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Getting Serious about Miranda in Minnesota: Criminal and Civil Sanctions for Failure to Respond to Requests for Counsel

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I. INTRODUCTION

The right of persons in custody to consult with counsel was the subject of Dickerson v. United States, a much anticipated opinion by the United States Supreme Court decided during the 1999-2000 term. In Dickerson, the Court clearly established that the warnings required by the Miranda v. Arizona opinion and the right to consult with counsel prior to custodial interrogation were of constitu-
tional dimension. The right of persons in custody to consult with counsel was also an important question in the State of Minnesota during the last year in both the courts and the Legislature.

During the past year, three apparently separate (but actually closely intertwined) developments occurred that will shape the contours of the application of *Miranda* and *Dickerson* in Minnesota for years to come. In chronological sequence, the first development was a very high profile Goodhue County trial court ruling in *Minnesota v. Jenson*, which suppressed a confession taken by an FBI agent, as required by both *Miranda* and *Dickerson*, because tape recordings, required under the Minnesota Constitution, revealed that the FBI agent had ignored numerous requests to speak to an attorney. Subsequently, a special prosecutor announced that, even though there had been numerous requests for counsel that had been ignored, the FBI agent had not violated any laws for which he could be held liable and the matter dropped from public view.5

The second development occurred when the Department of Corrections successfully lobbied the Minnesota Legislature to amend Minnesota Statute section 481.10, an 1887 statute that had been used by a *pro se* inmate plaintiff, Ronaldo Ligons, to hold the Department of Corrections liable for $100 for refusing his request to speak with his lawyer.6

The third development was a ruling by the Minnesota Court of Appeals on September 5, 2000, in *Mullins v. Churchill*7 (an appeal arising from the *pro se* case against the Department of Corrections, mentioned above) in which a Minnesota court made clear for the first time that (1) criminal penalties apply under Minnesota Statute section 481.10 for law enforcement officials who violate rights set out in *Miranda* and reinforced in *Dickerson*, and (2) an action for a separate, statutory civil remedy can be brought by the person whose

4. *Infra* notes 159-171 and accompanying text.
5. *Infra* notes 170-177 and accompanying text.
right to consult with counsel has been violated.

Part II of this article reviews the history of Minnesota Statute section 481.10 and its interpretation by the Minnesota Supreme Court, which creates an "absolute duty" for law enforcement officers to respond to requests for counsel, and which imposes criminal and civil sanctions for violations. Part III analyzes Mullins v. Churchill and demonstrates that, even though the Court of Appeals was incorrect in holding that the Department of Corrections attorney access policies did not violate the requirements of Minnesota Statute section 481.10, the Court was absolutely correct in concluding that law enforcement officials in Minnesota are subject to separate and independent criminal and civil penalties under the statute. Part IV compares the original statute ruled upon by the Court of Appeals with the language in recent amendments and demonstrates that, with the possible exception of the Department of Corrections, these penalties continue to apply to all law enforcement officials in Minnesota under the new provisions of 481.10. Part V examines Minnesota v. Jenson, the case mentioned above involving an errant FBI agent, to illustrate how Minnesota Statute section 481.10 interacts with Miranda, Dickerson and the Minnesota Constitution, and demonstrates that the failure to prosecute the FBI agent and other law enforcement officials who violated the defendant's right to consult with counsel was a policy decision that is not supported by Minnesota law. The Jenson case also illustrates the importance of the Court of Appeals decision in Mullins v. Churchill, which clearly established that civil remedies under Minnesota Statute section 481.10 may be pursued, irrespective of a criminal prosecution or conviction as an alternative means of enforcing the rights enunciated in Miranda and Dickerson.

The article concludes that the criminal and civil penalties imposed by Minnesota Statute section 481.10, combined with Minnesota Constitutional requirements that confessions be recorded to be admissible in court, provide the nation's most effective and

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8. MINN. STAT. § 481.10, subd. 1.
9. Id. at subd. 4.
10. 616 N.W.2d 764.
11. Infra notes 143, 145, 150, and 158 and accompanying text.
12. Infra notes 159 and accompanying text.
13. MINN. CONST. art. I, § 6 (requiring "[i]n all criminal prosecutions the accused shall enjoy the right...to have the assistance of counsel in his defense").
14. Infra notes 159 and accompanying text.
comprehensive enforcement mechanism of *Miranda* and *Dickerson* that should serve as a model for other jurisdictions.\(^{16}\)

II. MINNESOTA STATUTE SECTION 481.10 AND THE RIGHT TO CONSULT WITH COUNSEL

In Minnesota the right to consult with counsel is not only protected by the requirements of *Miranda, Dickerson* and the Minnesota Constitution’s right to remain silent and right to counsel, the right to consult with an attorney is also protected by Minnesota Statute section 481.10. Originally enacted in 1887, Minnesota Statute section 481.10 creates criminal and civil penalties for law enforcement officials who fail to honor a request for a lawyer.\(^{17}\) Although this statute had previously been the basis for Minnesota Supreme Court rulings establishing the right to consult with an attorney prior to being questioned\(^{18}\) and prior to taking a blood alcohol test,\(^{19}\) before the Court of Appeals decided *Mullins v. Churchill*, there had been no reported cases in which Minnesota Statute section 481.10 had ever been invoked as the basis for criminal or civil liability. At the time Mr. Ligons, the original plaintiff in *Mullins*, filed his claim in 1999 the statute read as follows:

> All officers or persons having in their custody a person restrained of liberty, except in cases where imminent danger or escape exists, shall admit any attorney retained by or in behalf of the person restrained, or whom the restrained person may desire to consult, to a private interview at the place of custody. Such custodians, upon request of the person restrained, as soon as practicable, and before other proceedings shall be had, shall notify the attorney of the request for consultation with the attorney. At all times through the period of custody, whether or not the person restrained has been charged, tried, convicted, or is serving an executed sentence, reasonable telephone access to the attorney shall be provided to the person restrained at no charge to the attorney or to the person restrained. *Every officer or person who shall violate any provision of this section*

\(^{16}\) MINN. STAT. § 481.10; see also State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (requiring electronic recording of all custodial interrogation and questioning); *Mullins*, 616 N.W.2d at 767 (validating civil penalty for non-compliance).

\(^{17}\) State v. Schabert, 15 N.W.2d 585, 589 (Minn. 1944).

\(^{18}\) Id.

\(^{19}\) Prideaux v. Minn. Dep’t of Pub. Safety, 247 N.W.2d 385, 394 (Minn. 1976).
shall be guilty of a misdemeanor and, in addition to the punishment prescribed therefor shall forfeit $100 to the person aggrieved, to be recovered in a civil action.

