Rocks rather than Cathedrals: The Minimalist Architecture of the Minnesota Supreme Court

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ROCKS RATHER THAN CATHEDRALS: THE MINIMALIST ARCHITECTURE OF THE MINNESOTA SUPREME COURT†

Carol Weissenborn†

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“Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .”

“Ambiguity is a creature not of definitional possibilities but of statutory context . . . .”

1. ANTOINE DE SAINT EXUPÉRY, PILOTE DE GUERRE (1942) (“A rock pile ceases to be a rock pile the moment a single man contemplates it, bearing within him the image of a cathedral.”).

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2. NLRB v. Federbush Co., 121 F.2d 954, 957 (2nd Cir. 1941) (L. Hand, J.).

I. INTRODUCTION

During the Minnesota Supreme Court’s 2009–10 term, Governor Tim Pawlenty’s appointees—Chief Justice Eric Magnuson and Justices G. Barry Anderson, Lorie Gildea, and Christopher J. Dietzen—formed the court’s fulcrum. They voted together, at least in criminal cases, some fantastic percentage of the time. They controlled case outcomes.

The “majority bloc” justices share an allegiance to minimalist principles. They believe that courts should yield to plausible judgments of the legislative and executive branches. They value jurisprudential modesty. They are averse to ambitious statements and broad rules. In statutory construction, they practice a new textualism, which involves a concrete application of “plain meaning” rules.

Two of the term’s high-profile cases, State v. Peck—the “bong water” decision—and Brayton v. Pawlenty—the unallotment case—provide especially fruitful opportunities for an exploration of the court’s uses of minimalism and textualism. The cases demonstrate that textualism does not exclude subjective choices, and minimalism does not preclude immodesty.

Part II develops a context for the discussions of Peck and Brayton. Part II.A tests quantitatively what many people assume to be true—that the Pawlenty appointees form a discrete voting bloc. Part II.B examines the values and conceits that underpin the bloc’s judicial philosophy. Part III analyzes State v. Peck, with a particular eye toward the mechanics of the conservative majority’s textualism. Part IV evaluates the dissenting justices’ minimalist claims in Brayton v. Pawlenty. Part V considers the impact of Justice David R. Stras’s addition to the court. Part VI reflects on the court’s direction in light of cases like Peck and Brayton.

5. Brayton v. Pawlenty, 781 N.W.2d 357 (Minn. 2010).
6. See infra Part II.
7. See infra Part II.A.
8. See infra Part II.B.
9. See infra Part III.
10. See infra Part IV.
11. See infra Part V.
II. BACKGROUND

A. A Voting Bloc

The 2009–10 term’s iteration of the Minnesota Supreme Court impressed many observers as more similar to the United States Supreme Court—the defined blocs, the clustering around ideological poles—than to the avuncular, centrist Minnesota Supreme Court of years past. This article attempts to quantify this hypothesis to some extent by examining the court’s voting patterns in its 2009–10 criminal cases. A complete roster of the criminal cases appears below. What follows is, admittedly, a limited assessment. An examination of the court’s voting in all cases, civil and criminal, would provide a more complete and reliable measure of its voting trends. Nor does my analysis permit historical comparisons of voting breakdowns. Nonetheless, even this partial exploration should afford some insight into the contemporary court’s particular synergy.

This article begins by looking at the entire pool of criminal cases decided during the 2009–10 term. In twenty-seven of the forty-seven cases, or 57.4%, the justices were unanimous in the opinion. In thirty-two of the forty-seven cases, the justices were unanimous in the result, for a rate of 68%.

<table>
<thead>
<tr>
<th>Breakdown Criminal Cases Decided, 2009–10 Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unanimous in signed opinion</td>
</tr>
<tr>
<td>Unanimous in final vote (at least one concurrence in result only)</td>
</tr>
<tr>
<td>Split decision (at least one dissent)</td>
</tr>
</tbody>
</table>

A deeper fissure is suggested if you separate the first-degree murder direct review cases from the court of appeals discretionary review cases. No winnowing of the issues takes place before the direct review cases reach the Minnesota Supreme Court; the cases are there by virtue of their status and not necessarily because they present consequential legal issues, though, of course, some of them do. Nevertheless, as a class, they ought to be more susceptible to

12. See, e.g., Rochelle Olson, No Doubt, the State’s High Court Tilts Right; Still, Pawlenty Shouldn’t Count on That in the Budget Dispute, STAR TRIB. (Minneapolis), Feb. 28, 2010, at 1B (“The court isn’t unfailingly conservative yet, but its rulings have begun to reflect the governor’s conservative philosophy.”).

13. See infra Appendix.
consensus than the discretionary review cases. The statistics say they are. In nineteen out of twenty-nine direct review cases, or 65.5%, the justices were unanimous in the signed opinion. They were unanimous with respect to the outcome twenty-one out of twenty-nine times, for a rate of 73.4%. The comparable numbers for the discretionary review cases are 44% and 61%, respectively.

### Breakdown Criminal Cases Decided: Direct Appeal Versus Discretionary Review, 2009–10 Term

<table>
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<tr>
<th></th>
<th>Unanimous signed opinion</th>
<th>Unanimous final vote</th>
<th>Split Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Appeal/Post Conviction</td>
<td>19</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Court of Appeals, Discretionary</td>
<td>8</td>
<td>3</td>
<td>7</td>
</tr>
</tbody>
</table>

The following chart tracks each justice’s frequency in the majority for all criminal cases, unanimous and split, direct and discretionary. Chief Justice Magnuson and Justices G. Barry Anderson, Gildea, and Dietzen voted with the majority (and with each other) more than 95% of the time. Justice Paul Anderson dissented at the highest rate.

