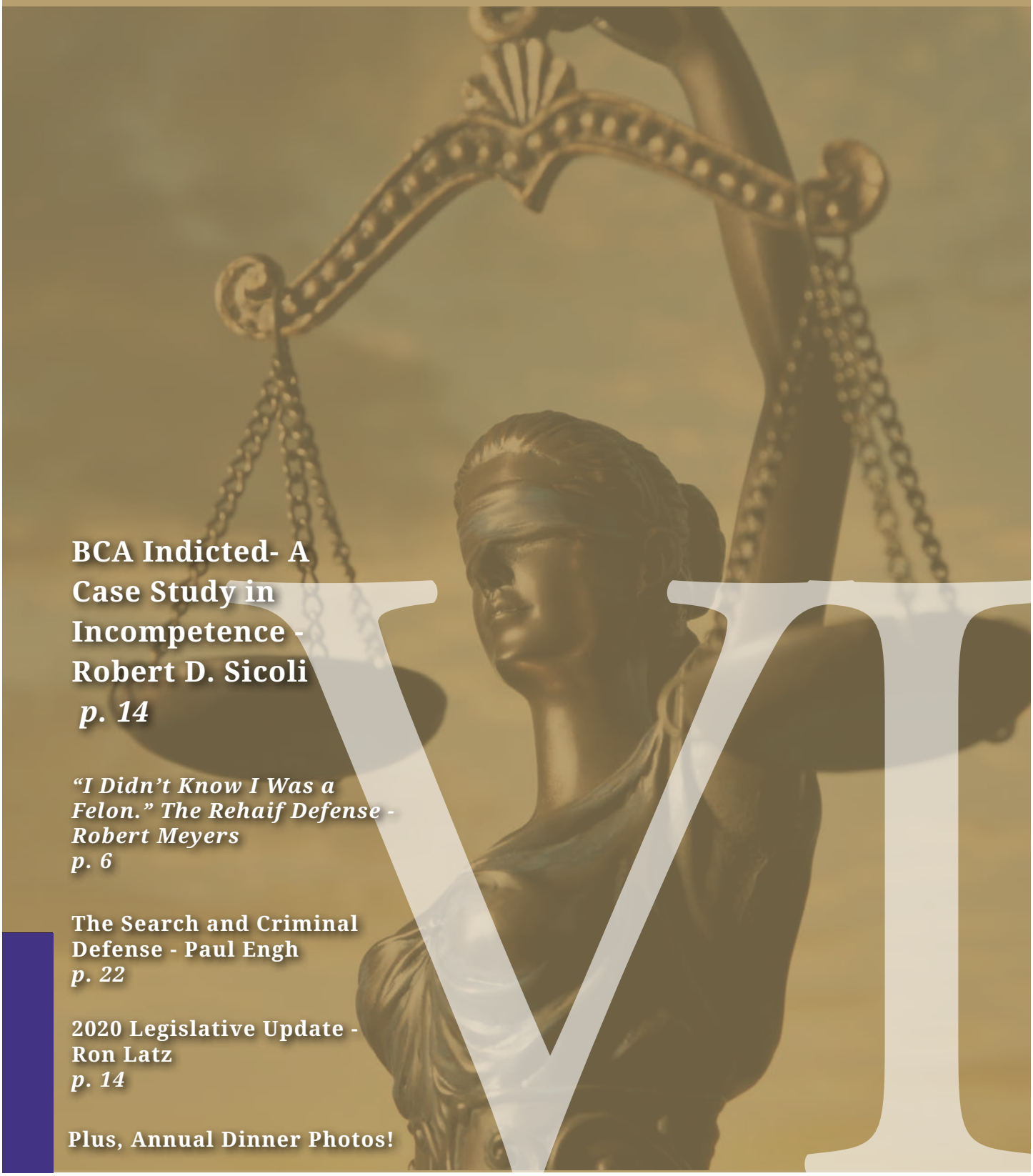
MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS



VI

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MACDL VI Magazine

Features

President's Column

Andy Birrell

These are challenging times on both a personal and professional level. COVID-19 has altered most aspects of how we live, the economy generally and how we practice law.

Like the criminal justice system, the virus has struck disproportionately hard at communities of color, the poor and people without political power.

We are also witnessing the reactions to racist law enforcement practices resulting in the murders of presumptively innocent African American citizens. Many people across the United States have taken to the streets crying out for an end to police brutality and violence.

As criminal defense lawyers, we are uniquely positioned to help our country transform the concept of equal justice under law from an aspiration to a reality. We must accept nothing less.

My hope is that MACDL will be an instrument of change in these times. We have all the tools to do it. We have over 350 members, an active board and many talented lawyers committed to help.

MACDL has shown it can respond quickly and effectively. For example, MACDL recently responded -within about 24 hours-to requests from the Minnesota Legislature for comment on several current bills. We responded in writing with an excellent statement of well thought out and reasoned positions. Input only MADCL was able to advance so quickly and effectively.

MACDL's response was compiled by many people dropping everything and working hard to produce our document. I am very proud of the many MACDL members who volunteered and put in the hard work for us to be successful. The effort was headed by Ryan Else who told me the day we were finishing up that he had barely slept the night before because he "was so excited." Bravo.

We are also in the process of expanding the MACDL strike force. The purpose of the strike force is to represent MACDL members who are faced with actual or possible contempt proceedings, subpoenas, and the like.

My concern is that with the ratcheting up of the courts "post" COVID-19 there may be instances where issues arise with lawyers being forced to trial, with procedures that may be constitutionally or otherwise infirm and a host of other problems that may put the lawyer in the position of needing strike force help. I am the Eighth Circuit coordinator of NACDL's lawyer's assistance strike force, and I can tell you we are anticipating this on a national level. MACDL needs to be ready as well. If you are interested in serving on the strike force, please let me know.

Of course, one of the best things about being a criminal defense lawyer is hanging around with other criminal defense lawyers, and we have not been able to do that for a while. Hanging around together is important not just because it is fun. We also get to spend time with people who think like us, understand us, and know what we are talking about. This is important because it reminds us of our shared goals and commitment to seeking justice for our clients. It recharges our batteries. It is affirming.

We are still all together even if we are not able to gather at this time.

In these strange and upsetting times, I hope you will "lean in" to MACDL and get more involved in who we are and what we do. There is a committee just waiting for you. If you want some help finding a place at MACDL, please call me and we will figure it out. MACDL is on the move. Let us keep it moving. Together we can help to create a more just world and have some fun in the process. ■

BCA INDICTED -

A Case Study in Incompetence

Robert D. Sicoli

The story I am going to tell sounds like a fictional Hollywood movie. Unfortunately, it is a real story that could have sent my client to prison for the rest of his life. It is a story about how the legal system failed by arrogantly assuming my client, who I will call A.J., was guilty of a brutal stranger rape solely based upon DNA evidence, when all of the other evidence indicated that he could not have committed the crime. It is also a reminder of why we as criminal defense attorneys do what we do, oftentimes in the face of an angry mob that demands that our clients be sent to prison, always assuming they are guilty.

This story begins on August 7, 2018, when an employee of Valley Fair, who I will identify here as B.P., who was staying at a dormitory-style facility used to house Valley Fair employees at the SCALE facility in Jordan, Minnesota, arrived back at the facility at about 12:45 a.m. As B.P. drove into the parking lot, she called her boyfriend on her cell phone. B.P. was talking to her boyfriend for about 7-10 minutes, when she saw someone sitting under a tree in the dark parking lot. B.P. went up to the person to see if he needed help. This person then grabbed her wrist forcing her to drop her cell phone, although the line was still open. This alleged perpetrator (I say alleged, because there is a question about whether this even happened, which I will not get into in this article) then dragged her down a 45 degree slope in the dark, through a swamp full of water, mud and 8-foot-tall reeds to an open area about 75 yards into the swamp, removed her belt, wrapped it around her neck, pulled her shorts down, and allegedly raped her.