A. The History Of Minnesota Statute Section 481.10

Long before the United States Supreme Court began describing the scope of the Sixth Amendment right to counsel in Federal Court in 1938 in Johnson v. Zerbst, and almost 100 years before the Supreme Court’s 1966 Miranda opinion established a right to consult an attorney in custody situations, the Minnesota Legislature enacted a statute that reflected a recognition of the importance of allowing persons in custody to consult with counsel. The language of the original statute, and the seriousness of penalties established for violation of the statute, create a strong inference that the 1887 Legislature was motivated by many of the same concerns expressed in Miranda regarding the inherent vulnerability of persons in custody.

The language of the original statute specifically links the right to consult with counsel with “custody,” the same requirement that is one of the necessary preconditions that triggers the Miranda warnings and the related right to consult with counsel before being questioned. The original Minnesota Statute section 481.10 also required law enforcement officers to contact counsel at the request of the “person restrained.” It takes little imagination to conclude that over 100 years ago the Minnesota Legislature understood that contact with an attorney, upon request, may be the only means of giving realistic protection to the rights of persons who are under the complete control of government entities. This, of course, was the central thrust of the “presumption of coercion” arising from...

20. MINN. STAT. § 481.10 (Supp. 1999) (emphasis added).
24. Id. at 832.
25. State v. Schabert, 15 N.W.2d 585, 589 (Minn. 1944) (stating MINN. STAT. § 481.10 “requires an officer having an accused in custody to grant a request for an interview with his counsel, and he shall notify such counsel ‘as soon as practicable, and before other proceedings shall be had.’”).
27. Friedman, 473 N.W.2d at 832 (quoting MINN. STAT. § 481.10, which had been the law in Minnesota since 1887).
28. Schabert, 15 N.W.2d at 588.
the fact of "custody" to which *Miranda* was directed,\(^{29}\) and which the United States Supreme Court felt compelled to conclude was of constitutional dimension in *Dickerson*.\(^{30}\)

The seriousness of the penalties imposed by the Legislature on governmental officials who ignored a request to consult with counsel reveal the seriousness with which the Minnesota Legislature approached the right of persons in custody to consult with counsel. In 1887, a time when the suppression of evidence as a remedy for government misconduct had just been introduced in Supreme Court jurisprudence in *Boyd v. United States*,\(^ {31}\) and over 100 years before the Supreme Court clearly established that the right of those in custody to consult with counsel was of constitutional dimension in *Dickerson*,\(^ {32}\) the Minnesota Legislature imposed remedies that may be even more effective than mere suppression of evidence: criminal and civil penalties levied directly against the offending officials.\(^ {33}\)

The penalty clause of the statute has remained essentially unchanged after more than 100 years. By providing for misdemeanor criminal penalties, the Legislature served notice on law enforcement officials that failure to contact an attorney upon the request carried the potential of the loss of their own freedom, not merely the loss of evidence. Moreover, the $100 civil penalty was also a statement of the seriousness with which the Legislature approached the access to counsel question. The $100 civil penalty imposed by the Legislature in 1887 would be worth more than $1700 at current value.\(^ {34}\)

Between 1887 and 1991, Minnesota Statute section 481.10 remained largely unchanged through numerous revisions of Minnesota Criminal Codes.\(^ {35}\) The first case to construe the statute was de-

\(^{29}\) *Miranda*, 384 U.S. at 444-57.

\(^{30}\) *Dickerson* v. United States, 120 S.Ct. 2326, 2336 (2000).

\(^{31}\) 116 U.S. 616, 633 (1886) (dictum).

\(^{32}\) *Dickerson*, 120 S.Ct. at 2336.

\(^{33}\) MINN. STAT. § 481.10, subd. 4 (2000) (penalty clause).

\(^{34}\) THE VALUE OF A DOLLAR (Scott Derks ed., Grey House Publishing, Lakeville, Conn. 1999) (stating in constant dollar terms the value of $1.00 in 1887 is worth $17.43 in 1999).

\(^{35}\) MINN. STAT. § 481.10 (Supp 1999) (amended by 2000 Minn. Sess. Law. 408). Prior historical amendments and derivations include the following: amended by Laws 1992, c. 571, art. 15, § 3; amended by Laws 1991, c. 345, art. 1, §101; St. 1927, § 5692; Gen. St. 1923, § 5692; Gen. St. 1913, § 4952; Rev. Laws 1905, § 2285; Gen. St. 1894, §§ 6187 to 6189; Laws 1887, c. 187, § 1 to 3. *Id.* See also State v. Schabert, 15 N.W.2d 585, 588 (Minn. 1944); Prideaux v. Minn. Dep't
cided in 1944. In *State v. Schabert*, the Minnesota Supreme Court interpreted the “before other proceedings shall be had” language in Minnesota Statute section 481.10 to create a *Miranda*-like right to consult with counsel before being interrogated. The statute was next mentioned in 1971 in a dissenting opinion by Justice Otis, who was joined by Justices Rogosheske and Kelly in *State v. Palmer*. Justice Otis wrote that pursuant to Minnesota Statute section 481.10 “arresting officers had an absolute duty to notify defendant’s lawyer of his request for consultation” in a case involving intoxication testing. The applicability of Minnesota Statute section 481.10 had not been raised in the court below, and the majority did not comment on the reasoning of the dissent.

Although persons in custody for purposes of taking a blood alcohol test did not have a right to consult with counsel under *Miranda* because such testing did not constitute “interrogation,” the dissent in *Palmer* suggested that, under Minnesota Statute section 481.10, such persons had an absolute statutory right to consult with counsel. In *Prideaux v. Minnesota Department of Public Safety*, decided in 1976, the Minnesota Supreme Court adopted Justice Otis’ reasoning in *Palmer* and held that the “absolute duty” created by Minnesota Statute section 481.10 required officers to notify persons in custody that they had a right to consult with counsel before taking a blood alcohol test. The Court also held that the right to speak with a lawyer “at the place of custody” could be met by allowing the person in custody to have access to a telephone to call an attorney. “The right to counsel will be considered vindicated if the person is provided with a telephone....”
In 1976, the Court also decided *State v. Held*, a case that held that the right to consult an attorney by phone, described in *Prideaux*, need not be made from a private room, but that any information gleaned from overhearing the call could not be used by the government. In 1977, the scope of the rights created by Minnesota Statute section 481.10 was again addressed by the Supreme Court in *Minnesota Deptartment of Public Safety v. Kneisl* which held that the right to consult with counsel was not "vindicated" by allowing a phone call, if the attorney who arrived at the jail pursuant to that phone call was denied access to person in custody. However, the Court also held that the "private interview" mentioned in Minnesota Statute section 481.10 need not take place in a private room, but that it may take place in an area "out of the earshot of officers."