### Frequency in the Majority, All Cases 2009–10 Term

<table>
<thead>
<tr>
<th>Justice</th>
<th>Majority votes</th>
<th>Total Votes</th>
<th>% in majority</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. J. Magnuson</td>
<td>47</td>
<td>47</td>
<td>100%</td>
</tr>
<tr>
<td>J. Page</td>
<td>36</td>
<td>46</td>
<td>78.3%</td>
</tr>
<tr>
<td>J. P. Anderson</td>
<td>36</td>
<td>47</td>
<td>76.5%</td>
</tr>
<tr>
<td>J. Meyer</td>
<td>40</td>
<td>47</td>
<td>85.1%</td>
</tr>
<tr>
<td>J. G. B. Anderson</td>
<td>46</td>
<td>47</td>
<td>97.8%</td>
</tr>
<tr>
<td>J. Gildea</td>
<td>45</td>
<td>47</td>
<td>95.7%</td>
</tr>
<tr>
<td>J. Dietzen</td>
<td>44</td>
<td>46</td>
<td>95.6%</td>
</tr>
</tbody>
</table>

Next we look at frequency in the majority in the split vote cases, i.e., the cases in which there was at least one dissent. As I have already noted, these cases constitute just 32% of the total, but include a disproportionate number of the court of appeals cases. Generally, these are more contentious cases because the court’s election to hear them signals its view that there is something unsettled or unclear in the law. In the cases in which they could
not agree, the justices disagreed with remarkable consistency. There is a marked 4-2 split on the court, with Chief Justice Magnuson and Justices Dietzen, Gildea, and G. Barry Anderson on one side and Justices Page and Paul Anderson on the other. There is a less pronounced but still regular 4-3 split when Justice Meyer joins the minority voters. Statistically, Justice Meyer may look like a swing vote—her vote is less predictable than the others—but a true swing is one whose vote will sway the outcome. Given the consistent voting pattern of the four-justice majority bloc, Justice Meyer’s vote seems unlikely to have had that effect.

<table>
<thead>
<tr>
<th>Justice</th>
<th>Majority votes</th>
<th>Total votes</th>
<th>% in majority</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. J. Magnuson</td>
<td>15</td>
<td>15</td>
<td>100%</td>
</tr>
<tr>
<td>J. Page</td>
<td>4</td>
<td>14</td>
<td>28.5%</td>
</tr>
<tr>
<td>J. P. Anderson</td>
<td>4</td>
<td>15</td>
<td>26.6%</td>
</tr>
<tr>
<td>J. Meyer</td>
<td>8</td>
<td>15</td>
<td>53.3%</td>
</tr>
<tr>
<td>J. B. Anderson</td>
<td>14</td>
<td>15</td>
<td>93.3%</td>
</tr>
<tr>
<td>J. Gildea</td>
<td>13</td>
<td>15</td>
<td>86.6%</td>
</tr>
<tr>
<td>J. Dietzen</td>
<td>13</td>
<td>15</td>
<td>86.6%</td>
</tr>
</tbody>
</table>

**B. A Distinct Philosophy**

It is evident that there is a distinct judicial philosophy at the new center of gravity on the court. That philosophy is deferential, self-conscious, spare, and prudent. It values majoritarian decision making above all else; its central aspiration is to safeguard the prerogatives of the other, (more) democratically elected branches. The dominant philosophy’s principal enterprises are prevention and forbearance. It acts preventatively when it thwarts

14. See Laase v. 2007 Chevrolet Tahoe, 776 N.W.2d 431, 437 (Minn. 2009). Justice Gildea stated that “using judicial disagreement to satisfy the repugnancy exception runs afoul of the judicial modesty the constitutional principle of separation of powers compels. We have respected this modest role for over 100 years.” Id. (citing Morrison v. Mendenhall, 18 Minn. 232 (1872)).

15. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (Yale University Press, 2d ed. 1986). Bickel used the term “counter-majoritarian” in connection with his argument that judicial review is illegitimate because it allows unelected judges to overrule the decisions of elected representatives. Id.
lower court decisions that encroach on legislative values. Chief Justice Magnuson enforced this principle in one of last term’s two child protection representation funding cases: “[T]o the extent that the district court based its decision on its perception of the relative abilities of the county and the State Board of Public Defense to raise funds, rather than on the applicable statutes,” the Chief Justice intoned, “the court erred. The Legislature makes such policy decisions, and expresses its judgment, in statutes, which courts apply.”

The court acts forbearingly when it declines itself to augment or interfere with legislative judgments. In last term’s *Laase v. 2007 Chevrolet Tahoe*, a forfeiture case, both Justices Gildea and G. Barry Anderson explained in unusually explicit language why they declined to mediate between a perceived injustice and a debatable legislative judgment. Justice Gildea wrote for the majority that:

> We recognize that the result in this case may be open to question on policy grounds, and we do not disagree with Justice Paul Anderson’s [dissenting] view about the importance of private property rights. But in the absence of a constitutional challenge, which we do not have in this case, it is the role of the legislature, not the courts, to rewrite the statute to provide greater protection for private property. The public policy arguments therefore should be advanced to the legislature, the body that crafted the language that compels the result here.

Justice G. Barry Anderson acknowledged in his concurring opinion in *Laase* that:

> [T]here is reason to question the balance struck by the legislature between various competing interests. For example, given the general disfavor of forfeiture statutes, the wisdom of vesting the right to possession of a forfeited vehicle in the law enforcement agency responsible for the arrest of a defendant and the forfeiture of a defendant’s vehicle is not immediately evident. But such issues are for the legislature to address, not this court.

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17. *Laase*, 776 N.W.2d at 440.
18. Id. (footnote omitted).
19. Id. (Anderson, J., concurring) (citation omitted).
If the majority quartet’s core value is the preservation of democratic decision making, its core practice is a form of judicial minimalism. Generally, minimalists prefer to avoid broad rules and abstract theories, focusing only on what is necessary to decide a case.\(^{20}\) If courts do less and articulate fewer reasons for their decisions, there is greater opportunity for action and explanation by democratically accountable actors in the public domain.\(^{21}\) That is the theory. It is jurisprudence that intends to tread lightly, but sometimes it winds up looking like jurisprudence that is determined not to leave a mark.