B.P.'s boyfriend heard her scream when she dropped her phone and he called 911 at 1 a.m. The police arrived at 1:12 a.m., eventually heard B.P. scream and found her in the swamp. The SCALE parking lot and swamp area were so dark that the police officers had a hard time finding an entry to go down the 45- degree angle to the swamp, and had a difficult time navigating through the high reeds to get to B.P. Once the police found her, it took at least three officers to get her out of the swamp, back up the slope to the parking lot where an ambulance was waiting to take her to the hospital.

A.J.'s nightmare began 4 hours later when police found him sleeping in his vehicle parked on a dirt road about 1 mile from the SCALE facility. A.J. was homeless at the time, and was living out of his vehicle. While the police officers were talking to A.J. (all of this is on bodycam), they allowed him to call his father. He told his father that he didn't know why he was stopped, and that he had been in his vehicle the entire time except for one stop at a gas station in Plymouth where he bought a yogurt and an apple juice.

Prior to the stop of A.J., a police officer interviewed B.P. at the hospital. Her description of her attacker was vague, and the few specifics she gave did not fit the description of A.J. B.P. told the officer that she did not know the race of her attacker. She said he was up to a foot taller than her and was of medium to large build, maybe 250 pounds. B.P. is 5'3" and weighs 120 pounds. A.J. is 5'7" and weighs 170 pounds. She also said her attacker was wearing a dark hoodie, shiny shoes, and had a big shiny black watch on that looked expensive, "like a jeweler would wear." When A.J. was stopped by the police, he was not wearing a dark hoodie, he was not wearing shiny shoes, and he did not have any watch, let alone an expensive-looking, shiny black watch. A.J. had all of his belongings in his vehicle, and none of these items were found there.

The police were undaunted by these discrepancies. They believed they had the perpetrator because A.J. is a registered sex offender from a previous case in which he pled guilty to statutory rape for having consensual sex with a 14 year -old girl when he was 18 years old. The police asked A.J. if he would come to the station to talk, and he said he couldn't because he had to go to a job interview. The police officers then decided to give him field sobriety tests to see if they can arrest him for a DUI. He passed the tests. A preliminary breath test detected no alcohol. Despite the fact they did not have probable cause to arrest him, they arrested him for probable cause criminal sexual conduct (we filed a suppression motion, but the judge found probable cause for the arrest).

The police next got a warrant for A.J.'s DNA. The BCA took three different samples from B.P.'s belt, a sample from the belt buckle, a sample from the middle of the belt and a sample from the belt holes. They also took samples from A.J.'s penis and the inside and outside of the fly of his underwear. The BCA determined there was a major profile of his DNA on her belt buckle, but no major or minor profile of B.P.'s DNA on the belt buckle (for purposes of this article, I am not going to go into the intricacies of DNA testing). The rest of the belt had a major profile for her DNA, but no major or minor profile of A.J.'s DNA. According to the BCA, there was a major profile of B.P.'s DNA on the sample from the inside and outside of A.J.'s underwear, but no major or minor profile of A.J.'s DNA there. In other words, A.J.'s DNA was on the belt buckle of B.P.'s belt that the attacker used to strangle her, and B.P.'s DNA was on the fly of A.J.'s underwear. However, the BCA's analyst did not find any of B.P.'s DNA on A.J.'s penis, which is strange, considering that B.P. said that the rapist penetrated her. It is also strange that A.J.'s DNA was not on the fly of his own underwear, that B.P.'s DNA was not on her own belt buckle, but was on the rest of her belt, and that A.J.'s DNA was prominently on B.P.'s belt buckle, but not on any of the other portions of the belt, even though the perpetrator strangled B.P. with the belt, and the only way he could have done that is by grabbing the two ends of the belt.

Based solely on the DNA evidence, Sue Brown (who is now an Anoka County judge), the chief of the criminal division of the Scott County Attorney's Office, charged A.J. with one count of criminal sexual conduct in the first degree. I was hired by the family in September. While trying another case in Scott County, I saw Sue Brown in the courthouse. I told her I was going to be substituting as A.J.'s attorney, and she joked that now she would have to work because I would file all sorts of motions, even though A.J. is obviously guilty based upon the DNA results.

After I was hired, we started looking for the gas station where A.J. bought the yogurt and apple juice. A.J. did not remember the location of the gas station. He believed that it was a Holiday gas station either off of Hwy 169 or Hwy 100 in Plymouth and that it was next to a church. You wouldn't believe how many Holiday gas stations are in that area. We eventually found a Holiday gas station that matched the description. I emailed a request to the head of security at Holiday, giving him the time parameters and what A.J. bought at the gas station. He checked the surveillance cameras, and within an hour or so, he emailed me a clear still photo of my client entering the Holiday gas station shortly before 1:30 a.m., and sent me the cash register tape showing that this person purchased a yogurt and an apple juice. We subpoenaed the surveillance video, which showed A.J. pulling into the Holiday gas station parking lot at 1:26 a.m. I had my investigator google the route from the SCALE facility to the Holiday gas station, and also had him drive the route at night when the traffic is light. The Holiday gas station is 37 miles away from the SCALE facility, and it takes about 40 minutes to travel the route.

We had a solid timeline as to when the rape occurred because we had cell phone records showing that B.P. placed the call to her boyfriend at 12:45 a.m., was on the cell phone call for 7-10 minutes before B.P. was grabbed by her attacker, and the 911 call reporting the abduction was at 1 a.m. Therefore, since the rape occurred close to 1 a.m., there was no way A.J. could have grabbed B.P., dragged her down a 45-degree slope to a swamp area, bring her 75 yards to an open field, rape her, get back up out of the swamp area, and drive to the Plymouth gas station 37 miles away and arrive at 1:26 a.m.

I was in a 6-week federal trial at the time, but on a Friday we had off, I drove out to Scott County and personally delivered

to Sue Brown a letter from me, a copy of the Holiday gas station video, a report from an interview with my client's father regarding how we found the video, a report from my investigator regarding the drive time to the Holiday gas station from the SCALE facility, and the contact information for the head of security at Holiday, so Sue Brown or the detective could contact him regarding the video and the accuracy of the time stamp on the video.

I heard nothing back from Sue Brown, so after my trial I contacted her. She said that she didn't find the video compelling because they have DNA evidence, and she has some "wiggle room" on the timeline. Not only did she disregard the video and timeline, she then doubled down by presenting the case to a grand jury to get an indictment which alleged heinous circumstances, meaning if A.J. was convicted and if the jury found heinous circumstances to exist, he would be sentenced to life in prison without the possibility of release. She presented our alibi defense to the grand jury, as she was required to do, but had the detective testify that if A.J. grabbed B.P. at 12.50 a.m., carried her down the steep slope to the swamp, dragged her 75 feet out to an open area in the swamp, raped her, and got back out of the swamp by 1 a.m., he could have arrived at the Holiday gas station at 1:26 a.m. by driving over 85 mph!