In 1990, the Minnesota Legislature responded to the Minnesota Supreme Court's interpretation of Minnesota Statute section 481.10 in *Prideaux* by amending the implied consent statute by explicitly eliminating the right to consult with counsel in implied consent settings. The amended statute explicitly stated that there was no right to consult with counsel prior to blood alcohol testing for license revocation purposes under the amended statute. A license revocation case in which the conflict between Minnesota Statute section 481.10 and the implied consent statute reached the Minnesota Supreme Court in *Friedman v. Commissioner of Public Safety* in 1991.

46. 246 N.W.2d 863 (Minn. 1976).
47. 251 N.W.2d 645 (Minn. 1977).
50. *Id.* at 831-32. In *Friedman*, the Supreme Court found that the Legislature's attempts to eliminate the right to consult with counsel, originally described in Minn. Stat. 481.10, was of constitutional dimension under the right to counsel provisions of the Minnesota Constitution. *Id.* Thus, although chemical testing was neither a critical stage under the Sixth Amendment nor subject to the protections of *Miranda*, the Court found that chemical testing was a "critical stage" under Art. 1, Sec. 6 of the Minnesota Constitution. *Id.* In reaching this conclusion, the Court reviewed the particular solicitude with which the right to consult with counsel has been treated in Minnesota, including a reference to Minnesota Statute section 481.10. *Id.* at 829, 831-32. In the most recent opinion citing Minnesota Statute section 481.10, the Minnesota Supreme Court held that the statutory right to counsel created in Minnesota Statute section 481.10 did not, standing alone, also create a right to an attorney at government expense. *State v. White*, 504, N.W.2d 211, 214 (Minn. 1991). In this respect the rights created under the statute differ from *Miranda* and *Dickerson*. *Id.*
In *Friedman*, the Minnesota Supreme Court acknowledged that the Legislature had explicitly rejected its interpretation of Minnesota Statute section 481.10 because the language of the implied consent statute, on its face, rejected the Court's interpretation of the statutory right to counsel in *Prideaux*. However, the Court concluded that the statutory right to counsel described in *Prideaux* was also a right of constitutional dimension under the right to counsel provisions of Article 1, section 6 of the Minnesota Constitution. 51 Although chemical testing is not a critical stage under cases decided by the U.S. Supreme Court, 52 the Minnesota Court held that it was a critical stage under the Minnesota Constitution and the implied consent statute was declared unconstitutional. 53 In the most recent opinion citing Minnesota Statute section 481.10, *State v. White*, 54 the Minnesota Supreme Court held that the statutory right to counsel created in Minnesota Statute section 481.10 did not, standing alone, also create a right to an attorney at government expense. Between 1991 and August 5, 2000, when the Court of Appeals decided *Mullins v. Churchill*, Minnesota Statute section 481.10 has not been interpreted in any other reported opinions.

B. The 1991 Amendment To Minnesota Statute Section 481.10

In 1991, the Legislature enacted the first major amendment to the 100 year old statute by adding language that closely tracked the construction of Minnesota Statute section 481.10 that had been adopted by the Minnesota Supreme Court in *Prideaux* and its progeny. An “attorney telephone access” clause was inserted between the clause that created the “absolute duty” to contact counsel to arrange an in person consultation 55 and the penalty clause. The 1991 “telephone access clause” amendment reads as follows:

At all times through the period of custody, whether or not the person restrained has been charged, tried, convicted, or is serving an executed sentence, reasonable telephone access to the attorney shall be provided to the person restrained at no charge to the attorney or to the person re-

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51. *Friedman*, 473 N.W.2d at 833 (citing United States v. Ash, 413 U.S. 300 (1973); Gerstein v. Pugh, 420 U.S. 103 (1975)).
52. *Supra* note 51.
53. *Id.* at 833-834.
54. 504 N.W.2d 14 (Minn. 1993).
55. *Minn. Stat.* § 481.10, subd. 1 (Supp. 1999) (citing 1991 amendment); *see also* *Prideaux* v. *Minn. Dep’t of Pub. Safety*, 247 N.W.2d 385, 393 (Minn. 1976).
strained.\(^{56}\)

On its face, the amendment appears to codify the construction of the previous clause by the Minnesota Supreme Court in *Prideaux*, that not only recognized that the duty to allow attorney consultation “as soon as practicable”\(^{57}\) following a request was “absolute,”\(^{58}\) but established that the duty could be “vindicated” by providing telephone access in lieu of “a private interview at the place of custody.”\(^{59}\) The Supreme Court had also determined that this telephone access was “reasonable,” if the call was made “out of the ear-shot” of law enforcement officials\(^{60}\) during a time period that would not defeat the effectiveness of the blood alcohol test.\(^{61}\)

In the 1991 amendment, the Legislature made clear that the right to consult with counsel under the statute was much broader than that established by the United States Supreme Court under either the Sixth Amendment,\(^{62}\) or the Fifth Amendment.\(^{63}\) The statutory right to attorney telephone access arose “whether or not the person restrained has been charged, tried, convicted, or is serving an executed sentence.”\(^{64}\) In addition, the Legislature made explicit what was implicit in *Prideaux*: the “absolute duty”\(^{65}\) of governmental officials to contact an attorney “as soon as practicable,”\(^{56}\) or to make a telephone available for a person in custody to do so, exists “[a]t all

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\(^{56}\) *Prideaux*, 247 N.W.2d at 391-93.

\(^{57}\) *Id.*

\(^{58}\) *Id.*

\(^{59}\) *Id.* at 394. Some 15 years before the Legislature added the “telephone access” clause, the Minnesota Supreme Court had observed that Minnesota Statute section 481.10 had been enacted long before telephones had become common, and that there was no point in requiring law enforcement officials to arrange a personal consultation, at least with respect to blood alcohol testing, when a private telephone consultation would accomplish the apparent result intended by the Legislature in enacting Minnesota Statute section 481.10.

\(^{60}\) Minn. Dep’t of Pub. Safety v. Kneisl, 251 N.W.2d 645, 649 (Minn. 1977).

\(^{61}\) *Prideaux*, 310 Minn. at 415-17, 247 N.W.2d at 391-93.