Last term’s *State v. Sanders* introduced the problem whether the recording requirement set forth in *State v. Scales*\(^ {22}\) applies when a law enforcement agency takes a custodial statement outside of Minnesota.\(^ {23}\) The majority opinion by Justice G. Barry Anderson folds around and into itself to avoid answering this question. “If the jury’s verdict was surely unattributable to the district court’s admission of . . . testimony regarding the statements Sanders allegedly made to the FBI,” Justice Anderson reasons, “we need not address whether the *Scales* recording rule applies to a custodial interrogation conducted outside Minnesota or whether the alleged *Scales* violation in this case was substantial.”\(^ {24}\)

In other words, the court does not have to reach the central issue if it can dispose of the case with harmless-error analysis. But which harmless-error rule should be applied—the one that comes into play when the evidence admitted affects constitutional rights?

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20. Cass R. Sunstein, *Forward: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 14 (1996). Writing for the majority in *State v. Carufel*, 783 N.W.2d 539, 544 nn.2–3 (Minn. 2010), Justice Dietzen chastises concurring Justice Paul Anderson for what Justice Dietzen views as excessively broad theorizing about the “park zone” enhancement in the controlled substance statutes. The concurrence, writes Justice Dietzen, “loses sight of the issue before the court . . . . [T]he concurrence presents a hypothetical 8-block area that is not before the court . . . . Our decision is limited to the actual facts presented and not a hypothetical illustration that is materially different.” *Id.* at n.3; see *State v. Taylor*, 650 N.W.2d 190, 203 n.11 (Minn. 2002) (declining to respond to the argument of the concurrence/dissent because it would require the court to render an advisory opinion); see also *State v. Wertheimer*, 781 N.W.2d 158, 162 (Minn. 2010), (beamoaning Justice G. Barry Anderson’s view of the “apparently broad statements in our case law” with respect to the time computation statute).


24. *Id.* at 887.
or the less stringent standard of review for evidence with no constitutional overtones? Like the *Scales* court, the *Sanders* court passes on the question of whether *Scales* implicates rights under the due process clause of the Minnesota Constitution. 

“In this case, we need not, and do not, decide which harmless-error standard applies to a district court’s erroneous admission of statements made during an unrecorded custodial interrogation because even under the more favorable constitutional harmless-error standard *Sanders* was not prejudiced by the district court’s admission of [the] testimony.” Therefore, “[w]e need not, and do not, decide whether the *Scales* recording rule applies to a custodial interrogation conducted outside Minnesota or whether the alleged *Scales* violation in this case was substantial.”

That is a lot of need-not and do-not from the state’s highest court. For the next district court judge faced with the decision whether to admit an unrecorded confession obtained outside Minnesota, there is no guidance available from the Minnesota Supreme Court. In the name of judicial economy, the decision costs have simply been passed on to the lower courts.

Minimalism is the majority quartet’s defining practice; narrowness is its methodology. One trait of the Magnuson court is its preference for deciding cases based on close, literal readings of the textual material. In *State v. Lopez*, a case in which a unanimous court articulated new limits on the reach of the predatory offender registration statute, Chief Justice Magnuson explains, characteristically, that “[w]e find the answer to the issue in this case in the text of [the registration statute]. . . . The district court and the court of appeals read the statute more broadly than its

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25. *See Scales*, 518 N.W.2d at 592 (“We choose not to determine at this time whether under the Due Process Clause of the Minnesota Constitution a criminal suspect has a right to have his or her custodial interrogation recorded. Rather, in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.”) (footnote omitted).

26. *Sanders*, 775 N.W.2d at 888.

27. *Id.* at 888–89.

28. Sunstein, *supra* note 20, at 17 (stating “[a] court that economizes on decision costs for itself may in the process ‘export’ decision costs to other people, including litigants and judges in subsequent cases who must give content to the law”).
language permits.”

The narrowing trend, however, goes beyond simple fidelity to the words of statutes. The conservative justices are contracting the rules and norms of statutory construction. William Eskridge uses the shorthand “new textualism” to describe a process of statutory construction championed by United States Supreme Court Justice Antonin Scalia. New textualism says that once a court ascertains a statute’s plain meaning, consideration of legislative history is irrelevant. On its face, this idea is neither new nor novel; Minnesota’s “plain meaning” statute, Minnesota Statutes section 645.16, has remained in effect, unchanged, since 1941. It states:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

(1) the occasion and necessity for the law;
(2) the circumstances under which it was enacted;
(3) the mischief to be remedied;
(4) the object to be attained;
(5) the former law, if any, including other laws upon the same or similar subjects;
(6) the consequences of a particular interpretation;
(7) the contemporaneous legislative history; and
(8) legislative and administrative interpretations of the statute.

29. See State v. Lopez, 778 N.W.2d 700, 706 (Minn. 2010).
30. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 621 (1990) (stating that “[a] statute’s text is the most important consideration in statutory interpretation, and a clear text ought to be given effect”).
31. Id. at 623.
32. MINN. STAT. § 645.16 (2008).
What seems to be changing, at least in Minnesota, is not the idea that explicit statutes speak for themselves so much as the meaning of plain meaning. What is changing, specifically, is the way that a majority of the court understands ambiguity.

Minnesota's test for ambiguity is whether a statute's language is susceptible to more than one reasonable interpretation. This ambiguity test itself is standardless, subjective, and discretionary. How is "reasonable" defined? By what quantum of proof must reasonableness be demonstrated? Are statutes subject to plural reasonable interpretations every time litigating parties disagree about their meaning? If this standard is too broad, what is the right one? The choice to declare a statute unambiguous connotes a certain Olympian objectivity and value-neutrality, but it is a decision that conceals its true nature. Whether language is subject to more than one reasonable construction is entirely a matter of judicial judgment.