There were so many problems with her argument that would have been obvious to anyone who was looking at the case dispassionately with an eye towards finding the truth. The detective's mathematical calculation as to the necessary speed A.J. would have to travel does not take into account the fact that it is 1.3 miles from the SCALE facility to Highway 169 on a road that has curves and a speed limit of 15 mph, and then A.J. would have had to travel south on Highway 169 from the road leaving the SCALE facility and make a U turn to travel north on Highway 169 to travel to Plymouth because you can only go south on 169 from the road that leads to the SCALE facility. Moreover, there are three stoplights along the way, including at the exit to the gas station. In addition, anyone who went out to the scene of the alleged crime (I went out to the scene 5 times) would have realized there was no way A,J. or anyone else could have done everything attributed to the attacker (not to mention clean off his clothes, and dispose of the watch, hoodie and shiny shoes) starting at 12:50 a.m and still arrive at the gas station in Plymouth 36 minutes later. Unconcerned, Sue Brown offered a plea agreement to plead to second degree CSC and a sentence at the top end of the box of 351 months. A.J. rejected the plea offer, consistently insisting he was innocent.

I then learned about Robert Richman's case in which he hired DNA expert Dr. Krista Latham to testify about transfer DNA and won an acquittal in federal court. I contacted Robert and talked with him for 45 minutes to an hour about his case, as well as mine. I then contacted Dr. Latham and retained her to look at the DNA evidence. She reviewed it immediately, and emailed me with her findings. She sent me PowerPoint slides that were color coded showing that the BCA tested 24 STRs (pieces of DNA), and comparing the results for the belt vs. the results for the fly of A.J.'s underwear. In reviewing this visual, it became clear that the results for the belt buckle looked like results that you would expect for A.J.'s fly, and the results for the fly looked like the results you would expect for the belt buckle. Dr. Latham thought that it was likely that the BCA either mislabeled the samples or mixed up the test results. She said that there was no way that A.J.'s DNA would not be on his own underwear. Dr. Latham also reviewed the BCA's unexpected results files for 2017 and 2018 (the unexpected results file contains results that the BCA knows are wrong or anomalous), and found 12 other incidences in other cases in which the BCA lab either mislabeled samples or mixed up results, but somehow caught their mistake.

We were scheduled for trial on December 2. In late October, I disclosed a summary of Dr. Latham's testimony without yet disclosing the summary charts, which I was going to disclose one week before trial. In the meantime, Sue Brown was appointed to the Anoka County Bench. In late November, I received an email from the new lead prosecutor Debra Lund (who acted ethically in this case) at about 10:30 p.m. asking me if I was available to talk the next morning. Debra called me at 11 a.m. and said she had the BCA retest the sample for the belt buckle and the preliminary results showed a major female profile that was B.P.'s DNA, and no major or minor profile of A.J.'s DNA. She told me she thinks Dr. Latham may be right, that the results were mixed-up, but that they needed to do further testing and to also retest the sample from the fly. We were scheduled to go to court that afternoon to argue pre-trial motions. She told me that when we go to court, she wanted to meet with Judge Stacey in chambers to tell him what was going on, and request that A.J. be released from jail pending the re-testing. I agreed to do it in chambers because I wanted to give her some space, since she was acting in good faith. Judge Stacey agreed and ordered A.J. released. (Unfortunately, A.J. was not immediately released from jail because he had a pending Carver County probation violation matter).

The additional testing by the BCA confirmed Dr. Latham's suspicions. The results were mixed-up. The results reported for the belt buckle (showing A.J's DNA) were really the results for A.J.'s fly, and the results reported for the fly (showing B.P.'s DNA) were really the results for her belt buckle. The next day after the testing was completed, Debra Lund filed a 30.01 dismissal dismissing the case.

After the case was dismissed, Scott County Attorney Ron Hocevar was quoted in the local Jordan paper stating that the system worked as it is supposed to because the error was discovered prior to the trial and the case was dismissed. I don't think you could convince my client that the system worked the way it was supposed to, considering he spent 15 months in the Scott County Jail facing the prospect of spending the rest of his life in prison for a crime he did not commit. All the evidence in this case other than the DNA results indicated that my client could not have committed this offense. He didn't match the description of the attacker, he was not wearing the items she said her attacker was wearing, and the alibi defense was solid showing that he could not have committed the crime. The state disregarded this evidence.

There was also an article printed in the Star Tribune in which the BCA released a statement. In its statement, the BCA misled the public by indicating that they retested the samples as routine quality control, making it sound as if the BCA through their excellent work discovered the problem. Again, not true.

If you have a case in which the state's evidence includes and/or relies on BCA DNA testing there are a several things you should do. First, make sure that you ask for the BCA litigation packet, which will include all of the analysts notes, and testing records of how the BCA collected the evidence, the chain of custody and the chronology of when the analyst or analysts took samples of the items that were tested. You should also specifically request copies of the "unexpected results file" for at least two years of testing by the BCA. The BCA makes many mistakes, some of which they catch. Many of the mistakes include contamination or transfer of DNA, many times the transfer of the analyst's DNA to the item tested. But there are also examples of mixing up labels or mixing up the results of the testing, which happened in my case.

You should also consider hiring a DNA expert to review the case. In A.J.'s case, I retained an attorney who is an expert in DNA to review the BCA reports. We were initially going to argue transfer DNA, either by the police officers or at the DNA lab. However, transfer DNA did not make sense to me because it would have required two transfers, DNA transfer from one of A.J.'s items to the belt buckle, and DNA transfer from one of B.P.'s items to A.J.'s fly. While not impossible, it appeared unlikely that there would be two transfer events. After talking to Robert Richman about his case (I want to thank Robert for spending a considerable amount of time talking to me about Dr. Latham and his case), I made the decision to retain Dr. Latham, which obviously was the key to winning the case. I would highly recommend her. Previous to hiring Dr. Latham, I had already expended thousands of dollars of my own money, mainly on hiring a cell phone expert to review my client's cell phone to determine whether we could obtain any useful evidence on my client's whereabouts that night (which we found none), and on the DNA attorney. My client's family did not have a lot of money, and could not afford to pay for experts. Dr. Latham's fees were very reasonable, and she is very thorough.

I would like to think that this case will have some effect on prosecutors and the BCA in future cases, but I doubt it. The question I can't help but ask is how many people are currently serving prison sentences for crimes they did not commit? Think about that question. There is nothing worse than an

innocent person being convicted of a crime that he or she did not commit. That is why we as criminal defense attorneys must tirelessly work on behalf of our clients. The government cannot be counted on to see that justice is done. We must do so on behalf of our clients. ■

About Robert D. Sicoli

Bob Sicoli has been a criminal defense attorney for over 32 years. He has obtained numerous jury acquittals for clients in cases ranging from murder to complicated white collar cases. He is a member of the NACDL and MACDL, and is a past President of the MACDL. Bob has mentored many younger criminal defense attorneys, and is always willing to spend time assisting other criminal defense attorneys achieve justice for their clients. If Bob can be of assistance, feel free to contact him at (612) 871-0708.

"I Didn't Know I Was A Felon."

The Rehaif Defense

Robert Meyers

Rehaif v. United States: the knowledge requirement in an unlawful possession of a firearm case under 18 U.S.C. § 922(g) and § 924(a)(2) requires a defendant to know not just that they possessed the firearm, but also that they had a certain status when they possessed it.

