausting, but successful process, and one that he continues to employ in his transactional corporate practice.

The experiences of my predecessors and opportunities of the internet age guide me as I begin my quest. As the venerable Abraham Lincoln expounded, "Always bear in mind that your own resolution to succeed, is more important than any other one thing." I am cognizant that I want to run before I walk, and that I have to work to temper my enthusiasm and maintain a balanced home/work life; however, I went to law school to be a vanguard for justice, a trial warrior, a pillar of prosperity, and the people's lawyer. In heeding Mr. Pacyga's advice, it is crucial to know when a case is too big to handle. Therefore, as a young lawyer, I will refer bigger cases to more seasoned criminal defense lawyers and learn from their experience. Yes, I will have to learn on the fly, I will make mistakes, and I will experience failures, but I firmly believe that my passion to defend the innocent and to protect freedoms and liberties of our Constitutions will help pave my path of becoming a successful and prolific criminal defense lawyer.



Anthony Bussa
William Mitchell College of Law
Juris Doctor, 2013
Staff Member of William Mitchell Law Review

Anthony was born and raised in Duluth, Minnesota. He graduated from Duluth Marshall high school in 2009 and attended Saint Olaf College, graduating in 2009. He played varsity football and majored in history and political science. He always knew that he wanted to be a lawyer, and is now about to realize his dream. He will be beginning the criminal defense practice as part of a civil law firm located in the Minneapolis area as soon as he passes the bar. He hopes to be able to represent the interests of his clients with the utmost vigor and to continue to cultivate invaluable relationships with his mentors in this profession.

The House Is On Fire!!

Patrick Cotter

Defending a client charged with setting fire to his or her own home or business brings fascinating challenges. Let's be frank: quite often the party in control is not the government, but the insurance company responsible for the loss. That insurance company has deep pockets and a vested financial interest in delaying and then denying payment for your client's loss. The company would also like to see its customer charged with Arson.

Your client may be blindsided by both a complete denial of his or her insurance claim and, worse, being served with a Summons and Complaint charging him or her with a serious felony. The criminal defense attorney who takes on an Arson case must be prepared to navigate the waters of civil litigation as it crosses paths with the criminal prosecution

Investigation

Most criminal cases are investigated by employees of a government law enforcement agency. However, in Arson investigations, many times the most extensive witness interviews and detailed evidence collection is completed by an investigator employed by the insurance company, an attorney retained by the insurance company to conduct Examinations Under Oath (EOU), and a "cause and origin" fire loss expert. An outside adjuster may be retained by the insurer to assess the damage and conduct further follow-up interviews of your client and other witnesses regarding the valuation of all the property lost or damaged by the fire.

The insurance defense attorney will aggressively demand an exhaustive list of financial records, credit card history, mortgage history, tax history, and essentially every billing record the client has incurred. The insurance company will also have a forensic accounting firm ready to evaluate every nook and cranny of your client's financial history looking for any possible financial distress. If it feels like the deck is stacked against your client long before you take the case, it is because that is in fact true.

Discovery

The quest to obtain full disclosure of discovery when defending an Arson case must include diligent demands for specific disclosure of material found in the insurance file. Many times the response to defense counsel's request for additional disclosure of evidence from the prosecutor is "I do not have that information or material in my custody, possession, or control." This answer simply is not good enough. The *Minnesota Arson Immunity Act Chapters* 299 F.052 and 299 F.057 allow disclosure and exchange of investigative material and information between an insurer and the State, and they provide immunity from suit.

> An authorized person may, in writing, require an insurance company to release to the requesting person any or all relevant information or evidence the authorized person deems important, which the company may have in its possession, relating to a fire loss or potential fire loss. Relevant information may include, and is limited to:
>
> (1) pertinent insurance policy information relevant to a fire loss or potential fire loss under investigation including the application for a policy;
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> (2) policy premium payment records which are available;
>
> (3) a history of previous claims made by the insured, including, where the insured is a corporation or partnership, a history of previous claims by a subsidiary or any affiliates, and a history of claims of any other business association in which individual officers or partners or their spouses were known to be involved; and
>
> (4) material relating to the investigation of the loss or potential loss, including statements of any person, proof of loss or potential loss, and any other evidence relevant to the investigation.

Minn. Stat. § 299F.054, subdiv. 1 (emphasis added).