\(^{62}\) Under the Sixth Amendment, the right to counsel arises only at “critical stages” which typically occur after the “initiation of adversary judicial proceedings.” Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); see also Maine. v. Moulton, 474 U.S. 159 (1985).

\(^{63}\) Under the Fifth Amendment, custody alone is not sufficient to trigger the right to consult with counsel. The right to consult with counsel arises only if law enforcement officials wish to interrogate a suspect. Miranda v. Arizona 384 U.S. 436, 467-73 (1966).

\(^{64}\) MINN. STAT. § 481.10, subd. 1 (Supp. 1999) (citing 1991 amendment).

\(^{65}\) *Prideaux*, 247 N.W.2d at 391-93.

\(^{66}\) *Id.*
times through the period of custody...  

As *Prideaux* made clear, a request for an attorney under the original language of Minnesota Statute section 481.10 required one of two mandatory responses: (1) notifying an attorney "as soon as practicable and before other proceedings shall be had" that a personal consultation has been requested and admitting that attorney to a private interview out of the "earshot" of law enforcement, or (2) in lieu of a private interview, facilitating a telephone call to the attorney in a setting in which the conversation would not easily be overheard by law enforcement. The 1991 amendment retained this language *en toto*.

Thus, when the 1991 amendment referred to "reasonable telephone access to an attorney... at no charge to the attorney or the person restrained," the Legislature actually expanded the "absolute duty" to grant telephone access established in *Prideaux* by making clear that financial limitations could not be imposed on the caller or the recipient of the call. The only legislative history that exists is committee hearings in which the cost of Department of Corrections policy that allowed only collect phone calls to attorneys was discussed as the reason for the amendment. There is little support for the conclusion that "reasonable" telephone access mentioned in the 1991 amendment was intended to create complete discretion to refuse to allow telephone calls that were clearly mandated by *Prideaux*.

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67. *Id.*


71. *Held*, 311 Minn. at 76, 246 N.W.2d at 864; *Kneisl*, 312 Minn. at 415-16, 251 N.W.2d at 649.


73. *Prideaux*, 247 N.W.2d at 392-93.

74. The legislative history cited by the trial court confirms that the Legislature intended to remove costs for making the mandatory phone calls and to require the Department of Corrections to eliminate collect calls charged to inmates or attorneys. *Infra* note 96 and accompanying text.

75. *Infra* note 79 and accompanying text.

76. *Id.* The sort of explicit statement of legislative intent that would be required to set aside statutory interpretation by the Supreme Court is evidenced in the amendment to Minnesota Statute section 481.10 that became effective August 1, 2000, which explicitly exempted Department of Corrections Officials from criminal and civil liability under Minnesota Statute section 481.10. *Id.* It also differs from the explicit Legislative action, taken in response to *Prideaux*, which explicitly sought to eliminate the statutory right to consult with counsel through the
III. MULLINS v. CHURCHILL

Ronaldo Ligons, an inmate serving a sentence in a Department of Corrections facility who was involved in a number of legal proceedings, wished to consult privately with his attorneys on a number of occasions. Although it is possible for inmates to use pay telephones, if there are sufficient funds in the inmates telephone account, all calls made from the pay telephones in DOC facilities are subject to being monitored at any time and the monitored conversations are not protected by attorney-client privilege. The DOC policy does permit inmates to make telephone calls to attorneys free of charge, but these attorney calls can be made only upon a written request being submitted to a case manager in which the inmate must describe why the inmate cannot use the mail, and the case manager has complete discretion to deny the request to consult with counsel.

Rather than making monitored calls from the pay phones, Mr. Ligons submitted a number of written requests to his case manager for free, confidential attorney telephone calls. The requests were summarily denied because Mr. Ligons failed to provide sufficient information to satisfy the caseworker that he could not accomplish his objectives via the U.S. Mail as was required by Department of Corrections telephone policy. He objected to the denial of his requests for telephone calls to counsel and was informed that, notwithstanding the language of Minnesota Statute section 481.10, the amendment of the implied consent statute. Prideaux, 247 N.W.2d at 393-94.

79. Id. at A94-96 (referring to Minnesota Dep't of Corrections, Div. Directive 302.210 (July 1, 1999)). The Court of Appeals opinion in Mullins quoted the relevant portion of the DOC telephone policy stating:
When legal business cannot be accomplished by U.S. mail, an offender may request an approved telephone contact with an attorney. Designated staff will review the call for approval. Staff will place the call and verify that the requested party is available and willing to accept the call. Telephones for approved legal calls will not be subject to any monitoring activity. The facility will not charge offenders for approved legal calls. Mullins, 616 N.W.2d at 768 (citing Minnesota Dep't of Corrections, Div. Directive 302.210, § B(4) (July 1, 1999)).
80. Id.
81. Id.
82. Supra note 78 and accompanying text.
83. Appellant's Opening Br. at A32, Mullins, 616 N.W.2d 764.
Department of Corrections personnel had complete discretion to deny his requests. As a result, he filed a pro se complaint in Washington County Conciliation Court against the warden of Stillwater Penitentiary for $300 in statutory damages under Minnesota Statute section 481.10 for three separate violations of the statute.

Mr. Ligons represented himself, as is required under Conciliation Court rules, but the court permitted the warden to be represented by counsel for the Department of Corrections. Both parties submitted written arguments, and on May 17, 1999, the court issued a $100 judgment in favor of Mr. Ligons on one of his claims under Minnesota Statute section 481.10. In spite of its long history, and the litigation described above, this may have been the first time any Minnesota Court had been presented with claims under Minnesota Statute section 481.10, and it is the first judgment rendered in favor of a plaintiff. This single Conciliation Court award called into question the attorney telephone access policy that had been promulgated by the Department of Corrections following the 1991 amendment of Minnesota Statute section 481.10 and the Department filed for a trial de novo in District Court in Washington County.

After the case was transferred to the District Court, the Minnesota Civil Liberties Union entered the case on behalf of Mr. Li-

84. Id. at A17 (referring to Minnesota Correctional Facility—Stillwater, Policy & Procedure T-1, § IV (B), Legal Calls (Dec. 31, 1998)). The Court of Appeals in Mullins quoted the relevant telephone policies from the Stillwater correctional facility stating:

In situations where phone contact is necessary, the inmate shall send a kite to his Case Manager 24 hours in advance of the requested call. The request must include the name of the attorney, the phone number and a specific explanation of why this communication cannot be handled through the U.S. mail. Approval of requests are at the discretion of the inmate’s Case Manager.