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18 U.S.C. § 922(g) makes it unlawful for anyone who falls into one of nine listed categories to possess a firearm or ammunition that has been shipped or transported in interstate or foreign commerce. The most frequently prosecuted category is felons: anyone convicted of a "crime punishable by imprisonment for a term exceeding one year" is prohibited from possessing a firearm or ammunition. Two other enforced categories are being an alien who is illegally or unlawfully in the United States (§ 922(g)(5)(A)) or being convicted of a misdemeanor crime of domestic violence (§ 922(g)(9)). I will refer to these nine categories of people who cannot possess firearms collectively as the status element. Section 924(a)(2) of Title 18 provides a punishment of 0-10 years in prison for anyone who "*knowingly* violates" § 922(g).

Before *Rehaif v. United States*, 139 S. Ct. 2191 (2019), § 922(g) crimes had the following elements:

1. A status element (i.e., the client had a prohibited status, meaning that they fell into one of the nine categories described in § 922(g). For example, they had been convicted of a crime punishable by more than 1 year, or they had been convicted of a misdemeanor crime of domestic violence, or they were an alien who was illegally or unlawfully in the U.S., etc.).

2. A *knowing* possession element (i.e., after having that prohibited status, the client knowingly possessed or received a firearm or ammunition).

3. A jurisdictional element (the firearm or ammunition was transported across a state line during or before possession).

The issue decided in *Rehaif* was the scope of the term *knowingly*: did it only apply to the second element, as outlined above, or did it also extend to the status element? In other words, did the defendant have to know that he or she had been convicted of a crime punishable by more than one year in order to be convicted of violating § 922(g)(1)? The Court held that knowledge applied to both the possession and the status element; that is, the government must prove that the defendant knew he possessed the firearm or ammunition and that he knew he had the status specified in the statute.[1] *Rehaif*, 139 S. Ct. at 2200. Knowledge did not apply, however, to the jurisdictional element.

[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 particular status element at issue in *Rehaif* was being an alien illegally or unlawfully in the United States. "Rehaif entered the U.S. on a nonimmigrant visa to attend university," but he failed out. *Id.* at 2194. Later, he went to a shooting range and shot two guns. *Id.* Surprisingly, the government charged him with violating § 922(g)(5) by "possessing firearms as an alien unlawfully in the United States." *Id.* The judge instructed the jury that the government did not have to prove "that Rehaif knew that he was illegally or unlawfully in the United States." *Id.* (internal quotation marks omitted).

Rehaif appealed, but the Eleventh Circuit affirmed, reasoning that the "criminal law generally does not require a defendant to know his own status, and further observed that no court of appeals had required the Government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions." *Id.* at 2195. The Court granted certiorari and reversed, holding that the "Government must prove that a defendant knows of his status as a person barred from possessing a firearm." *Id.*

The Court's reasoning began with the longstanding "presumption in favor of scienter"—i.e., that a defendant must "possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Id.* This presumption applies "even when Congress does not specify any scienter," and becomes even stronger when Congress includes a mens rea component in the statute. *Id.* Congress did precisely that in § 924(a)(2) by punishing anyone who "*knowingly* violates" § 922(g). *Id.*

There was no convincing reason for departing from that presumption in Rehaif. Everyone agreed that *knowingly* applies to the second element (the possession element). *Id.* at 2196. It wouldn't make sense to apply knowingly to the second element, but not the first. *Id.* More fundamentally, criminal law should generally reach only those individuals "who understand the wrongful nature of their act[, not] those who do not." *Id.* (internal quotation marks omitted). Scienter requirements help distinguish between these groups. *Id.*

And that's exactly what applying *knowingly* to the status element does here: "it helps to separate wrongful from innocent acts. Assuming compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent." *Id.* at 297. So "the defendant's status, and not his conduct alone," differentiates wrongful acts from innocent ones. *Id.* If the defendant does not know his status, he "may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.*

The Court found the government's arguments to the contrary unconvincing. The government argued that "Congress does not normally require defendants to know their own status"; for support, the government adduced three other statutes: one prohibited people of certain status from misappropriating classified information, one applied to individuals over 18 who solicit a minor to help avoid being detected of certain crimes, and the final applied to a "parent or legal guardian who allows his child to be used for child pornography." *Id.* (internal quotation marks omitted). The conduct these statutes proscribe is "wrongful irrespective of the defendant's status." *Id.* So they are fundamentally different than § 922(g) and § 924(a)(2), in which "the defendant's status is the crucial element separating innocent from wrongful conduct." *Id.*

The Court also did not think "that Congress would have expected defendants under § 922(g) and § 924(a)(2) to know their own statuses." Requiring no scienter with respect to status could thus lead to absurd results: "these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is '*punishable* by imprisonment for a term exceeding one year.'" *Id.* at 2198 (quoting § 922(g)(1)).

The government characterized the status inquiry, which in *Rehaif* was whether an alien was illegally or unlawfully in the United States, as a question of law. *Id.* Then the government pointed to the maxim that ignorance of the law is no excuse to a crime. *Id.* But the government's argument failed to account for when the maxim does and does not apply.

The maxim applies when a "defendant has the requisite mental state in respect to the elements of a crime but claims

to be unaware of the existence of a statute proscribing his conduct." *Id.* (internal quotation marks omitted). In essence, it prohibits the argument that though a defendant knew what she was doing, she didn't know there was a statute criminalizing her conduct.

But the maxim does not usually apply when a defendant "has a mistaken legal impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct, thereby negating an element of the offense." *Id.* (internal quotation marks omitted). For instance, say a defendant receives probation for a crime punishable by more than a year. If the defendant does not know that he was convicted of a crime punishable by more than one year (a distinct possibility), he's mistaken about the collateral legal matter of his status. So when he possesses a gun, he doesn't understand that he's been convicted of a crime punishable by more than one year and is thus prohibited from possessing a gun. So his mistake about the collateral legal matter of his status "results in his misunderstanding the full significance of his conduct." *Id.* He "does not have the guilty state of mind that the statute's language and purpose require." *Id.*

The Court's reasoning that knowledge applied to any element necessary to ensure that the defendant's conduct was wrongful rather than innocent also explains why knowledge did not extend to the jurisdictional element (i.e., that the firearm or ammunition was transported across a state line during or before possession). This element's function was simply to ensure that federal courts had jurisdiction over the defendant's conduct through the Commerce Clause. It was not separating wrongful conduct from innocent conduct. "Because jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter." *Id.* at 2196.

In sum, to convict a defendant under § 922(g) and § 924(a)(2) the government must prove that the gun traveled across state lines, and that the defendant knew both that he possessed the gun and that he had the relevant status when he possessed it.

The Court expressly declined to opine "about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here." *Id.* at 2200. But it did remark that it "doubt[ed] that the obligation to prove a defendant's knowledge of his status will be as burdensome as the Government suggests." *Id.* at 2198. And it cited to the rule that "knowledge can be inferred from circumstantial evidence." *Id.* (internal quotation marks omitted).

Now that we have set forth *Rehaif's* holding and reasoning, we can begin to explore its implications.

Rehaif arguably makes it impossible to prosecute under § 922(g)(9) which prohibits possession of a firearm by one convicted of a misdemeanor crime of domestic violence).

In light of *Rehaif*, a client who knows he has been convicted in any court of a *misdemeanor crime of domestic violence* may not possess a firearm. 18 U.S.C. § 922(g)(9) and § 924(a)(2). A *misdemeanor crime of domestic violence* is a term of art that is defined in 18 U.S.C. § 921(a)(33)(A). The term means an offense that is (1) a misdemeanor and (2) that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a domestic relation (e.g., current or former spouse, parent, or guardian of the victim).