Defense attorneys are entitled to inspect and reproduce all relevant material and information not only in the government's direct custody, possession, or control, but also material and information in the possession or control of "any others who have participated in the investigation or evaluation of the case and who regularly report, or with reference to a particular case have reported to the prosecutor's office." Minn. R. Crim. P. 9.01 subdivs. 1a(1) and (2) (emphasis added). The quest for discovery generally will first come with continued specific requests for disclosure of discovery material with the prosecutor. If your demands are ignored, then the next step is to bring a motion before the Court to demand compliance. See *Minn. R. Crim.* P. 9.01, subdiv. 2; *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976). However, do not forget the tool that civil litigators employ all the time: serving a Subpoena Duces Tecum on the insurer and its attorney demanding that they appear and/or produce the papers, documents, statements, evidence logs, or other items you seek. See Minn. R. Crim. P. 22.01, subdiv. 2. This can be a very effective way to obtain material that is in the custody, possession, or control of the insurance company, such as their insurance adjusting file and notes. If the insurance company refuses to comply or brings a motion to quash your subpoena, that only bolsters your argument that the government can and must obtain this information from the insurance company and turn it over to you. The moral of this story is that an Arson case requires a defense attorney to press hard for material and discovery that is not always readily available in the prosecutor's file.

The following items are some of the materials that the practitioner must obtain:

Insurance File

- All investigation reports completed on behalf of the insurer, as well as all color photos taken and any statements taken of the named insured or the insured or his spouse.
- Any Sworn Statement in Proof of Loss submitted as required to the insurer, as well as any attachments.
- Any laboratory submittal form for any samples of debris taken by a representative of the insurer (or others) and the resulting lab report and findings.
- If an Examination Under Oath (EUO) was taken of any insured by the insurer, a transcribed copy should be obtained.
- Any correspondence between any investigator and/or adjuster involving this claim and the insurer.

- Copies of any emails as listed in the previous request.
- Any engineering reports such as from any electrical engineer retained to examine the electrical artifacts involved in this claim.
- Any evidentiary logs regarding items taken from the scene on behalf of the insurer as well as their current location for examination by your cause and origin expert if deemed appropriate by counsel.
- Any "Releases or Consent" forms provided by a representative of the insurer and the documents or things obtained through the "Release and/or Consent" documents.
- Copies of any and all financial records, credit history, mortgage documents, and tax information.
- Copies of the Insurance adjuster claims file history

Government's file

- All reports written by any law enforcement officer regarding this investigation as well as any written by a Deputy State Fire Marshal (DSFM) investigating this case.
- Copies of any audio and/or video statements taken of any person, including but not limited to, the client in the investigation of this claim.
- Transcriptions (if made) of any of the audio/video statements described above.
- A list of all items taken from the scene by the DSFM investigating this loss, current location, etc.
- The gas chromatograms concerning any debris samples taken from the scene by the DSFM investigating this loss. (BCA)
- The lab submittal form completed by the DSFM or the intake personnel at the BCA for any samples taken from the scene as well as the reported results of the testing of any such samples, in writing.
- The name and contact phone number of any BCA analysts testing any of the aforementioned samples.
- All recorded statements taken of the client/defendant during the polygraph examination including any written notes.
- A copy of the polygraph examination chart.
- Any transcription of the interview before, during, or after the polygraph completed by the examiner and the client/defendant.
- The name and contact information of the polygraph examiner.
- Any written report by the polygraph examiner.
- The first report written by the DSFM as to the origin and cause of the fire.
- All 'Releases and/or Consent' documents signed by the client/defendant regarding the investigation of this loss provided by any person investigating the fire, and the documents or things obtained through the 'Release and/or Consent' documents.

Beware of a failure to keep items such as electrical artifacts, which may show a failure of an appliance or electrical arcing, which could have caused the fire. Failure to maintain such possible exculpatory material may well constitute evidence spoliation, especially when the client/defendant is told the fire is accidental and a substantial period of time elapses and suddenly charges are filed.

Terry Duncan, President Central States Fire Investigations, P.O. Box 798 Owatonna, MN 55060.

Evidence

Arson cases are prosecuted with circumstantial evidence. It is the rare Arson

case where the government has a confession, eye-witness testimony, or a recovered ignition source with DNA or fingerprints. The key ingredients to prosecute these cases include three elements: (a) financial motive, (b) opportunity to access the area of origin of the fire, and (c) cause and origin expert(s) opining that the fire was "incendiary," meaning "intentionally" set.

(a) Financial Motive

The common prosecutorial playbook will include a healthy dose of evidence intended to prove your client's motive to burn down his or her property to collect insurance proceeds or escape financial obligations. However, the place the prosecutor will turn to obtain this evidence is within the insurance investigation file. While law enforcement will work with the insurer to investigate the fire, it often is the insurer that will expend significant financial resources to track down each and every one of your client's billing statements, credit card statements, tax returns, mortgage documents, energy bills, car payments, bank loans, personal loans, prior insurance claims, and the list of documents goes on and on. The insurance company's attorney will aggressively demand further proof of the items that your client claims were lost or damaged in the fire and the value to be placed upon those items. What is the relevance of all of this one might ask? It is simple: both the insurer, and subsequently the prosecutor, are looking to prove a motive.