The most significant legal decisions of the Peck majority and the Brayton minority are their determinations of nonambiguity. As we will see, those so-called threshold determinations go a long way toward concluding their analyses.

III. STATE V. PECK: WORDS AS ROCKS

State v. Peck, the “bong water” decision, was easily the term’s most notorious case. It inspired a rallying cry in opposition, a public relations gaffe, and punch lines by the score.
criticism of *Peck* has been so widespread that it is tempting to dismiss the decision as haphazard or an aberration—as something other than a serious effort by smart, diligent justices to do exactly what they did.\(^{39}\) It would be a mistake to think of the case this way. In fact, *Peck* offers a frank look at the mechanics of the linear textualism that now commands a majority of the court.

On the day they searched Sara Peck’s home, Rice County Sheriff’s Department deputies discovered—in addition to Ms. Peck’s bong—a baggy containing a grainy substance, plus a second baggy, scale, spoon, and pipe; all bearing evidence of drug debris.\(^{40}\) Compared to this other material, Minnesota’s most renowned bong may well have looked like an afterthought to the deputies, but they dutifully preserved the liquid and sent it along with all the other items to the crime lab for testing.\(^{41}\) The bong water did not look like a trifle to the Rice County Attorney. Because of it, he charged Peck with a first-degree controlled-substance crime,\(^{42}\) carrying a maximum of thirty years imprisonment and a $1 million fine.\(^{43}\) Specifically, he alleged that Peck possessed a “mixture” of

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\(^{40}\) *Peck*, 773 N.W.2d at 769.

\(^{41}\) Id.

\(^{42}\) Id.

\(^{43}\) **Minn. Stat.** § 152.021, subdiv. 3(a) (2008).
something that contained methamphetamine and weighed more than twenty-five grams. The legal issue for the court was whether the bong water counted as a “mixture” under the statute.

In deciding this question, the court divided 4-3 in the expected manner. Justice G. Barry Anderson’s majority opinion, joined by Chief Justice Magnuson and Justices Gildea and Dietzen, is slender: it takes up only five pages, and half of these are devoted to a summary of the facts and proceedings below. The core of the majority’s analysis requires just two paragraphs, which are reproduced here in full:

The State argues that the statutory definition of “mixture” is unambiguous. We agree.

Minnesota Statutes § 152.01, subdivision 9a, defines “mixture” as “a preparation, compound, mixture, or substance containing a controlled substance, regardless of purity.” A “preparation” is a “substance, such as a medicine, prepared for a particular purpose.” The American Heritage Dictionary 1386 (4th ed. 2000). A “compound” is a “combination of two or more elements or parts.” Id. at 379. A “mixture” is “[s]omething produced by mixing.” Id. at 1128. A “substance” is “[t]hat which has mass and occupies space; matter. A material of a particular kind or constitution.” Id. at 1726.

We conclude that when applied to the water containing methamphetamine stored in the bong, the phrase “preparation, compound, mixture, or substance” is clear and free from all ambiguity. Bong water is plainly a “substance” because it is material of a particular kind or constitution. The bong water is a “mixture” because it is a “substance containing a controlled substance”—methamphetamine.

44. Peck, 773 N.W.2d at 769–70; see also Minn. Stat. § 152.021, subdivs. 2(1), 3(a) (2008).
45. Peck, 773 N.W.2d at 771.
46. See id. at 769.
47. Id. at 769–73.
48. Id. at 772.
The majority’s logic demonstrates how a court’s determination of unambiguousness can work to bring a case to a blunt conclusion. The majority conflates the identification and resolution of ambiguity into a single step. It commingles decision and analysis until they are fused into an impenetrable circle: the statute is unambiguous because bong water is a substance, and bong water is a substance because the statute is unambiguous. The decision to declare the statutory language unambiguous effectively decides the case.

If, as the majority’s argument implies, literalness is the touchstone, how shall it be maintained as a literal matter—that the words of section 152.01, subdivision 9a and 152.021, subdivision 2(1), as applied to two-and-a-half tablespoons of water sitting in a bong, do not lend themselves to other reasonable interpretations?

Two lower courts and the supreme court dissenters thought they did. All three entities looked at section 152.01’s definition of drug paraphernalia—namely, “materials of any kind” used in ingesting controlled substances—and wondered, sensibly, why bong water does not constitute drug paraphernalia, rather than a mixture. The court of appeals also deemed it a reasonable construction that “preparation, compound, mixture, or substance” excludes a water-based combination. The supreme court majority adjudged that no other reasonable interpretation presented itself. The majority’s was not a necessary decision. It was discretionary, reflecting the values and preferences of the justices who made it. It posed, however, as something else—as compulsory, objective, disinterested, and inevitable. Its subjectivity was covert.

49. See Slocum, supra note 34, at 794.
50. Peck, 773 N.W.2d at 774 (Paul Anderson, J., dissenting). Justice Paul Anderson’s dissent includes the information that “[t]he amount of liquid seized, 37.17 grams, equals approximately two and one-half tablespoons of water.” Id.
51. See id. at 775–79; State v. Peck, 756 N.W.2d 510, 516 (Minn. Ct. App. 2008), rev’d, 773 N.W.2d 768 (Minn. 2009) (finding that “the post-use byproduct of a methamphetamine bong is not a ‘mixture’”).
52. MINN. STAT. § 152.01, subdiv. 18 (2008) (“‘Drug paraphernalia’ means all equipment, products, and materials of any kind . . . used primarily in . . . injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . .”).
53. See Peck, 773 N.W.2d at 778 (Paul Anderson, J., dissenting); Peck, 756 N.W.2d at 515 (stating “[w]e also note, as did the district court, that the broad definition of ‘drug paraphernalia’ in the controlled-substance statute . . . tends to create ambiguity”).
55. Peck, 773 N.W.2d at 773.
Justice Paul Anderson argues in dissent that the contemporary court is altering traditional rules and norms of statutory construction. There are, he emphasizes, dual clauses in section 645.16’s pivotal sentence: “When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” However,

[i]n recent years, our statement of the statutory interpretation standards has focused more on the latter part of this sentence than on the former. In our efforts to ensure that we are not disregarding the “letter of law . . . under the pretext of pursuing the spirit,” we have often lost sight of considering the words of a statute in their application.