Mullins, 616 N.W.2d at 769 (citing Minnesota Correctional Facility—Stillwater, Policy T-1, § IV(B) (Dec. 31, 1998)).

85. Supra note 78 and accompanying text.

86. Mullins, 616 N.W.2d at 769. Ligons signed the conciliation court document representing himself pro se. Id.

87. Appellant’s Opening Br. at A50-51, Mullins, 616 N.W.2d 764.

88. Id. at A48-49 (referring to Judge Thomas G. Armstrong’s Order dated May 17, 1999 and judgment filed on June 10, 1999, awarding Ligons $100).

89. Id.

90. Id. at A50-51, A67-87 (referring to Minnesota Department of Correction’s Demand for Removal/Appeal, dated June 10, 1999, and subsequent Motion to Dismiss or for Summary Judgment, dated Nov. 5, 1999).
gons 91 and the Office of the Attorney General entered an appearance on behalf of the DOC. 92 The District Court granted the defendant's Motion for Summary Judgment 93 holding that the $100 civil remedy under Minnesota Statute section 481.10 was only available following a conviction under the criminal penalty clause of the statute, likening the civil remedy to a "forfeiture" which must be preceded by a criminal conviction. 94 The court also stated the Department of Corrections policies limiting telephone access to attorneys were reasonable under the "reasonable telephone access to attorneys" clause in light of the defendants' security concerns and the availability of mail communication as an alternative, if the request to consult with counsel by telephone is denied. 95

The court also referred to the legislative history of the 1991 amendment which indicated that, prior to the amendment, "many jails required inmates to contact their attorneys by collect calls on a public phone" 96 and that the high cost of these collect calls to county funded public defenders "unnecessarily exacerbated" public expenditures. 97 According to the trial court opinion "[t]he reasonable telephone access" provision of Minnesota Statute section 481.10 was enacted in 1991 to reduce taxpayer expense in response to the inmate-attorney telephone policy of some jail officials. 98 The trial court opinion was correct, insofar as the legislative history is concerned, but the court failed to cite Prideaux, or any of the other Minnesota Supreme Court cases that had construed Minnesota Statute section 481.10 to create an "absolute duty" to allow a "private interview," or a telephone call to an attorney, upon request, 99 and plaintiff Ligons appealed.

The decision in Mullins v. Churchill was issued by the Court of

91. Along with James Manahan and Teresa Nelson, the author was co-counsel of record on behalf of the Minnesota Civil Liberties Union.
92. Supra note 78, at A50-51, A67-87 (noting attorney of record listed as Paul Merwin, Assistant Attorney General for the State of Minnesota).
93. Id. at A199-210 (referring to Ligons v. Christ (D. Minn. Jan. 3, 2000) (No. C3-99-3077) (Court Order granting the DOC summary judgment)).
94. Id. at A205-06.
95. Id. at A207.
96. Id. (citing Act of June 1, 1991, ch. 345, art. 1, § 101, 1991, Minn. Laws 2645; Transcript of Senate Judiciary Committee, Civil Law Division Testimony of the Honorable Kevin Burke (March 26, 1991) at 3; Transcript of House Judiciary Committee of the Honorable Judge Burke (April 8, 1991) at 3).
97. Id.
98. Id.
99. Supra note 78 and accompanying text.
Appeals on September 5, 2000. On the issue of the availability of criminal and civil penalties under Minnesota Statute section 481.10, the Court of Appeals reversed the trial court. The Court of Appeals distinguished Minnesota forfeiture statutes from the provisions of Minnesota Statute section 481.10 on the grounds that civil forfeitures allow the government to attach assets related to criminal prosecutions and that

"[u]nlike the criminal[-civil] forfeiture statutes cited by the district court, the plain language of Minnesota Statute 481.10 does not state that a criminal conviction is a prerequisite to a civil penalty...[i]nstead it prescribes both criminal and civil remedies; neither of which is a prerequisite to the other."

The court noted that the language of Minnesota Statute section 481.10 was identical to the statute that imposes criminal liability and treble civil damages for attorney fraud and that

[n]either this court nor the supreme court has ever stated that a criminal conviction is required before permitting recovery of treble damages under Minn. Stat. §§ 481.07, .071....Therefore, we conclude that the district court erred when it determined that a civil recovery is not available under Minn. Stat. § 481.10 absent a criminal conviction.

Although the Court of Appeals upheld Ligons' standing to bring a civil action independent of the criminal sanction for violations of the statute, the Court of Appeals upheld the trial court finding that the DOC regulations were reasonable under the "reasonable telephone access" clause of Minnesota Statute section 481.10 as a matter of law. The court did not address plaintiff's argument that providing telephone access is mandatory under Prideaux, in lieu of the "absolute duty" to contact an attorney and arrange "a private interview at the place of custody." Nor did the court address the argument that the 1991 "reasonable telephone access" amendment must be read in light of existing Supreme Court doctrine that allows "private" phone calls to be made "out of

101. Id. at 766.
102. Id.
103. Id. at 768.
104. Id.
105. Prideaux v. Minn. Dep’t of Pub. Safety, 310 Minn. 405, 415-17, 247 N.W.2d 385, 391-93 (Minn. 1976).
earshot" during a reasonable period of time, and the language of the statute that requires that attorney access must occur "as soon as practicable." The Court of Appeals cited no cases in support of its conclusion that, "[t]he statute, by definition, allows for discretion."

Further, the court found that requiring inmates to justify why they cannot use the mail to contact their attorneys is not unreasonable; limiting attorney phone calls only to those related to court dates or filing deadlines is not unreasonable and does not interfere with an inmate's right to talk confidentially to an attorney because these dates "are a matter of public record;" and, that the DOC policies are reasonable under Minnesota Statute section 481.10 given DOC security and management concerns. The court reached this conclusion even though "imminent danger of escape" is the only proper basis to deny attorney access specifically mentioned in Minnesota Statute section 481.10, and the court did not refer to Prideaux, Held, Kneisl or any other caselaw to support its analysis.

IV. ANALYSIS OF MULLINS V. CHURCHILL

In light of the Court of Appeals failure to address the Minnesota Supreme Court opinion in Prideaux which has very clearly established that telephone access to counsel is mandatory, in lieu of contacting an attorney and allowing a private consultation at the prison, it appears that the Court of Appeals opinion directly contravenes well established Supreme Court doctrine. Further, by fail-
ing to read the "reasonable telephone access to attorneys" clause in the 1991 amendment in a manner that is consistent with "reasonable" but mandatory telephone access under the unamended portions of the statute, established by the Supreme Court in *Prideaux* and *Held*, the Court of Appeals opinion concluded that the Legislature intended to contravene well established Supreme Court doctrine without explicitly stating that purpose, and without any legislative history to support such an intention.