(b) Opportunity

If your client had access to the area within the property where the fire originated, he/she is the prime suspect. The first place the government will look to bolster its case is your client's statements made to insurance representatives, to law enforcement, and the attorney who takes the client's EOU. The EOU is essentially testimony elicited under oath by an insurance defense attorney of your client long before the criminal defense attorney has been retained. The EOU, along with the statements taken at the time of the fire will establish that your client had the opportunity to commit the crime. The statements will establish when your client was last at the scene of the fire, who had access (i.e. keys) to the scene, when the client left the scene, and what the client did during the time he or she was at the scene of the fire.

Like any proper criminal investigation, don't just rely on what the prosecutor gives you. Reconstruct the timeline with your own investigation. Your defense investigator must interview your client and all potential witnesses at or near the location of the fire.

(c) Cause and Origin

The State Fire Marshal's Office will respond to the scene of a fire loss while it is still ablaze or certainly as soon thereafter as feasible. They are not alone. The insurance company has retained a cause and origin expert on its own dime to complete an exhaustive evaluation of the fire loss. In addition, the insurer will hire an electrical engineer and possibly a chemical engineer to process the fire scene. It is not uncommon for the Assistant State Fire Marshal and the cause and origin expert to analyze the scene together, taking hundreds of photographs and picking apart the area that they deem the fire originated to remove "artifacts." The "artifacts" removed from the "area of origin" of the fire will be stored at the engineering firm site where these items are examined. The actual scene of the fire will always either be altered or completely destroyed by the time the criminal defense lawyer is retained.

Therefore, we are left to rely upon information and materials created or retained by agents of the government and the insurance company. These items include (a) hundreds of photographs, (b) artifacts retained from the fire loss scene, (c) forensic lab testing results, and (d) expert reports. I will not dive too deep into fire science because that goes beyond the scope of this article.

However, criminal defense practitioners

must adhere to two basic principles. First, it is imperative that the attorney hire his or her own cause and origin fire expert. He or she should also be willing to consult with an electrical engineer and possibly a chemical engineer, if necessary.

Second, the attorney must secure a copy of NFPA 921 Guide for Fire & Explosion Investigations 2011 Edition. Use these fundamental guidelines to cross-examine the government's expert witnesses. Fire science is not afforded any more leniency than any other scientific evidence. Experts in fire investigation must operate in and adhere to the "scientific method." National Fire Protection Association, NFPA 921: Guide for Fire & Explosion Investigations, 17 §§ 4.2, 4.3 (NFPA 2011 ed.) (1992). Up until recently, fire investigators often used a process to eliminate possible fire ignition sources and then opined that because they could rule out all other possible causes, the fire must be determined "incendiary." This process, sometimes called "negative corpus," is no longer the accepted standard of practice in the fire investigation community. Id. at 174 § 18.6.5.1.

Conclusion

Arson cases can appear daunting when a client first appears in your office looking for a good attorney. As one renowned fire loss attorney representing a large insurance company told a client of mine, "You are up against a giant. You cannot win." Well, he did win. However, to win we have to go the extra mile with discovery and make the investment to battle their expert with our own expert.

Patrick Cotter has a unique trial practice with significant jury trial experience in both criminal defense and personal injury litigation. Patrick is a Criminal Law Specialist, certified by the Minnesota State Bar Association. He has achieved complete jury acquittals in over twenty serious felony cases, such as First and Second Degree Assault, Criminal Sexual Conduct, Domestic Violence Crimes, Controlled Substance Possession and Distribution, Burglary, and Arson. He has also successfully litigated major White Collar cases in Federal Court including Bank Fraud, Wire Fraud, and Tax Evasion. Patrick has taken his trial success to the civil courtroom, as well, obtaining successful verdicts and settlements for his clients who have been injured due to the negligence of others. In the past year, he secured a jury verdict of over $250,000 for a women seriously injured due to her landlord's negligence.

Patrick is a member of the Board of Directors of the Minnesota Association of Criminal Defense Lawyers. He is often asked to speak at CLEs, to classrooms of attorneys, and to those aspiring to seek a career in law.

Refusing to Submit: Defense Bar Pushes Back Against the Crime of Test Refusal

Chuck Ramsay and Dan Koewler

The executive and legislative branches of Minnesota government have a long and storied history of chasing after drunk drivers with little regard or respect for the Constitution. Again and again, the good men and women of Minnesota have had to rely upon a conscientious and respectful judiciary to step in and invalidate unconstitutional police practices and unconstitutional laws.

This was the case when law enforcement tried using random, suspicionless "sobriety checkpoints" around the state to try and catch more drunk drivers. At that point, our courts had to not-so-gently remind the police that suspicionless stops are unconstitutional, despite claims that many people would willingly suffer the short term intrusion of a sobriety checkpoint stop in order to remove drunken drivers from the road. (Ascher v. Comm'r of Pub. Safety).