Under this more recent, more narrow review, we have begun to focus on a statute’s “language” as the majority does here . . .

Focusing on the “language, on its face” permits the majority to declare the statutory language at issue in this case is unambiguous based on a dictionary definition. Of course, every word used in a Minnesota law has a dictionary meaning, so if the majority’s plain-meaning approach is taken to its logical conclusion, no word is ambiguous.

Dictionary meanings suffer from what one commentator terms a “fundamental indeterminacy.” They exist outside the statutory framework, unmoored to and heedless of statutory content and context. Their affiliation with statutory meanings is essentially flawed. This phenomenon of indeterminacy and attenuation is compounded by the Peck majority’s selective literalism: “mixture” is stringently, literally defined; “reasonable” is not. The court opens itself up to criticism that its finding of unambiguousness had less to do with the language of the statute than with how its finding would resolve the case.

56. Id. at 777 (citing MINN. STAT. § 645.16 (2008)).
57. Id.
59. Id.
60. Id.
61. See Peck, 773 N.W.2d at 772.
Nevertheless, dictionaries appear to be carrying the day on the Minnesota Supreme Court. In the linear textualism of the majority, the decision that language is unambiguous means that judges are free to treat words as rocks. The possession of bong water is a felony carrying penalties reserved for the most dastardly drug kingpins; and words are rocks, pebbles in alien juxtaposition. They have only a solitary existence, the meaning of one never interpenetrating the others. Neither singly, nor in the aggregate, do they draw any purpose from the setting in which they are used.

IV. Brayton v. Pawlenty: Reordering the Rocks

In Brayton v. Pawlenty, the unallotment case, a controversy about power sharing between the executive and legislative branches became the vehicle for the Minnesota Supreme Court to debate its own legitimate role in the constitutional order. The case featured an interesting split between proponents of judicial restraint. Chief Justice Magnuson parted company with the other members of the quartet to join Justices Paul Anderson, Page, and Meyer in voting to block the governor’s unallotments. Chief Justice Magnuson authored the majority opinion; Justice Gildea authored the dissent.

Justice Gildea’s dispute with the majority, and specifically with Chief Justice Magnuson, is an argument about minimalist orthodoxy. Justice Gildea castigates the majority for failing to make a finding of unambiguousness:

The majority is unable to [apply the law as written by the legislature] because the language the Legislature used in the unallotment statute leaves the majority with uncertainty and ambiguity. The majority therefore rewrites the statute to insert additional conditions, and then finds that the Commissioner of Minnesota Management and Budget (Commissioner) violated the statute because he did not comply with the conditions the

63. Id. at 368.
64. Id. at 358.
65. Id. at 370 (Gildea, J., dissenting).
66. The challenge feels distinctly personal. In the opening paragraph of the dissent, Justice Gildea intonated that “[t]he judiciary’s ‘duty’ is simply ‘to apply the law as written by the legislature’” and then appended the information that the source for the original quote was “Magnuson, C.J. for a unanimous court.” Id. (citation omitted).
majority has added.  

...  

[T]he majority divines that what the Legislature meant to say was that once a balanced budget has been enacted into law and a deficit thereafter occurs, the Commissioner may unallot to make up that deficit. The obvious problem with this rewrite is that it is a rewrite.  

The dissent’s criticism notwithstanding, it is the majority opinion in Brayton that impresses for its rectitude, and the dissenting opinion that comes across as immodest. It is the dissenters who take liberties with the text, who reach to impose their will, and not the other way around.  

Brayton dealt with the meaning of two triggering conditions that are prescribed in the unallotment statute, Minnesota Statutes section 16A.152, subdivision 4. These conditions are the state budget commissioner’s determinations that (1) “probable receipts for the general fund will be less than anticipated” and (2) “the amount available for the remainder of the biennium will be less than needed.” The statute does not explicitly answer the question when these determinations are to be made. Anticipated when? Remainer measured from what point in time? The statute does not say.  

Whether receipts were “less than anticipated” presents, in the first instance, a factual question. It is reasonable to expect that a minimalist, noninterfering court would pride itself on taking the facts where it finds them. To do otherwise—to omit, ignore, or deliberately manage, sculpt, or stage the facts—effectively insinuates a court into the merits. It converts a passive court into an active one. It makes the court a player.  

The majority opinion recounts the events that culminated in the executive branch unallotments (author’s numbering):  


2. In February 2009, the commissioner forecast a deficit of $4.57 billion.
3. In January 2009, the governor submitted a proposed budget with anticipated revenues of $31.07 billion.  
4. In March 2009, the governor submitted a revised budget with anticipated revenues of $29.905 billion.  
5. In April 2009, the commissioner updated its information to reflect that February and March revenues were $46 million less than projected in the February forecast.  
6. “On May 9, 2009, the governor vetoed a revenue bill that increased taxes in order to meet the anticipated revenue shortfall.”  
7. Between May 4 and May 18, the legislature passed appropriation bills that reduced spending below the levels projected in the February 2009 forecast; the projected $4.57 billion deficit was reduced to $2.7 billion.  
8. “The governor signed the appropriations bills into law.”  
9. “On May 18, 2009, the day it was required to adjourn,” the legislature passed a revenue bill that would raise taxes to address the $2.7 billion remaining deficit.  
10. The governor vetoed the second revenue bill.  
11. The legislature had adjourned by the time of the veto.  
12. “The Governor did not call a special session of the legislature.”  
13. On June 4, 2009, the commissioner informed the governor by letter that the unallotment conditions had been satisfied; namely, the commissioner had determined that “probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the 2010–11 biennium ‘will be less than needed.’”  