Determining whether a conviction qualifies as a *misdemeanor crime of domestic violence* requires courts to apply the categorical approach (and perhaps the modified categorical approach). *United States v. Castleman*, 572 U.S. 157, 168 (2014). These analytical approaches require courts to decide whether the elements of the conviction at issue are the same or narrower than the definition of *misdemeanor crime of domestic violence* in § 921(a)(33)(A). If the conviction's elements are the same or narrower than that definition, the conviction counts as a *misdemeanor crime of domestic violence*; if the elements are broader, it doesn't. Fully explaining how these analytical approaches apply is beyond the scope of this article. The crucial point about these approaches is that applying them is very complicated and difficult, even for attorneys and courts.[2]

Under these approaches some state domestic-abuse statutes will fall within the term *misdemeanor crime of domestic violence* under § 921(a)(33)(A), and some won't. Ascertaining whether a domestic-abuse conviction under a particular state statute does or doesn't qualify as a *misdemeanor crime of domestic violence* is going to be complicated and difficult for legal practitioners and essentially impossible for clients. This in turn means that it is essentially impossible for a client to know whether his prior state conviction is a *misdemeanor crime of domestic violence* under § 921(a)(33)(A). So when a § 922(g) prosecution is predicated on the client having been convicted of a *misdemeanor crime of domestic violence*, defense attorneys should argue that a client can't know whether they possess this status and thus cannot be convicted of unlawful possession of a firearm under *Rehaif*.

Prosecutions under § 922(g)(1): felons in possession.

1. *Meritorious claims of* Rehaif *error versus unmeritorious ones*

The most frequently prosecuted crime under § 922(g) is felons in possession. If your client was convicted of a crime punishable by more than one year in prison, it is unlawful to possess a gun. After *Rehaif*, the government must prove that your client knew that he had been convicted of a crime punishable by more than one year in prison. This means that indictments must allege, jury instructions must require, and plea colloquies must establish that your client knew that he had been convicted of a crime punishable by more than one year in prison.

In many cases, this will not be difficult for the government to establish. If your client has actually served more than one year in prison on a prior conviction, arguing that the knowledge-of-status element is not satisfied will almost certainly not work. *See E.g., United States v. Hollingshed*, 940 F.3d 410 (8th Cir. 2019) (reasoning that Hollingshed's being imprisoned for 4 years on a prior drug conviction, being imprisoned for an additional 15 months following his supervised release being revoked, and his prison call to his girlfriend asking someone else to claim ownership of the gun "indicate[d] that [he] knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year); *United States v. Parsons*, __ F.3d __, 2020 WL 62780, at *2 n.2 (8th Cir. 2020) (reasoning that a *Rehaif* claim would fail because Parsons "served more than two years in prison for the underlying . . . assault conviction). Similarly, if your client received a sentence of more than one year on a prior conviction, it will also be very difficult to argue that your client did not know he had been convicted of a crime punishable by more than one year. *United States v. Seltzer,* 2020 WL 91066, at *2 (8th Cir. Jan. 8, 2020) (unpublished) (reasoning that the government could show Seltzer knew he had been convicted of a crime punishable by more than one year because "Seltzer had been sentenced to more than a year in prison on some of his previous convictions, including one on which he received a two-year prison sentence").

But there are cases in which a *Rehaif* claim would be viable. *Rehaif* itself pointed to one such situation: "a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is '*punishable* by imprisonment for a term exceeding one year.'" *Rehaif*, 139 S. Ct. 2191, 2198 (quoting 18 U.S.C. § 922(g)(1)) (emphasis in original).

The Eighth Circuit in *United States v. Davies* provides another example of a meritorious claim. 942 F.3d 871 (8th Cir. 2019). Davies pled guilty to two Iowa felonies in September 2016. Later, in October 2016, he possessed two

[2] For example, fully defining how these approaches work has taken at least four Supreme Court cases: *United States v. Taylor*, 495 U.S. 575 (1990); *United States v. Shepard*, 544 U.S. 13 (2005); *United States v. Descamps*, 570 U.S. 254 (2013); *United States v. Mathis*, 136 S. Ct. 2243 (2016). And these approaches have created numerous circuit-court splits as courts struggle to apply them to particular state statutes.

firearms. In December 2016, the Iowa state court entered a deferred judgment against him and placed him on probation. *Id.* at 872

Davies was indicted federally for the firearms he possessed in October 2016. At a bench trial, he stipulated that he knowingly possessed the firearms, but he argued that he had not been convicted of a felony at the time he possessed them because he had not yet been sentenced on the two Iowa felonies. The district court found that Davies's guilty plea qualified as a conviction under Iowa law and therefore found him guilty of being a felon who possessed a firearm. Davies appealed. *Id.*

He continued to argue that his guilty plea was not a conviction under Iowa law and he thus was not a felon when he possessed the firearms. *Id.* The Eighth Circuit rejected this argument. *Id.* at 873.

But Davies also argued in the alternative that "even if he was convicted under Iowa law, the Government did not prove that he knew he had been convicted," as *Rehaif* requires. *Id.* at 873 (emphasis in original). (*Rehaif* was not issued until after the appeal was fully briefed, but the Eighth Circuit ordered supplemental briefing to consider its impact on the case.) "Because [Davies] failed to challenge the lack of a jury instruction regarding his knowledge of his felony status, we review his claim for plain error." *Id.* (quoting *Hollingshed*, 940 F.3d at 415) (brackets in original).

The government conceded that the failure to require knowledge of status was plain error.[3] But it argued that Davies could not satisfy the third prong of plain-error review: namely, "that the error affect[ed] his substantial rights." *Davies*, 942 F.3d at 873. To satisfy this prong, Davies had to show a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* (internal quotation marks omitted). The government pointed out that when Davies pled guilty to the two Iowa felonies, "he affirmatively stated . . . that he understood that he was pleading guilty to two felonies, each of which carried a statutory maximum of up to five years." *Id.* Moreover, "Davies stipulated to the [federal] district court" trying his gun case "that he pleaded guilty to crimes 'punishable by a term of imprisonment greater than one year.'" *Id.* at 874.

But these "facts establish [only] that Davies knew he pleaded guilty to the Iowa felonies, they do not show that he knew he had been *convicted* of the Iowa felonies." *Id.* There was no "evidence that he knew when he possessed the firearms on October 25, before his sentencing, that he had been convicted of those crimes. Indeed, it seems reasonable that someone in Davies's position, after pleading guilty, might nevertheless think he could possess firearms because he had not yet been sentenced." *Id.* So "Davies has shown a reasonable probability that the outcome would have been different" absent the *Rehaif* error. *Id.* And because *Rehaif* had reasoned that when a defendant does not know his status, his conduct may be an "innocent mistake" rather than wrongful, the Eighth Circuit concluded that the fourth prong of plain error—namely that the "error also serious affected the fairness, integrity, or public reputation of judicial proceedings"—was satisfied as well. *Id.* So the Eighth Circuit vacated Davies's conviction and remanded for a new trial. *Id.*

2. *How to proceed in cases in which the government has not set forth that the knowledge of status is satisfied*

Given the holding in *Rehaif*, prosecutors will now presumably conform indictments, plea agreements, and a plea's factual basis at the change-of-plea hearing to the new law (e.g., indictments will allege that your client knew he was convicted of an offense punishable by more than one year in prison, etc.). But there will be prosecutions that started before *Rehaif* was decided that are deficient in one or more respects now. For example, the indictment may not allege knowledge of status, or it may not have been established in the plea agreement or the plea colloquy that your client knew he was convicted of a crime punishable by more than one year. How should you proceed in these cases?

[3] The law is clear that "Supreme Court decisions in criminal cases apply to all cases pending on direct review." Davies, 942 F.3d at 873 (internal quotation marks omitted).