The legislature then tried the same tactic, issuing "whiskey plates" to convicted drunk drivers and then announcing that these plates gave law enforcement carte blanche to perform suspicionless stops on these drivers. And again, the courts were called upon to uphold the constitution and throw out an unconstitutional law, despite claims that the owner of these vehicles gave consent to a suspicionless stop when they applied for these "special" plates. (State v. Henning).

There are many other examples, some as egregious as the situations in Ascher and Henning, some more case specific, but all examples point to one conclusion: our police and our legislature have very little interest in considering the constitutional limitations on their power. Instead, they will largely do what they see fit, and wait for the courts to reign them in if they've gone too far.

And with the test refusal law, the legislature not only went too far, they went right off the cliff. Since 2003, refusing to submit to chemical testing has been a crime - in the vast majority of cases, a crime that is more severe than the underlying DWI crime that the driver was arrested for (prior to 2003, it was still a crime, but only a misdemeanor). The test refusal law is a conviction factory, punishing drivers who may be over the legal limit for doing nothing more than standing on their constitutional right to say "no" when an officer asks to execute a warrantless search and seizure in the attempt to find incriminating evidence. Or, in the words of Justice (then Judge) Wright in *State v. Netland*, "because an individual does not have the right to say no to a chemical test, and indeed, is subject to criminal penalties for doing so, the 'consent' implied by law is insufficiently voluntary for Fourth Amendment purposes."

Ve Waf Vays Ov Makink You Talk

You can squeeze your eyes shut tight; cover your ears; stomp your feet and scream "no no no no no" until you're hoarse, but eventually everyone has to realize the simple truth: blood, breath, and urine tests are all searches, the types of searches that are protected by the Fourth Amendment to the Constitution. When an officer tells you to blow into the

DataMaster, that officer is executing a search for incriminating evidence in the same way as if he or she was digging through your desk drawers or medicine cabinet.

And just like your papers and your property, your body is protected by the Fourth Amendment - law enforcement has every right to execute a search, but they'd better have a warrant. Because if they don't have a warrant, they're going to have to head into court after the fact and try and convince a judge that there was a valid exception to the warrant requirement that they could rely upon. Relying upon a warrant is a little more time consuming, but far, far more reliable.

That is, a warrant is more reliable when it comes to digging through someone's desk or their bathroom. If the police show up to perform one of those types of searches, they're always going to ask you first - try and get your consent. If you understand your rights, and have any respect for your own privacy, you'll say no, and soon they'll be calling a judge to get that warrant they need. But if an officer is trying to search your body, your person, your blood . . . well, they've got an extra ace up their sleeve when it comes to consent. Because if you know what's good for you, you'll not only say, "yes" but you'll go out of your way to make sure the search is successful. If the officer says "blow" you'll say "how hard?" If the officer says, "pee" you'll say, "how much?" If the officer says "bleed" you'll roll up your sleeves and make a fist.

Of course, a person complying with one of these searches doesn't have any less respect for their own privacy, or any less understanding of their constitutional rights - but in the DWI context, every Minnesotan has lost the protections of the Fourth Amendment due to our stunningly shortsighted test refusal law. The police never have to get a warrant for a DWI search under the current state of Minnesota law; they'll simply tell you that you are required by law to submit to a search, and that if you don't, you'll be charged with another crime and hauled off to jail.

This is a powerful piece of constitutional chicanery. Everyone has the right to withhold consent to a warrantless search - it's baked in to the very definition of "consent." So right away, when the police tell you that you are "required" to provide your consent, they're going against hundreds of years of constitutional jurisprudence. Then, they let you know that if you withhold your consent you'll end up going to jail; this means they won't have to bother with that warrant anyway, because you just committed a more serious crime right in front of them.

And all because you tried to exercise a bedrock constitutional right.

Liberty and Privacy Interests . . . Not Vacuum Cleaners

Judges around the State are being asked to fulfill the time-honored Minnesota tradition of invalidating unconstitutional DWI laws. Some are rising to the challenge; some are not. But it is the role of the defense bar to maintain hope and continue to fight for each and every client, because the law is certainly on our side in this battle against the bastardization of the concept of consent, against the criminalization of the constitution.

One example: the U.S. Supreme Court has repeatedly held that laws that criminalize an individual's failure to consent to a warrantless housing inspection (a search that is not geared towards uncovering criminal evidence) are unconstitutional. (*Camara v. San Francisco* and *See v City of Seattle* are two good cases).

Another example: As if it wasn't clear enough already, just saying "yes" to a search does not mean that the search was consensual. *Bumper v. North Carolina* stands for the basic proposition that if you tell someone they are required by law to consent to a search, you can't then turn around and explain that their consent alone was enough to authorize the search. *State v. George* comes right out and says, "when the right to say no to a search is compromised by a show of official authority, that the Fourth

Amendment intervenes." Can you think of something that may compromise an arrested driver's "right to say no to a search?" If you thought of Minnesota's test refusal law, go to the head of the class.