78. Id.  
74. Id.  
75. Id.  
76. Id.  
77. Id.  
78. Id.  
79. Id.  
80. Id. at 360.  
81. Id.  
82. Id.  
83. Id. at 360–61.
14. “The Governor approved proposed unallotments of approximately $2.5 billion on July 1, the first day of the biennium.”

15. The commissioner implemented the unallotments beginning in July 2009. “Some of the unallotments were effective for both the first and second years of the biennium,” and some were effective only for the second.

16. The commissioner reduced allotments to the Minnesota Supplemental Aid program (which includes the specific Special Diet program challenged in Brayton) by $2.866 million for FY 2010 and $4.3 million for FY 2011.

17. “The effect of these unallotments was to eliminate Special Diet Program payments from November 1, 2009, through June 20, 2011, the end of the biennium.”

The dissent’s version of the facts dramatically downplays events three, four, five, six, nine, ten, eleven, twelve, fourteen, fifteen, and sixteen. Justice Gildea’s initial factual recitation fails to mention that the governor twice vetoed revenue bills that were intended to meet the shortfall, that the second veto followed the legislature’s mandated adjournment date, that thereafter the governor declined to call the legislature into special session, that the governor approved and ordered the unallotments on the first day of the 2010–11 biennium, and that the cuts to the Special Diet Program formed part of a larger Minnesota Supplemental Aid unallotment of $2.866 million for all of FY 2010. Justice Gildea refers to some of these events in the body of her argument, but only in the most cursory manner.

The point of including the information in points three, four, five, six, nine, ten, eleven, twelve, fourteen, fifteen, and sixteen is not, as the dissent dismissively asserts, to cast blame about “[w]hich of the two coordinate branches of government is responsible for

84. Id. at 361.
85. Id.
86. Id.
87. Id.
88. Id.
89. See id. at 371 (Gildea, J., dissenting).
90. Id. at 372 (“[R]espondents contend that when the Governor signed appropriation legislation and vetoed revenue legislation, the Governor (and therefore the Commissioner) knew that the state would not have funds sufficient to satisfy the financial obligations in the appropriation legislation.”).
the budget shortfall.\textsuperscript{91} These things matter because the court was obliged to make mixed factual-legal determinations that turned on these events. The dissent erased pertinent facts that were inconvenient to its analysis.

Regarding the two triggering conditions in section 16A.152, subdivision 4, namely, that “probable receipts for the general fund will be less than anticipated,” and that “the amount available for the remainder of the biennium will be less than needed,” the majority finds that, lacking express temporal benchmarks, the statute is susceptible to more than one reasonable interpretation, and is therefore ambiguous.\textsuperscript{92} The court ultimately endorses the respondents’ interpretation, which construes the statute in a commonsense fashion that ascribes real meaning to all of the words that actually appear there.

The common meaning of “remainder” is . . . something less than the whole, after part of the whole has been removed or consumed. Accordingly, the requirement that the Commissioner find that “the amount available for the remainder of the biennium will be less than needed,” . . . reasonably means that the triggering circumstance (amount less than needed) cannot logically be met until some of the biennium has passed, and that the unallotment process can never apply to a full biennium.\textsuperscript{93}

Moreover, continues the court, the two clauses “are joined by the conjunctive ‘and’; when read together, the natural conclusion is that the determination about receipts being ‘less than anticipated’ must be related to ‘the amount available for the remainder of the biennium.’”\textsuperscript{94}

Citing \textit{Peck}, Justice Gildea argues in dissent that the statute is unambiguous.\textsuperscript{95} The statute, she insists, is clear on its face, and it can be applied “as it is written” to uphold the executive branch’s unallotments.\textsuperscript{96} Were probable receipts less than anticipated? The dissent says, incredibly, yes. All that is required, writes Justice

\begin{itemize}
  \item \textsuperscript{91} Id. at 373.
  \item \textsuperscript{92} Id. at 364 (majority opinion) (emphases added).
  \item \textsuperscript{93} Id. at 363–64.
  \item \textsuperscript{94} Id. at 364.
  \item \textsuperscript{95} Id. at 372–73 (Gildea, J., dissenting).
  \item \textsuperscript{96} Id.
\end{itemize}
Gildea, is that the commissioner “make this determination before he unallots.”\(^97\) The statute “does not provide any other deadline by which the Commissioner is to make this determination.”\(^98\) The dissent simply avoids answering when, exactly, the budget shortfall was unanticipated. When the governor vetoed the first revenue bill? The second? When he declined to call the legislature back into special session? These are all facts that largely fell out of the dissent’s narrative. The budget shortfall was not just anticipated; it was front-and-center in the participants’ minds throughout the legislative season.\(^99\) Given Justice Gildea’s espoused commitment to applying the “plain language” of the unallotment statute, should not the dissenters have come down the opposite way?

One fact the dissent omits is that the governor approved the unallotments, including the FY 2010 unallotment to the Minnesota Supplemental Aid program, which includes the Special Diet Program, on July 1, 2009, the first day of the biennium.\(^100\) This is crucial information for purposes of ascertaining the effect of the word “remainder” on the unallotments’ legality. Instead, Justice Gildea fixes on the fact that the withholding of funds for the Special Diet Program did not occur until November 1, 2009. She writes:

The only question presented in this case is whether the decision to unallot funds from the Special Diet Program complies with the statute. As to the Special Diet Program, the Commissioner determined that “the amount available for the remainder of the biennium will be less than needed”; that is, the amount available, starting November 1, would be less than needed to fund the Special Diet Program for the remainder of the biennium. Further, there is no dispute that the Special Diet Program funds were not unallotted until November 1. The Commissioner’s determination that there would be insufficient funds for this program was, indisputably, only with respect to a portion of the biennium and not the entire biennium. We therefore have no occasion in this

\(^{97}\) Id. at 373.