The guiding principle is determining whether your client will benefit from your actions. So the merits are important. Do you have a potentially meritorious argument that your client did not know he was convicted of an offense punishable by more than one year in prison? If your client had served more than one year on a prior conviction or had been sentenced to more than one year on a prior conviction, a *Rehaif* argument is very unlikely to prevail.[4] But if you do have a *Rehaif* argument with merit, you may want to take steps to litigate this issue. You can move to dismiss an indictment for failing to state an offense under Rule 12(b) of the Federal Rules of Criminal Procedure. If your client has already pled guilty, you can move to withdraw the guilty plea under Rule 11(d)(2) of the Federal Rules of Criminal Procedure. See *Kercheval v. United States*, 274 U.S. 220, 224 (1997). If your client is on direct appeal after being convicted through a plea, you can argue that the guilty plea is null and void because the court lacked jurisdiction under Rule 12(b)(2) of the Federal Rules of Criminal Procedure. The argument being that by missing an element, the government failed to state an offense. If your client is on direct appeal after being convicted following a trial, you can argue that *Rehaif* renders the conviction inval*Id.* *See Davies*, 942 F.3d at 873-74.

When seeking to undo a plea agreement or a sentence that you consider favorable, it is imperative that you think through whether doing so will benefit your client. Because the last thing you want is to succeed in getting a plea agreement withdrawn or a sentence vacated only to find later that your client ends up with more time.

3. Old Chief *stipulations after* Rehaif

Whether you seek to enter an *Old Chief* stipulation—i.e. stipulating that your client was convicted of a crime punishable by more than one year in order to prevent prejudice flowing from the prosecution offering evidence of the name and nature of the prior conviction—after *Rehaif* depends on whether you want to raise a *Rehaif* defense. If you have no viable knowledge-of-status defense, an *Old Chief* stipulation agreeing to status and knowledge of status is likely strategically advantageous. But if your defense is that your client did not know he had the requisite status, you probably do not want to enter any stipulation about your client's prior conviction.[5]

Moreover, it's untenable to think that you can contest knowledge of status without the government being able to introduce the name and nature of your conviction, and probably much more. If you are contesting knowledge, the government will have to prove beyond a reasonable doubt that your client knew that he was convicted of an offense punishable by more than one year in prison. To do that, they would need to introduce evidence that your client actually spent more than one year in prison on a prior conviction, that your client received a sentence of more than one year on a prior conviction, or, if neither of those things are true, that it's common knowledge that the prior offense your client was convicted of is in fact a felony. They'd probably want to show all the times your client had been in court to show that your client was familiar with the legal process and knew what was going on. Remember, *Rehaif* explicitly points out that knowledge can be proved through circumstantial evidence. In sum, if you contest knowledge of status, you should know that the government is going to have wide latitude to introduce evidence that your client knew he had the status, and that evidence is likely going to be very damaging to your client.

[4] Remember that all Rehaif requires is that your client knew he possessed a certain status (e.g., that he was convicted of a crime punishable by more than one year). It does not require that he knew he was prohibited from possessing a firearm based on that status.

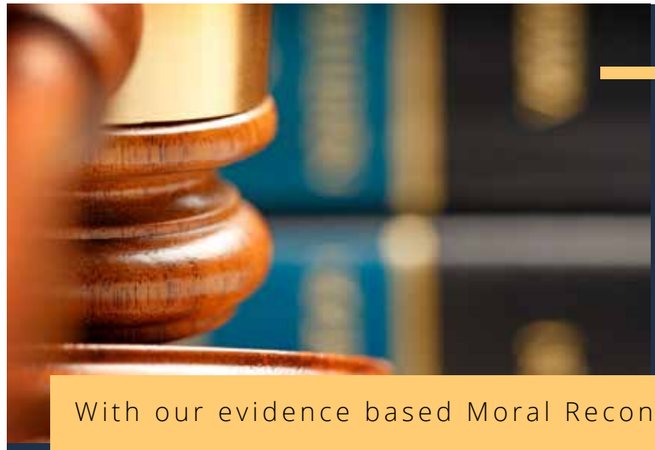
[5] The Eighth Circuit has not yet decided whether an *Old Chief* stipulation means that your client has also agreed that he knew he was convicted of an offense punishable by more than year. The cases presented to the Eighth Circuit thus far have been reviewed for plain error. When an *Old Chief* stipulation was present, the Eighth Circuit was able to assume without deciding that the stipulation did not resolve the knowledge-of-status element and then conclude that the defendant lost because he could not establish that the error affected his substantial rights. *See Hollingshed*, 940 F.3d at 415 ("[W]e will *assume* that Hollingshed's [*Old Chief*] stipulation does not resolve the issue of whether he knew he was a felon." (Emphasis added.)).

Conclusion

Rehaif changed the law significantly in an unlawful-possession-of-a-firearm case by requiring the government to prove that your client knew they had the requisite status under § 922(g). For clients prosecuted under § 922(g)(9)—which makes it illegal for someone convicted of a misdemeanor crime of domestic violence to possess a firearm—defense attorneys have a substantial argument that prosecutors cannot prove the knowledge-of-status element. For other subsections of § 922(g), whether a client has a valid *Rehaif* claim will be highly fact dependent. Defense attorneys need to carefully consider whether marking a *Rehaif* argument will help or hinder their clients.

About Robert Meyers

Robert Meyers is an Assistant Federal Defender in the Office of the Federal Defender for the District of Minnesota.



The Search and the Practice of Criminal Defense

Paul Engh

In 1962, Walker Percy won the National Book Award for his first novel, *The Moviegoer* (Knopf 1961 and The Noonday Press 1967) . It was an unexpected achievement, and signaled the arrival of new Southern Catholic voice in literature. The protagonist, a fellow named Binx Bolling, enjoys, among other things, going to the movies by himself. While watching the silver screen, her ruminates about the lives of the actors, and who it is that he would want to be. He thinks about breaking free of what his life has become by means of "the search."

As Mr. Percy explains, "[t]he search is what anyone would undertake if he were not sunk in the everydayness of his own life. To become aware of the search is to be onto something. Not to be onto something is to be in despair." Noonday Press, at 13. "As you get deeper into the search, you unify. You understand more and more specimens by fewer and fewer formulae. There is the excitement. Of course, you are always after the big one, the key, the secret leverage point, and that is the best of it." *Id.* at 82.

Mr. Percy is also cautious as to the ultimate result of the breaking free. "Where there is a change of gain, there is also a chance of loss. Whenever one courts great happiness, one also risks malaise." *Id.* at 121.

The practice of criminal law is about that same kind of search, the constant effort to avoid a malaise that comes with a perverse verdict, an unfair sentence, a loss on appeal, all of this balanced with the chance of day to day happiness and success.

But when you think about it, just everyone is searching. And you can learn a lot by observing others who likewise struggle against everydayness. You just have to decide to look.

An example of where the search can be found is at the edge of St. Thomas University, Houston, Texas. Light drifts down through the ceiling of the Rothko Chapel, onto fourteen purple and black panels each reflecting the artist's end descent. What you don't initially see are the deep red and dull orange tints buried in the each canvass.

Mark Rothko described his own search as a reflection of the "basic human emotions – tragedy, ecstacy, doom." Paul Richard, "Rothko of Paper: Gazing at Eternity" The Washington Post (May 13, 1984). Rothko "painted the struggle – as a difficult crossing into an unknown space where life appears on the verge either of a new start or disintegration." James Breslin, *Mark Rothko, A Biography* (University of Chicago Press 1993), at p. 327.