Final example: In *State v. George*, Justice Tomljanovich penned a special concurrence that surely ranks as one of the most poetic calls to action written by a Minnesotan - and in the context of today's fight against our unconstitutional test refusal law, can be viewed as almost prophetic. She wrote that our courts continue to face, "an ongoing attempt to come to grips with the increasing use by state troopers and police officers of subtle tactics to get motorists and others to 'consent' to searches." She went on to add that, "[w]e are not dealing with vacuum cleaners in this case but with the liberty and privacy interests of all the people of the State of Minnesota, and we have an obligation to ourselves and to the Constitution of this State to do what we can, in our limited role as a court of last resort, to provide reasonable protection to those interests."

We are certainly at a crossroads in Minnesota, where our legislature is doing its part to use not-so-subtle tactics to get our drivers to "consent" to searches. Since State v. Netland, our courts have carefully dodged the question of whether or not our test refusal law is unconstitutional by relying on the "single-factor exigency" doctrine to uphold warrantless DWI searches and seizures. Post-McNeely, that option is off the table, and our test refusal law stands alone as a pillar of un-American and unconstitutional legislation. Whether it will be knocked down by brave judges, or reinforced with the remains of our constitution, will be decided soon enough.

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(bio cont. on next page)

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Mr. Charles A. Ramsay has practiced Criminal Defense since 1995 and gained acquittals in nearly every type of case from DWI to murder. He prides himself on being on the cutting edge of criminal defense and has helped pioneer a number of defenses in Minnesota, including faulty eyewitness identification, false confessions, and the right of a defendant to present alternative suspects to a jury. Today, he practices primarily in the area of DWI/DUI criminal defense and appeals and civil forfeitures arising out of alleged criminal conduct. He has tried dozens of cases to verdict, the majority of which have resulted in a not guilty.

An effective appellate lawyer, Chuck has appeared before the Minnesota Court of Appeals and the Supreme Court in approximately 75 cases.

Chuck is a graduate of the University of Wisconsin-Madison and of William Mitchell College of Law. He is also a graduate of the prestigious Robert F. Borkenstein Course on Alcohol and Highway Safety: Testing Research and Litigation at the University of Indiana, 2007. He is a member of the Minnesota Society of Criminal Justice (MSCJ), a prestigious group of attorneys limited in number to 50 of the top criminal defense attorneys in the state. Chuck is also an active member of the National Association of Criminal Defense Lawyers (NACDL) and the Minnesota Association of Criminal Defense Lawyers (MACDL). Chuck also regularly serves as a faculty member at continuing education classes for health care professionals where he lectures on the topics of boundaries and ethics, and represents various professionals before their licensing boards and in the legal system.

Chuck has been named Super Lawyer by Minnesota Law & Politics, Twin Cities Business Monthly and Minneapolis/St. Paul Magazine. This honor is bestowed upon the top 5% of Minnesota lawyers as selected by their peers. In 2007 and again in 2008, he was among the top 40 of all the criminal defense lawyers in Minnesota.

Throughout his career, Chuck has successfully challenged the constitutionality of unjust laws and invalid and unreliable scientific testing methods. A Certified Intoxilyzer 5000 operator, Chuck has testified about the shortcomings of the Intoxilyzer 5000. Most recently, he intervened in the federal source code lawsuit and obtained access to the actual source code for the Intoxilyzer 5000. He is one of the three lead counsels of the Source Code Coalition.

Chuck is also widely recognized as the leading attorney on attacking Minnesota's urine testing program, having obtained court orders suppressing the urine testing as unscientific, unreliable and outright absurd.

Daniel J. Koewler, Esq.
Associate, Ramsay Law Firm, PLLC

As a result of his hard work and dedication, Dan was recently named as one of only 25 "Up and Coming Attorneys" out of the entire state by Minnesota Lawyer.

Dan Koewler is an associate attorney with Ramsay Law Firm, PLLC, licensed to practice law by the Supreme Court of the State of Minnesota. Dan represents Minnesota Clients against both a broad array of criminal charges and after-the-fact assistance with expungements. Currently, a majority of his case load is devoted to vigorously and tirelessly defending drinking and driving cases, staying one step ahead of the prosecution to insure that new developments in the law work for, not against, his clients.

Prior to graduating from University of Minnesota Law School in May 2007, he worked on Intellectual Property related issues with the National Arbitration Forum and externed at the Hennepin County District Court in Minneapolis, MN. Dan has two Bachelor of Arts degrees from the University of St. Thomas, one in Political Science and one in International Studies. He also has a minor in Spanish.

Dan was born and raised in the small town of Sleepy Eye, Minnesota, and currently lives in New Brighton, MN. In his free time he wonders why he doesn't have more free time.