\(^{98}\) Id.

\(^{99}\) See, e.g., Patricia Lopez & Mike Kaszuba, Minnesota’s Budget Deficit: $4.57B, STAR TRIB. (Minneapolis), Mar. 4, 2009, at 1A (predicting “hard-edged conflict at the State Capitol as leaders attempt to climb out of the deepest fiscal valley in generations”).

\(^{100}\) See Brayton, 781 N.W.2d at 361.
case to determine whether decisions to unallot that were effective on the first day of the biennium violate the statute.\textsuperscript{101}

The executive unallotment order concerning the Special Diet Program was given on July 1, 2009.\textsuperscript{102} It was part of a larger FY 2010 unallotment of the Minnesota Supplemental Aid program.\textsuperscript{103} The Special Diet Program did not actually lose funds as a result of the governor’s order until November 1, 2009—the implementation date—but the operative decision was made on the first day of the biennium.\textsuperscript{104} The dissent appears to have purposefully made a hash of these facts. This stratagem allows Justice Gildea to shrink the issue so dramatically that the troublesome “remainder” question is simply removed from the frame.

It is minimalist credo that issues are to be framed narrowly. The aspirational rationale for doing so is to curtail judicial incursion into the decision making of the other branches and to leave as much as possible open for democratic deliberation. It is difficult to square these purposes with what the dissent has actually done in Brayton. It took a bold act to force the remainder issue into so artificially narrow a container. It took boldness to edit the factual record as liberally as the dissenters did. In particular, it is hard to square the dissent’s exclusion of the facts describing the process of democratic deliberation with a judicial aspiration to promote the same. The dissent’s methods in Brayton suggest not prudence, but its opposite. Mostly, they suggest a willful effort to give a muscular hand up to the executive branch.

\section*{V. Enter Justice Stras}

There was an unmistakable slant to the media coverage that attended Justice David Stras’s appointment to the court at the end of the 2009–10 term. Most commentators expected that Justice Stras’s addition would continue or even hasten the court’s conservative momentum.\textsuperscript{105} These prognostications appeared to

\begin{flushleft}
101. \textit{Id.} at 374 (Gildea, J., dissenting).
102. \textit{Id.} at 361 (majority opinion).
103. \textit{Id.}
104. \textit{Id.}
\end{flushleft}
have less to do with Justice Stras’s scholarly work than with his resume.

Following law school, Justice Stras clerked for two federal appellate judges. The first was Judge Melvin Brunetti of the United States Court of Appeals for the Ninth Circuit, accorded by his former law clerks—not necessarily an impartial constituency—as a conservative but non-ideological jurist. Then, Justice Stras clerked for Judge J. Michael Luttig of the United States Court of Appeals for the Fourth Circuit. During the presidency of George W. Bush, Judge Luttig made the White House’s short list for the United States Supreme Court seats that wound up going to Chief Justice John Roberts and Justice Samuel Alito. Judge Luttig sat on the Fourth Circuit bench for fifteen years. Forty of his law clerks graduated to clerkships at the United States Supreme Court and thirty-three of the forty worked for either Justices Thomas or Scalia. One of these was Justice David Stras, who clerked for Justice Thomas during the 2002–03 Supreme Court term.

Justice Thomas is, famously, conservative. “[P]robably the most conservative justice,” writes Jeffrey Toobin, “since the Four Horsemen, FDR’s nemeses, retired during the New Deal.” Justice Thomas has stated publicly that he has no interest in hiring law clerks who do not share his ideology: “I won’t hire clerks who have profound disagreements with me,” he told an audience at the National Center for Policy Analysis, a conservative think tank. “It’s like trying to train a pig. It wastes your time and aggravates the

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Keep High Court Tilting Right, STAR TRIB. (Minneapolis), May 13, 2010, at 1A; Barbara L. Jones, New Minnesota Chief Hailed: Gildea is Smart, Articulate—and Conservative, MINN. LAWYER, May 17, 2010; Doug Grow, Pawlenty’s 2 Supreme Court Choices Cement a Key Part of His Legacy, MINN. POST, May 13, 2010, http://www.minnpost.com/politicalagenda/2010/05/13/18163/pawlenty’s_2_supreme_court_choices_cement_a_key_part_of_his_legacy.


110. Id.

111. See Judge Profile, supra note 106.

112. See TOOBIN, supra note 108, at 99.
During Justice Stras’s term as a law clerk with Justice Thomas, the Court voted 6-3 in *Lawrence v. Texas*\(^{114}\) to invalidate Texas’s ban on same-sex sodomy. Justice Thomas joined Justice Scalia and Chief Justice Rehnquist in dissent.\(^ {115}\) Also during the 2002–03 term, the Court decided a pair of cases involving the use of racial preferences in admissions at the University of Michigan. The Court upheld the law school’s individualized policy in *Grutter v. Bollinger*,\(^ {116}\) and it struck down the undergraduate college’s strictly numerical policy in *Gratz v. Bollinger*.\(^ {117}\) Justice Thomas dissented in *Grutter*. “The majority upholds the Law School’s racial discrimination,” he chafed, “not by interpreting the people’s Constitution, but by responding to a faddish slogan of the cognoscenti.”\(^ {118}\)

The unfortunate “cognoscenti” to the contrary notwithstanding, is it fair to base predictions about an individual’s leanings on the views of his prior employers?