Mr. Rothko spoke of "the boundless aspirations and terrors, the welter of restlessness, the senselessness, the desires, the alternations of hope and despair out of context and out of reason," described as "the shaky security of our ordered life," *Id.* at p. 499, an everydayness he, too, sought to escape.

Rothko's most famous paintings are of rectangles that appear as if hovering in twos and threes, the separation of layered colors a "fluctuating movement, charged feeling." *Id.* at p. 267. Repetition was his mantra. "If a thing is worth doing once," he said, "it is worth doing over and over again – exploring it, probing it, demanding by this repetition that the public look at it." Richard, supra.

Beginning each work with a raw, un-primed canvas, "to which he applied a glue size mixed with powered pigments," Breslin, at p. 316, Mr. Rothko diluted his oils with turpentine, and then applied the colors, one after another, and yet another. Rothko had always wanted his large paintings hung low as to "confront and surround a viewer." *Id.* at 378.

He became famous for his singular vision. "Mark Rothko's layered bands of misty color represent the apex of the 20th-century abstraction. Here was an artist who painstakingly distilled the achievements of the painters who came before him, and forever changed how we see the horizon line." Ted Loo, "Rothko's Journey to His Fields of Color, in Full View," *New York Times* March 20, 2013). Indeed, Rothko's "horizons are never dull, ruled lines. Frequently they're fogged. Occasionally they slightly curve as if in imitation of the rolling of the sea." Richard, *supra.* There was a " rapture in his pictures. They feel imbued with the sacred, no land divides their waters. The colored light within them is stranger than plain daylight. It has the unfamiliar freshness of light just created." *Id.* "Rothko painted light," *Id.*, and a leaning into that light.

Most cases in the law begin with a void, the empty if symbolic canvass, the blank page. You start out with nothing. No relationship with the client has been formed. There has been no investigation, an absent theory of the defense. You begin working the file hoping to find the fault lines within the government's proof. It's the same process for each new case, the starting out, no matter how many years you're away from graduation.

Lawyers are not often painters, of course, or writers of Catholic Existential novels like Walker Percy was. But there is a daily search in the practice. As you move forward in each case, you're walking toward a destination which you may think you know but can't be sure of. In doing so, you're heading away from the everydayness, and toward your own line on the horizon, a demarcation between what you already know and what you'll invariably learn. From an uncertain start, the journey can be enthralling. ■

About Paul Engh

Paul has practiced criminal law since 1981.

2020 Legislative Update

Ron Latz

The 2020 Legislative Session got off to a strong start but was quickly and entirely derailed by the onset of the COVID-19 pandemic. What was supposed to be a session focused on policy work and a bonding bill became a session focused on quickly passing bills that kept Minnesotans safe and got money into the hands of those that needed it to combat the coronavirus.

The legislature passed a number of COVID response bills that included a handful of judiciary-related items intended to make Minnesotans' lives easier during the pandemic.

Of particular importance was legislation that paused statutory deadlines in district and appellate courts until 60 days after the end of the state's peacetime emergency.

We were also able to pass a handful of small omnibus bills. We passed a data privacy bill that requires law enforcement agencies to obtain a warrant in order to use a drone for surveillance, with some exceptions for emergencies, disasters, and other issues, and requires law enforcement to obtain a warrant to search through electronic communication, namely emails. The bill also requires a tracking warrant for unique identifiers associated with smartphones and apps, and it makes clarifications to reporting on electronic location tracking warrants.

We passed a civil law omnibus bill that includes updates to the state's guardianship and conservatorship laws, updated laws governing transfers to minors, increased the amount a worker may preserve under a wage garnishment to 40 times the amount of either the state or federal minimum wage - whichever is higher - from garnishment per pay period, and extended the length of time that court ordered wage garnishment can continue from 70 to 90 days.

I was also able to pass during regular session a bill to mandate best practices for the use of double-blind eyewitness identification procedures, a bill that was worked on by the Innocence Project, and we will also almost certainly see a presumptive five-year cap on probation sentences starting August 1 as the legislature did not act to stop the Sentencing Guideline Commission's recommendation from going into effect.

Unfortunately, many of my priorities - including gun violence prevention, civil forfeiture reform, and changes to the state's DWI ignition interlock program - were left on the table as the pandemic forced us to narrow our focus for regular session. The governor called us into a special session on June 13. While the original reason for the special session was to extend the state's peacetime emergency ordered in response to COVID-19, important work was added to the agenda following the Memorial Day murder of George Floyd at the hands of a now former Minneapolis police officer and the protests that followed.

The murder of George Floyd is not an isolated incident but instead a reflection of the inherent structural issues present in our criminal justice system, especially in how law enforcement treats Black people and other people of color. The time is now to take steps toward creating systemic and structural change in our criminal justice and policing system, and I support the People of Color and Indigenous (POCI) Caucus' legislative proposals that take those steps.

These proposals include banning chokeholds, requiring officers to intervene when their colleagues are using excessive force, and requiring that police officers report uses of excessive force while allowing them to do so without fear of retaliation. They would help prevent another murder by the hands of a police officer.

These proposals also include mandating mental health and crisis intervention training as well as training on interacting with people with autism, which will make interactions with police officers safer for some of our state's most vulnerable individuals.

Another piece of the proposal, appointing independent investigators for officer-involved shootings and cases of excessive force and appointing a special prosecutor for cases of officer-involved deaths, is a first step in ensuring justice when this does happen.

The proposals also include cash bail reform, voter restoration for individuals with felonies, data collection and regulatory reform, and more.

Unfortunately, in a divided legislature where Republicans in the Senate have ignored the need for any substantive changes to our policing and criminal justice system, I am not certain that these proposals will make it into law.

While they call for 'sweeping reform', Republicans are instead putting up minimal proposals that essentially sweep reform under the rug. At the time of writing this, Republicans have refused to engage with or listen to people of color in formulating their proposals. We have to listen to our Black community and communities of color that are experiencing every day the impacts of the systemic racism in our policing and criminal justice systems or we will not bring forward the systemic changes actually needed.

Senate Republicans are committed to adjourning the special session after a week, regardless of whether our work is done. As of this writing, we have yet to pass a bonding bill or pass any substantive changes to our policing and criminal justice system. I hope that if Senate Republicans do adjourn, the governor calls us back in so we can continue to do our jobs and have the tough conversations and pass the bills that will make a real difference in the lives of Minnesotans.

If you would like more information on any of the policing or criminal justice reform bills moving through the legislature, or you want to get involved in any of these issues, please contact my office at (651) 297-8065 or email me at Ron@ronlatz.org.

I also encourage you to contact Senator Paul Gazelka at (651) 296-4875 and Senator Warren Limmer at (651) 296-2159 and demand that they not hold up the POCI Caucus' transformative criminal justice and policing legislation. ■

About Ron Latz

Senator Ron Latz was first elected to the Minnesota Senate in 2006 to represent District 46, which includes St. Louis Park, Hopkins, Medicine Lake and parts of Golden Valley and Plymouth. Ron also served for four years in the Minnesota House of Representatives and for nine years on the St. Louis Park City Council.

Senator Latz is the lead Democrat on the Judiciary and Public Safety Budget and Policy Committee. Before the past election, he was Chair of the Judiciary Committee.

Ron served as a Minnesota Assistant Attorney General from 1989-1995, mostly in the Public Safety Division.