"No" Means No, But Does "Yes" Mean Yes? The Cruel Choice Facing Minnesota DWI Arrestees

Derek Patrin

Should I take the test? That's probably the most common question attorneys hear when their friends, family, or clients ask for advice if they ever get arrested for DWI. When faced with such a decision at the police station, jail, or back of a squad car in handcuffs, DWI arrestees face a cruel choice in Minnesota: provide evidence against yourself from inside your body or commit a serious crime in the presence of an officer by refusing to provide that evidence. Some prosecutors and District Court judges in Minnesota would have you believe that a decision to submit to testing instead of committing a new crime constitutes the type of voluntary "consent" needed under the Fourth Amendment and its Minnesota counterpart to overcome the need for a search warrant.

For years, the Minnesota appellate courts have ducked this issue pursuant to a misinterpretation of *Schmerber v. California*, 384 U.S. 757 (1966). That case was used in Minnesota as authority to carve out a unique "single-factor exigency" in every DWI investigation that allowed officers to proceed with alcohol concentration testing without obtaining a warrant first. By using that theory to bypass the Fourth Amendment warrant requirement, the consent of the driver was not needed to justify the warrantless search. Now that the US Supreme Court has eliminated the "single-factor exigency" exception in DWI cases in *Missouri v. McNeely*, 569 U.S. ___ (2013), Minnesota courts are faced with their own "cruel choice" of deciding whether to follow normal Constitutional jurisprudence or to seek out yet another dubious exception for DWI cases. Will the courts choose to uphold the individual rights guaranteed in the State and Federal Constitutions or engage in more "pretzel logic" to maximize the expediency for officers investigating DWI offenses? History strongly favors the latter, unfortunately.

Some prosecutors and judges continue to deny the obvious outcome provided in *McNeely* by insisting that *McNeely* only applies to blood tests, and maybe urine tests, but certainly not breath tests. Apparently the "single-factor exigency" exception that was eliminated in *McNeely* somehow inexplicably still applies to some alcohol concentration tests. Other prosecutors and judges are admitting that the "single-factor exigency" is gone altogether, but they have come up with new applications of old warrant exceptions such as "search incident to arrest," the "good faith exception," and the "special needs doctrine" to try to justify warrantless searches across the board. Never mind that these other exceptions already existed before the "single-factor exigency" exception was painstakingly carved out of practically nothing, and that the *McNeely* court could have used any of those other exceptions to justify the warrantless search in that case. I will leave the lunacy of those efforts to be discussed by other writers.

A third faction of prosecutors and judges have realized that there are no warrant exceptions left to apply across the board after *McNeely*, and instead choose to rely on the "consent" provided by the driver to justify

the warrantless search. A neutral review of this issue can only lead to one conclusion: a DWI arrestee in Minnesota is not in a position to provide voluntary consent that would eliminate the need for a warrant.

The pre-test procedures that officers must follow in Minnesota currently only require them to read the standard Implied Consent Advisory (ICA) to DWI arrestees. The goal of the ICA reading is to advise the arrestee of the limited right to consult with an attorney regarding the testing decision and of the harsh consequences of refusing to submit to an alcohol concentration test, whether the officer requests blood, urine, or breath. The ICA informs the DWI arrestee that "*Minnesota law requires you to take a test to determine if you are under the influence of alcohol*" and that "*refusal to take a test is a crime.*" See Minn. Stat. § 169A.51, subdiv. 2(a)(1) and (2). The ICA also states that "If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test." *See* Minn. Stat. § 169A.51, subdiv. 2(a)(4). Not only is it a crime to decide to refuse the test, it is also a crime to make no decision at all. Only one option is left for the DWI arrestee who does not want to commit another crime in the presence of the officer: submit to testing.

This entire set up is overtly designed to force the arrestee to submit to the warrantless search of their alcohol concentration by making the alternative prohibitively punitive. Treating the resulting "decision" to submit to testing as voluntary consent for Constitutional purposes defies reason. There are three ways that prosecutors and judges have found "*consent*" to justify the warrantless search in this scenario.

First, they argue that the "*consent*" was provided prior to the reading of the coercive ICA when the DWI arrestee first decided to get behind the wheel that night. Such "implied consent" is dictated in the Implied Consent statutes (Minn. Stat. § 169A.51, subdiv. 1), they argue, and a plurality of the *McNeely* court mentioned the usefulness of implied consent statutes to assist law enforcement with persuading arrestees to provide a test sample. *McNeely*, 569 U.S. ___ (slip op. at 22). Notably, the McNeely court did not use this "implied consent" to justify the warrantless search in that case; the regular Fourth Amendment warrant analysis still applied.