Justice Stras’s own writings are amiably esoteric and technocratic. Are senior judges unconstitutional?\(^ {119}\) Should Supreme Court justices ride circuit once again?\(^ {120}\) Is there an algorithm that explains plurality decision-making?\(^ {121}\) Was Pierce Butler anything other than entirely forgettable?\(^ {122}\) As a law professor,\(^ {123}\) Justice Stras appeared to be primarily interested in federal courts, both as institutional and economic organisms. Given his scholarly preoccupations, it is something of a surprise that he is drawn to service in the state court system, where even at

\(^{113}\) Id. at 101.

\(^{114}\) 539 U.S. 558 (2003).

\(^{115}\) Id. at 586.


\(^{117}\) 539 U.S. 244 (2003).

\(^{118}\) *Grutter*, 539 U.S. at 350.


\(^{123}\) Justice Stras was a member of the faculty of the University of Minnesota from 2004 until his appointment to the Minnesota Supreme Court in 2010. *Judge Profile*, supra note 106.
the supreme court level, judges cannot avoid the commonplace grind of private litigation. In any event, Stras’s scholarship focuses on institutions, rather than on discrete legal concepts or developments. It does not clearly augur who he will become as a justice of the Minnesota Supreme Court.

VI. CONCLUSION

Brayton and Peck expose incongruities of means and end on the part of the court’s minimalists. Their object, they say, is to reduce their own imprint and vindicate the preferences of the other branches. However, the Brayton dissenters are only able to launch themselves into a pietistic criticism of the majority’s actions by taking inordinate liberties with the facts and the law. The Peck majority’s idea of effectuating a statute’s plain meaning guts a carefully conceived statutory scheme. Statutory construction became an increasingly myopic and concrete enterprise during the 2009–10 term of the Minnesota Supreme Court.

Going forward, the court’s approach to ambiguity is likely to serve as a bellwether of its philosophical orientation. If the court’s ambiguity determinations simply import statutory meanings from dictionaries, and if they collapse ambiguity identification and resolution into a single feckless stroke, then it will be an unhappy development for Minnesota law, which has always contemplated that words in statutes have a communal existence.
VII. **APPENDIX: VOTING COUNT OF THE MINNESOTA SUPREME COURT IN CRIMINAL CASES FROM 2009–10**

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<th>Prevailing Party</th>
<th>Majority/Plurality Author</th>
<th>Concurrence/Dissent Authors</th>
<th>Decision</th>
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<td>COA (^{124})</td>
<td>State</td>
<td>J. Dietzen</td>
<td>Unanimous</td>
<td>7-0</td>
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<td>J. G.</td>
<td>Unanimous</td>
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124. COA: Court of Appeals.
125. PC: Post-Conviction Relief.
126. 1°M: First Degree Murder.
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<th>Year</th>
<th>Case Name</th>
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<th>Citation</th>
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<th>Court</th>
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<td>N.W.2d 64</td>
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<td>J. Anderson</td>
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<td>773</td>
<td>N.W.2d 89</td>
<td>(Minn. 2009)</td>
<td>5-2</td>
<td>State</td>
<td>J. Dietzen</td>
<td>J. Page dissents, J. P. Anderson joins</td>
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<tr>
<td>2009</td>
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127. DA: Direct Appeal.
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<th>Party</th>
<th>Decision</th>
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<tr>
<td>State v. Fardan, 773 N.W.2d 303 (Minn. 2009)</td>
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<td>J. Gildea</td>
<td>6-1 in final vote 4-3 in opinion</td>
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<tr>
<td>State v. Vang, 774 N.W.2d 566 (Minn. 2009)</td>
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<td>State v. Vang, 774 N.W.2d 566 (Minn. 2009)</td>
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<td>J. Page</td>
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128. Justice Page did not take part.
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<td>COA State</td>
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<td>1/07/10</td>
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129. Justice Dietzen did not take part.
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<td>State v. Cox, 779 N.W.2d 844 (Minn. 2010) (3/18/10)</td>
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<td>J. P. Anderson</td>
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<td>State v. Matthews, 779 N.W.2d 543 (Minn. 2010) (3/18/10)</td>
<td>DA/1° M</td>
<td>State</td>
<td>J. Dietzen</td>
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<td>Ferguson v. State, 779 N.W.2d 555 (Minn. 2010) (3/25/10)</td>
<td>PC/1° M</td>
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<td>State v. Wertheim</td>
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<td>J. B. Anderson</td>
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<td>State v. Carufel, 783 N.W.2d 539 (Minn. 2010)</td>
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<td>State</td>
<td>J. Dietzen</td>
<td>J. P. Anderson concurs; J. Page concurs</td>
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<td>State v. Her, 781 N.W.2d 869 (Minn. 2010)</td>
<td>Remand from U.S. Supreme Court after DA/1st M</td>
<td>State</td>
<td>J. Gildea</td>
<td>J. Page dissents, J. P. Anderson joins</td>
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<td>Hannon v. State, 781 N.W.2d 887 (Minn. 2010)</td>
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<td>Francis v. State, 781 N.W.2d 892 (Minn. 2010)</td>
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<td>State v. Jenkins, 782 N.W.2d</td>
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<td>State v. Stone, 784 N.W.2d 367 (Minn. 2010) (5/20/10)</td>
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<td>State v. Chavarria-Cruz, 784 N.W.2d 355 (Minn. 2010) (6/30/10)</td>
<td>COA</td>
<td>Defendant</td>
<td>C.J. Magnuson</td>
<td>J. Gildea concurs, J. Dietzen joins</td>
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<td>State v. Prtine, 784 N.W.2d 303 (Minn. 2010) (6/30/10)</td>
<td>DA/1 M</td>
<td>State/Defendant (remand on issue whether D consented to counsel’s concession of guilt)</td>
<td>J. Page</td>
<td>J. Gildea concurs in part, dissents in part, joined by J. Dietzen; joined in part by J. P. Anderson</td>
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<td>Staunton v. State, 784 N.W.2d 289 (Minn. 2010) (6/30/10)</td>
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<td>State</td>
<td>J. G. Barry Anderson</td>
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