The legislative history cited by the trial court, which was not referred to by the Court of Appeals opinion, does not support the reading of the "reasonable telephone access" amendment advanced by the Court of Appeals. The legislative history clearly shows that there was no discussion of altering existing Supreme Court doctrine regarding the mandatory nature of attorney phone calls. Rather, adding the "reasonable telephone access" was intended to give full effect to *Prideaux* by lowering unnecessary costs to counties by eliminating collect calls and shifting the costs to the Department of Corrections and private attorneys who receive the calls mandated by *Prideaux*. These issues will have to be addressed by the Supreme Court to prevent the Court of Appeals from effectively overruling *Prideaux* and its progeny.

However, the erroneous interpretation of the "reasonable access to attorney clause" notwithstanding, the portion of the opinion that addressed the availability of remedies is likely to prove to have a significant impact on the conduct of custodial interrogations, and the ability of the courts of Minnesota to enforce the constitutional requirements of *Miranda* and *Dickerson*. For the first time since Minnesota Statute section 481.10 was originally enacted in 1887, a Minnesota court has clearly ruled that law enforcement officials, other than those covered by DOC policies, who violate their "absolute duty" to (1) inform persons in custody of their right to consult (*Prideaux*), (2) contact attorneys for "reasonably"

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115. *Id.*
116. Minn. Dep't of Pub. Safety v. Held, 246 N.W.2d 868, 864 (Minn. 1976) (stating telephone access, in lieu of a private consultation in the prison, is mandatory on request, but does not require separate rooms for telephone calls).
118. Supra note 78 and accompanying text.
119. *Id.* (discussing cost effective measures).
120. *Mullins*, 616 N.W.2d at 768-69.
private consultations in jails (Kneisl) or, in the alternative (3) to provide prompt access to a telephone to contact an attorney (Prideaux) in a "reasonably" confidential setting (Held), are subject to criminal prosecution. Further, even if law enforcement officials choose not to commence a criminal action against one of their own, Mullins v. Churchill establishes that private individuals have an independent civil action for statutory damages.

The Court of Appeals opinion in this regard was compelled by the plain language of Minnesota Statute section 481.10:

Every officer or person who shall violate any provision of this section shall be guilty of a misdemeanor and, in addition to the punishment described therefor shall forfeit $100 to the person aggrieved, to be recovered in a civil action.

Although this is the first time this section of Minnesota Statute section 481.10 has been construed, the court was correct in noting that, with respect to the relationship between the criminal sanction and the civil remedy, Minnesota Statute section 481.10 makes use of exactly the same language as Minnesota Statute section 481.07, the statute that exposes attorneys who commit fraud to criminal sanctions, and to a separate and independent civil cause of action brought by the person harmed:

An attorney who, with intent to deceive a court or a party to an action or judicial proceeding, is guilty of or consents to any deceit or collusion, shall be guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, the attorney shall be liable to the party injured in treble damages.

According to the Court of Appeals, "[n]either this court nor the supreme court has ever stated that a criminal conviction is re-

123. Prideaux, 310 Minn. at 421, 247 N.W.2d at 394.
125. Mullins, 616 N.W.2d 768 (citing MINN. STAT. § 481.10 (1998)).
126. Id. at 767 n.2 (citing MINN. STAT. § 481.10 (1998) (emphasis added)). Within footnote two the court noted this particular section of the statute had recently been amended by the 2000 legislative session. Id. The amendment exempts the DOC and its officers and employees from penalties. Id. But the court added that because the Mullins action was commenced prior to the effective date of the amendments, the amendments did not apply. Id.
127. Id. at 767.
128. Id. at 768 (quoting MINN. STAT. § 481.07 (1998) (emphasis added)).
quired before permitting the recovery of treble damages under Minnesota Statute section 481.07, .071.\textsuperscript{129} The court was correct in this regard. To reach a contrary conclusion with respect to Minnesota Statute section 481.10, it would be necessary to conclude that no attorney could be sued for treble damages for fraud unless that attorney had already been criminally prosecuted and convicted. This would, in many cases, have the effect of insulating attorneys from being held liable for money damages for committing fraud, and would make it extremely difficult for clients to receive recompense for the misdeeds of their attorney. It is unlikely that the legal profession, much less the general public, would accept such an extreme limitation on the right to bring a claim for attorney fraud. There is no reason to conclude that the 1887 Legislature intended to so severely limit the availability of a remedy to enforce the broad "absolute duty" to permit consultation with counsel that had been created in the first clause of the statute.

The major difference between the attorney malpractice statute, and the 'jailer practice" statute is that a jailer must "forfeit...$100...to be recovered in a civil proceeding,"\textsuperscript{130} and "an attorney shall be liable to the party injured."\textsuperscript{131} The word "forfeit," however, does not mean that the "civil action" established in Minnesota Statute section 481.10 "has the same thrust"\textsuperscript{132} as "forfeiture" procedures under other Minnesota statutes, as asserted by the trial court. All of the forfeiture statutes, cited by the defendants and noted by the court, involve criminal prosecutions and civil recovery actions for items related to the crime, both of which are brought by the government.\textsuperscript{133} Minnesota Statute section 481.10 clearly states that the civil action may be brought by the "person aggrieved."\textsuperscript{134} In addition, most of the forfeiture statutes specifically use language that states that the governments civil action arises "after a conviction," "only...by proof of a criminal conviction," or "when a person is convicted."\textsuperscript{135}

In sum, the opinion of the Court of Appeals makes clear that Minnesota Statute section 481.10 imposes criminal liability upon all

\textsuperscript{129} Id. (citing MINN. STAT. §§ 481.07, .071 (1998)).
\textsuperscript{130} Id. (citing MINN. STAT. § 481.10 (1998)).
\textsuperscript{131} Id. (citing MINN. STAT. § 481.07 (1998)).
\textsuperscript{132} Id.
\textsuperscript{133} Id. (citing MINN. STAT. §§ 609.762, subd. 4, 609.5312, subd. 4, 609.905, subd. 1 (1998)).
\textsuperscript{134} Id. (citing MINN. STAT. § 481.10 (1998)).
\textsuperscript{135} Id. at 767.
governmental officials, other than those acting pursuant to DOC policy, for failure to respond to a request to consult with counsel by any person who is in government custody for any reason. Further, the court made clear that the "person aggrieved" may bring a civil action for $100 for each occurrence, whether that official is prosecuted or not.\(^{136}\) As a result, the Minnesota courts have clearly recognized, for the first time, a new enforcement mechanism for the right of persons in custody to consult counsel upon request in situations that include those described in *Miranda* and *Dickerson*.\(^{137}\)

It is a remedy that far exceeds the suppression of evidence remedy that *Miranda* made available and it applies more broadly than *Miranda* and *Dickerson* because it is not limited to interrogation situations.