Minnesota's appellate courts have been equally unimpressed with the concept of "implied consent" to justify warrantless alcohol concentration tests. This was addressed long ago by the Minnesota Supreme Court in State, *Department of Highways v. Beckey:*

> *Our implied-consent statute is designed to aid the proper enforcement of our driving-while-under-the-influence statute. The chemical tests provide a tool for determining blood alcohol concentrations indicating intoxication regardless of the availability of evidence of the accused's behavior. The term 'implied consent,' however, is a misnomer because the statute does not give the police the authority to administer the blood, breath, or urine test without the driver's actual consent.*

192 N.W.2d 441, 444 (Minn. 1971).

More recently, the Minnesota appellate courts have expressed concern that creating a blanket "implied consent" to search as a condition of driving on Minnesota roadways would be an unconstitutional condition placed on the privilege of driving. S*ee State v. Netland*, 762 N.W.2d 202, 211 (Minn. 2009); *State* v. *Netland*, 742 N.W.2d 207, 213 (Minn. Ct. App. 2007) (reversed on other grounds, *Netland*, 762 N.W.2d 202 (Minn. 2009)). Both of the Netland decisions cited *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593–94 (1926). The *Frost* decision expressed grave concern regarding the manipulation of governmental power to the detriment of individual rights:

> *[A]s a general rule, the state, having power to deny a privilege altogether,*

may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost, 271 U.S. at 593–94. Any effort to rely on "implied consent" to overcome the normal Fourth Amendment warrant requirement in DWI investigations fails miserably and opens up a new can of worms under Frost.

But does an individual have the right to refuse to submit to a warrantless (unreasonable) search under the Fourth Amendment? Absolutely. An individual enjoys the right under the Fourth Amendment to withhold consent to an unreasonable warrantless search without facing criminal penalties for doing so. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 540 (1967) (holding that a home owner had a constitutional right to insist that housing inspectors obtain a warrant to search for possible code violations and that home owner may not constitutionally be convicted for refusing to consent to the warrantless inspection); *See State v. Jones*, 678 N.W.2d 1, 29 n.3 (Minn. 2004):

A passive refusal to consent to a search cannot be treated as evidence of a crime. See United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir.1978) (stating that '[o]ne cannot be penalized for asserting this right, regardless of one's motivation. Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from liability, so may one withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing.') (citations omitted).

The unconstitutional conditions doctrine forbids the government from conditioning the privilege of driving on the relinquishment of the Fourth Amendment right to withhold consent to a warrantless search.

Second, there are prosecutors and judges who do not regard the language of the ICA as being unduly coercive, but merely presenting the DWI arrestee from a choice between two "evils" of providing harmful evidence or withholding that evidence to face criminal penalties instead. If the individual says "yes" when asked to take a test, that must be voluntary consent. They equate this choice to the one discussed in *South Dakota v. Neville*, 459 U.S. 553 (1983), which found no violation of an individual's constitutional rights when threatened with having the refusal to submit to testing used against them at trial for the underlying DWI offense to show consciousness of guilt. *Neville*, 459 U.S. at 564. They like to quote *Neville's* passage that states:

We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.

Id.

Without reading the rest of this case, that passage may be instructive here. Fortunately, we have access to the rest of the opinion, which reveals that using *Neville* to justify the coercion in Minnesota is misguided. Consider these passages from the same opinion (keeping in mind that the second passage below comes *directly before* the passage quoted above):

Schmerber, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test.

. . .

> [T]he values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace, see *Schmerber,* 384 U.S., at 771, 86 S.Ct., at 1836, that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice.

Neville, 459 U.S. at 559, 563–64 (emphasis added). *Neville* clearly relied on a reading of *Schmerber*, as Minnesota had, that assumed there could be no Fourth Amendment violation by compelling an alcohol concentration search in a DWI investigation. Now that we have the proper reading of *Schmerber* from the *McNeely* decision, which states that an alcohol concentration test can only be taken from a DWI arrestee if the usual warrant exceptions apply under the totality of the circumstances, the *Neville* decision loses its luster. *See McNeely*, 569 U.S. ___ (slip op at 9–12). Another interesting nugget to note is that the South Dakota implied consent statute in question in *Neville* required officers to inform drivers of their *right* to refuse the test. *Neville*, 459 U.S. at 559-60. To the contrary, Minnesota's implied consent law requires officers to inform DWI arrestees that refusal to take the test is a crime and they are required to submit to a test. *See* Minn. Stat. § 169A.51, subdiv. 2. We are not talking about a "difficult choice" like the one presented in *Neville*; we are talking about NO choice.