Ron is a private criminal defense and civil employment discrimination lawyer. He graduated from Harvard Law School in 1988 and from the University of Wisconsin-Madison, B.A. w/Honors 1985, Phi Beta Kappa. Ron resides in St. Louis Park, is married to attorney Julia Shmidov Latz and together they have three children, Nathan, Miya and Yana.

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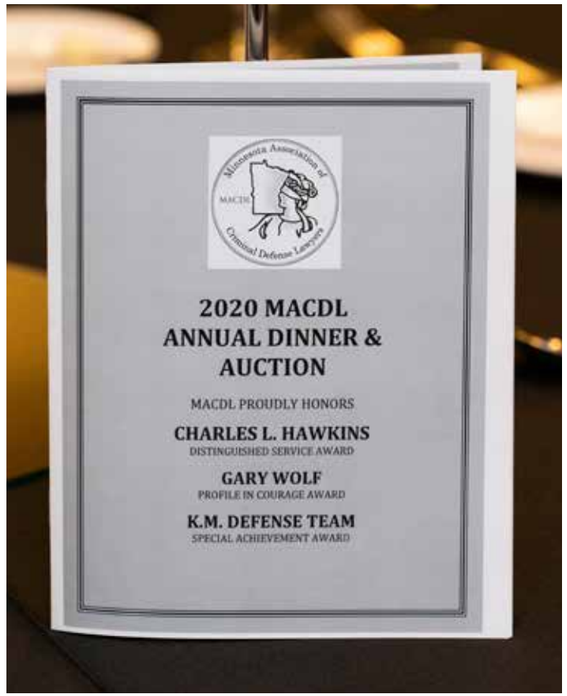

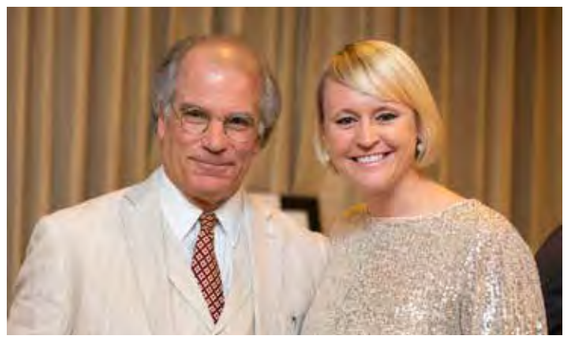

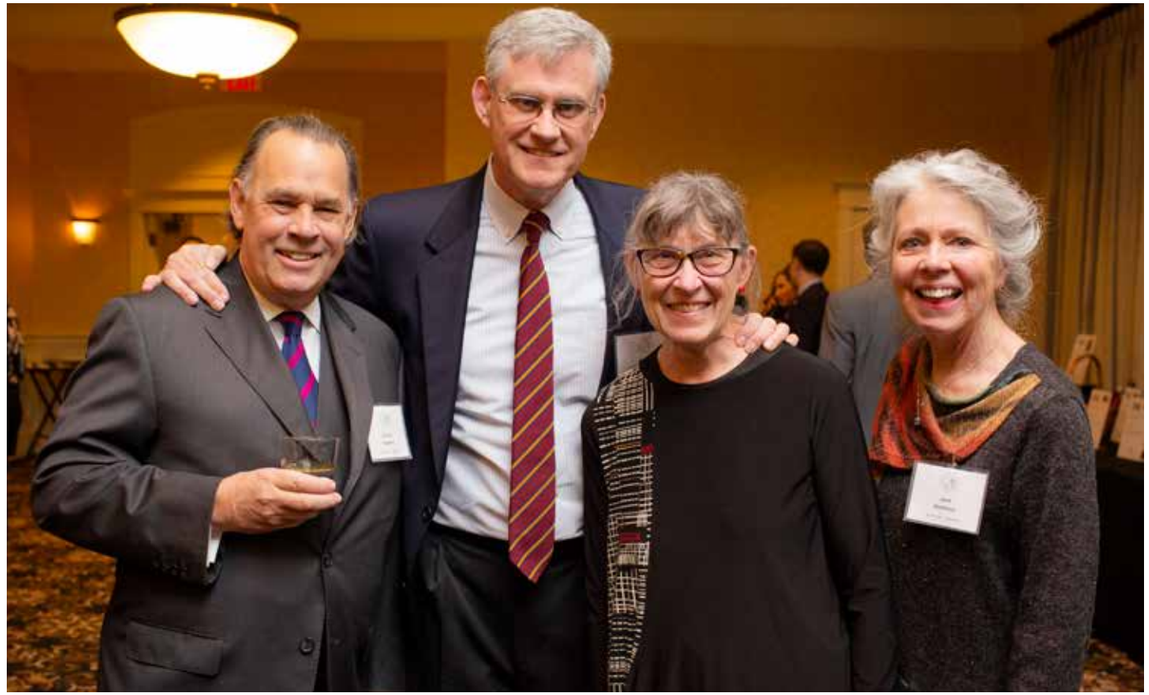

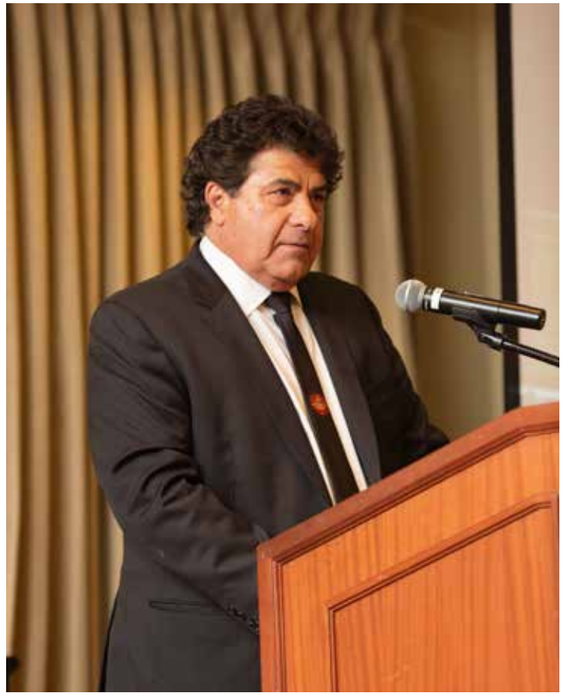

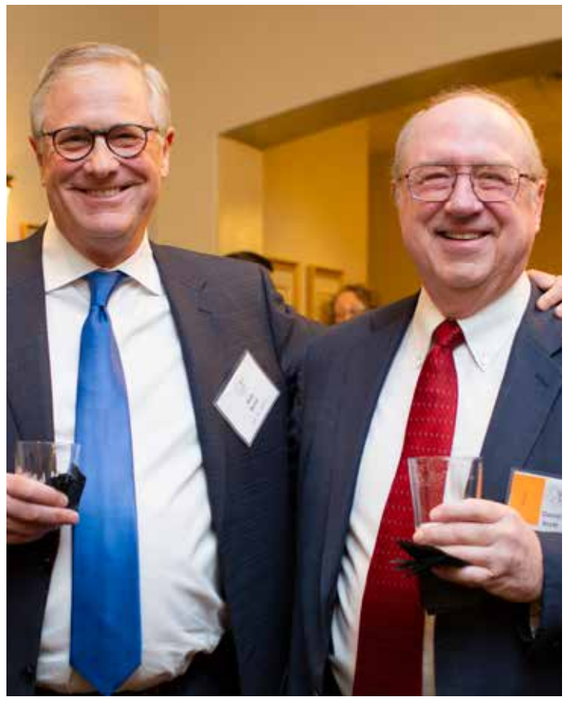

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