As the Supreme Court noted in *Prideaux*, there is an "absolute duty" to inform and an absolute obligation to respond to a request, either by arranging a private consultation or by allowing access to a telephone.\(^{138}\) Together with the existing requirement under the Minnesota Constitution that all confessions be recorded to be admissible, a requirement to which only Alaska and Minnesota adhere,\(^{139}\) Minnesota can now justifiably claim to have the most comprehensive mechanism for policing the right to consult with counsel described in *Miranda* and constitutionalized in *Dickerson*.\(^{140}\) The implications of these enhanced enforcement possibilities will be discussed in part five.\(^{141}\)

V. THE 2000 AMENDMENTS TO MINNESOTA STATUTE SECTION 481.10

The Conciliation Court claim filed by Mr. Ligons did more than result in an Appeals Court ruling that made enforcement of *Miranda* more effective, it also had an effect on the Department of

\(^{136}\) *Id.* at 769.  
\(^{137}\) *Id.*.  
\(^{138}\) *Prideaux* v. Minn. Dep’t of Pub. Safety, 247 N.W.2d 385, 391-94 (Minn. 1976).  
\(^{139}\) *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994) (citing *Stephen v. State*, 711 P.2d 1156, 1158 (Alaska 1985)). *Scales* affirmed "that the recording of custodial interrogatories "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial." *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).  
\(^{140}\) *Dickerson v. United States*, 120 S.Ct. 2326, 2350-36 (2000).  
\(^{141}\) *Infra Part V.*
Corrections' legislative activities. After Mr. Ligons prevailed in his _pro se_ action, the Department of Corrections not only undertook to rigorously defend the suit by removing the case to District Court, the DOC also entered the legislative process in an attempt to change the language of Minnesota Statute section 481.10 to exempt the Department from future liability under the statute. The DOC, itself, made clear that it had a legislative strategy to avoid future liability in its pleadings in District Court. This legislative strategy was successful in securing amendments to Minnesota Statute section 481.10 that purport to significantly alter DOC responsibilities under the statute and which remove the DOC from the reach of its penalties. The amended 481.10 became effective on August 1, 2000.

The recently amended Minnesota Statute section 481.10 reads as follows:

Subd. 1. CONSULTATION. All officers or persons having in their custody a person restrained of liberty, except in cases where imminent danger of escape or injury exists, shall admit any attorney retained by or on behalf of the person restrained, or whom the restrained person may desire to consult, to a private interview at the place of custody. Such custodians, upon request of the person restrained, as soon as practicable, and before other proceedings shall be had, shall notify the attorney of the request for a consultation with the attorney.

Subd. 2. TELEPHONE ACCESS IN LOCAL CORRECTIONAL FACILITIES. Except in cases where imminent danger of escape or injury exists, all officers or persons having in their custody a person restrained of liberty whether or not the person restrained has been charged, tried, or convicted, shall provide private telephone access to any attorney retained by or on behalf of the person restrained, or whom the restrained person may desire to consult at no charge to the attorney or to the person restrained. Reasonable telephone access under this subdivision shall be provided following the request of the person.

142. Appellant's Opening Brief at A56-59, Mullins, 616 N.W.2d 764 (2000) (referring to the DOC’s Informational Statement at A58-59 where the DOC discusses its plans to propose legislation regarding inmate telephone access). The DOC reserved the right to rescind removal of the Conciliation Court case based on the possibility that the 2000 Legislative Session would amend Minnesota Statute section 481.10, excluding the DOC from liability. _Id._

restrained and before other proceedings shall be had regarding the alleged offense causing custody.

Subd. 3. TELEPHONE ACCESS IN STATE CORRECTIONAL FACILITIES. Except in cases where imminent danger of escape or injury exists, all officers or persons having in their custody a person restrained of liberty while serving an executed sentence in a state correctional facility, shall provide private telephone access to any attorney retained by or on behalf of the person restrained, or whom the restrained person may desire to consult at no charge to the attorney or to the person restrained. Telephone access under this subdivision shall be provided following the request of the person restrained and in accordance with policies adopted by the institution that meet constitutional requirements.

Subd. 4. CRIMINAL PENALTY.

(a) Except as provided in paragraph (b), whoever violates subdivision 1 or 2 is guilty of a misdemeanor and shall also forfeit $100 to the person aggrieved, to be recovered in a civil action.

(b) The penalties described in paragraph (b) do not apply to officers or persons having in their custody persons restrained of liberty while serving and executed sentence in a state correctional facility.144

Perhaps the most striking feature of the amended statute is how little has been changed by the Legislature. The entire first clause, which the Minnesota Supreme Court has interpreted in *Prideaux* as creating an “absolute duty” to (1) notify a “person restrained” of their right to consult with counsel on request, (2) notify the attorney of the request “as soon as practicable and before other proceedings,” and (3) “admit...the attorney to a private interview at the place of custody” remains unchanged as Subdivision one.145 This is the same language that the *Prideaux* Court held could be “vindicated” by providing access to a telephone to allow the person restrained to call an attorney.146 Under this clause of the statute, it appears that the “absolute duty” to arrange a private

144. *Id.* (emphasis added).


interview or a phone call remains unchanged; refusing to respond to a request for a "private interview" with counsel, or conditioning a response on a law enforcement official's exercise of discretion of any sort is still not an option.

The second clause, which applies only to persons restrained in county and municipal facilities, clarifies some aspects of the telephone access question by using the same language used in the original statute that *Prideaux* held created an "absolute duty" to allow private telephone access to attorneys on request.\(^{147}\) It also retains the cost shifting feature of the 1991 amendment by requiring that the calls must also be free of charge.\(^{148}\) However, unlike the "consultation clause" these telephone calls must occur "before other proceedings regarding the alleged offense causing custody."\(^{149}\) The "as soon as practicable" language has been removed. But since *Schabert* held that "other proceedings" included interrogations, this clause would still apply to all situations in which *Miranda* and *Dickerson* would also apply, although it is not clear how the absence of the "as soon as practicable" language would effect the response time for other sorts of proceedings.