Third, there are prosecutors and judges who determine that consent is not being coerced because the ICA only threatens criminal penalties for refusing to *submit* to testing, not refusal to *consent* to testing. They like to use the more recent case of *State v. Wiseman*, 816 N.W.2d 689 (Minn. Ct. App. 2012), and this particular passage:

> [*C*]*onsent* is not constitutionally necessary to administer a warrantless chemical test, nor is *consent* the basis for the search. Indeed, the implied consent advisory required by Minnesota law, which was presented to Wiseman, does not seek a person's consent to submit to a warrantless chemical test; rather, it advises a person that Minnesota law requires the person to take a chemical test and that refusal to submit to a chemical test is a crime. Minn.Stat. § 169A.51, subd. 2 (2008).

Id. at 694 (emphasis in original). This is perhaps the most ridiculous position of the three. If we even get to this point, the assumption is that no other warrant exceptions would apply. Therefore, consent will be needed to avoid suppression of the warrantless search. If the State argues that the agreement to take the test is merely coerced "submission" instead of coerced "consent," then what saves the warrantless search from being suppressed? Let's see if we can find the answer in *Wiseman* when you consider the entire passage leading up to the quote above:

> Although Minnesota's 'implied consent' law provides that any person who drives a motor vehicle within the state 'consents' to have his or her blood, breath, or urine chemically tested for the purpose of determining the presence of alcohol, Minn.Stat. § 169A.51, subd. 1(a) (2008), the statutory phrase 'implied consent' is a misnomer in this context. A warrantless chemical test is constitutionally reasonable if the police have probable cause to believe that the person was driving, operating, or in physical control of a

> motor vehicle while chemically impaired because of the exigent circumstances created by '[t]he rapid, natural dissipation of alcohol in the blood.' *State v. Shriner,* 751 N.W.2d 538, 549–50 (Minn.2008); *accord Netland,* 762 N.W.2d at 212–13. When the requirements of probable cause and exigent circumstances are met, *consent* is not constitutionally necessary to administer a warrantless chemical test, nor is *consent* the basis for the search. Indeed, the implied consent advisory required by Minnesota law, which was presented to Wiseman, does not seek a person's consent to submit to a warrantless chemical test; rather, it advises a person that Minnesota law requires the person to take a chemical test and that refusal to submit to a chemical test is a crime. Minn. Stat. § 169A.51, subd. 2 (2008).

Id. (emphasis in original). Aha! We do not need consent because there will always be "single-factor exigency" in DWI cases to justify the search. At least that was the case until *McNeely* clarified that *Schmerber* never created a "single-factor exigency" to begin with. Using *Wiseman* is a circular argument that only leads us back to the original inquiry: what justifies the warrantless search?

It remains to be seen how the Minnesota Supreme Court (and possibly the U.S. Supreme Court, ultimately), will regard Minnesota's ICA and its inherent coercion. It is hard to imagine a scenario where an individual is able to give voluntary consent to a search immediately after being threatened with a criminal sanction for withholding that consent. Will the appellate justices bend themselves into yet another logic pretzel to find valid Constitutional consent, or unravel the unconstitutional tangle of coercion imposed on DWI arrestees? Stay tuned.

Derek A. Patrin has been practicing in the area of DWI defense since 2001. In that timeframe, he has handled hundreds, perhaps thousands, of DWI cases. His work in DWI defense has been recognized by the legal community by Minnesota Law & Politics, who has named Derek a "Rising Star" in multiple years in the practice area of DWI defense. He was also named one of 25 "Attorneys of the Year" in 2011 for his work in the statewide consolidated Intoxilyzer 5000EN Source Code Litigation and Supreme Court Appeal. Derek graduated *cum laude* from the University of Minnesota Law School in 1998 and initially worked for the large downtown Minneapolis law firm of Rider, Bennett, Egan & Arundel. After nearly two years with that firm, Derek got tired of defending large corporations and insurance companies against "the little guy," so he left. Eventually, Derek joined the DWI defense firm of Gerald Miller & Associates, where he began his work as a DWI defense practitioner and never looked back. He co-founded the firm of Meaney & Patrin, P.A. in 2005, also known as "The DWI Guys."

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10:00 – 11:00 a.m.	**Avoiding the "Personal and Confidential" Envelope – Ethics** Tom Plunkett, Esq.
11:00 – 12:00 p.m.	**GIDEON'S ARMY: The Battle Continues** **Jonathan Rapping, President and Founder of "Gideon's Promise" an Atlanta, Georgia-Based Training Center Dedicated to Training Public Defenders and Strengthening Public Defense**
12:00 – 1:00 p.m.	**LUNCH provided** **McNeely Highlights and Update:** Jeff Sheridan, Partner Strandemo, Sheridan & Dulas, P.A.
1:00 -2:00 p.m.	**Managing Paper at Trial in The Electronic Age** Joe Friedberg, Esq. and Laura Danielson, Law Firm Practice Manager, NightOwl Discovery
2:00 - 3:00 p.m.	**Collateral Consequences to Criminal Convictions** E. Michelle Drake, Partner, Nichols Kaster, PLLP and Tony Atwal, Associate Attorney, Nichols Kaster, PLLP
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