Subdivision three speaks to the obligation of the Department of Corrections to provide telephone access to attorneys. Under this subdivision, "private telephone access" appears to be mandatory in some general fashion, but there is no requirement that DOC officials respond to a request for a phone call,\(^{150}\) as they are obligated to respond to a request for "private interview" consultations with counsel in subdivision one.\(^{151}\) Although this section does not mandate that DOC officials respond to a request for an attorney phone call, it does require that regulations for responding to requests for attorney phone calls must meet "constitutional requirements."\(^{152}\)

In addition to differentiating between the obligations of the DOC and local officials to respond to requests for attorney phone calls, by far the most important change in the statute is embodied in subdivision four. Although the statute retains the same penalties that were held to be independent remedies by the Court of Appeals in *Mullins v. Churchill*,\(^{153}\) paragraph (b) specifically excludes the

\(^{147}\) Id.

\(^{148}\) Id.; see also supra note 78 and accompanying text.

\(^{149}\) State v. Schabert, 15 N.W.2d 585 (Minn. 1944).

\(^{150}\) MINN. STAT § 481.10, subd. 2 (amended by 2000 MINN. LAWS 408).

\(^{151}\) Id. at subd. 1.

\(^{152}\) Id. at subd. 3.

Department of Corrections officers from both the criminal and civil liability imposed by Minnesota Statute section 481.10. However, subdivision 4 does not change the liability for any other law enforcement officials in the state.

In the future it will be necessary to determine how the mandatory attorney notification and private consultation language in subdivision one, which Prideaux has held requires mandatory telephone access in lieu of a private meeting at the place of confinement, will impact the interpretation of the amended telephone access clauses. And, the telephone policies that may be instituted by the Department of Corrections pursuant to "constitutional requirements" will have to be explored in future proceedings. With respect to the penalty clause, it seems that the criminal and civil penalties that previously applied to all officials holding persons in custody, no longer apply to the DOC personnel.

This means that the impact of Mullins v. Churchill, as a means of enforcing Miranda and deterring abuses of the right to consult with counsel, remains unchanged as it relates to all other law enforcement personnel in that state. Thus, even after the recent amendment, law enforcement officials in Minnesota who violate a request for counsel during interrogation continue to be subject to criminal prosecution under Minnesota Statute section 481.10 for refusing to respond to requests for counsel in most of the situations in which Miranda and Dickerson apply—custodial interrogations.

VI. THE RIGHT TO CONSULT WITH COUNSEL IN MINNESOTA: A CASE STUDY

Minnesota v. Jenson arose out of the efforts of Goodhue County law enforcement officials to solve an open investigation involving the disappearance and suspected homicide of a young
child. The investigators had focused on the mother's live-in companion, Dale Jenson, as the prime suspect. However, a body had never been discovered and there was insufficient evidence to prosecute either the mother or Mr. Jenson.\footnote{Richard Meryhew, New Lead Possible In Jessica Swanson Case, Police Say, MINNEAPOLIS STAR TRIB., Nov. 13, 1997, at 7B (stating investigators continued to focus on Dale Jenson in the June 27, 1995, disappearance of three-year-old Jessica Swanson; police remained unsatisfied with information provided by Swanson and Jenson); Maria Elena Baca, Tipster's Account of Jessica Swanson Case Investigated, MINNEAPOLIS STAR TRIB., Nov. 25, 1997, at 2B (stating source indicated girl died from a fall off a counter top in her home and alleges Dale Jenson disposed of her body; investigators still seeking additional information).}

Goodhue County officers secured the services of a nationally recognized interrogation expert from the Federal Bureau of Investigation in Milwaukee, Wisconsin.\footnote{Burcum, supra note 162 and accompanying text. Burcum notes local authorities sought assistance from FBI agent Dan Craft. Craft had "a reputation as a good interviewer." \textit{Id.} BCA director, Nick O'Hara stated, "He [Craft] wouldn't have been invited in to help with the [Jenson] investigation unless he had an excellent reputation." \textit{Id.} Craft had been recognized for his questioning of serial killer Jeffrey Dahmer in 1991, and Harold (Howie) Kramer, Jr. in relation to Kramer's leaving his three-year-old son in the woods to die. \textit{Id.} See also Chuck Haga, Interrogator's Skills Help Crack The Case, MINNEAPOLIS STAR TRIB., Aug. 17, 1999, at 1A. FBI agent Craft's skills were compared to that of the great interrogators," intimating Goodhue County officials had almost given up hope of solving the four year old disappearance of Jessica Swanson. \textit{Id.}} Jenson was questioned by the FBI agent in a closed room in a police facility and, after several hours of questioning by the FBI agent, he admitted having accidentally killed the child and led officers to the scene.\footnote{Jill Burcum, Jenson's Attorney Says His Confession Should Be Thrown Out, MINNEAPOLIS STAR TRIB., Sep. 2, 1999, at 1A; (stating the FBI interrogator ignored Jenson's repeated requests to speak to an attorney).} Because of the apparently effective work of the FBI agent, Jenson was charged with the homicide and a public defender was appointed to represent him.\footnote{Id.; see also infra note 164 and accompanying text.}

Pursuant to usual practice in Minnesota, the public defender made a motion for a copy of the tape recording of the confession.\footnote{Jill Burcum, Sheriff: Confession Dispute Not Unusual, MINNEAPOLIS STAR TRIB., Sep. 3, 1999, at 2B. Goodhue County Sheriff Dean Albers and the Minnesota Bureau of Criminal Apprehension (BCA) jointly decided to seek the assistance of FBI agent Dan Craft in questioning Dale Jenson. \textit{Id.} The interview with Jenson lasted approximately two hours culminating in Jenson's confession. \textit{Id.} Audio taped copies of the interview were reviewed by both the prosecution and the defense counsels. \textit{Id.}} This is not a motion that would have been made had this case arisen in Federal Court where cases investigated by the FBI...
usually are tried. Nor would it have been made in any state of the Union other than Alaska. This is because only two states, Minnesota and Alaska, require confessions to be recorded to be admissible at trial. As a result, in most jurisdictions in which the FBI agent usually works, tape recordings are not made of interrogation sessions and the details of the interrogation session must be described in court testimony by FBI agents or other law enforcement officials who were present at the time of the confession.

Because of the special Minnesota taping requirement, a tape recording revealed exactly what had happened during the interrogation of Mr. Jenson. When the public defender received the tape, she heard Mr. Jenson requesting to speak with a lawyer on no less than fourteen occasions. She also heard the FBI agent ignore the requests, or refuse to respond to the requests, each time the request for an attorney was made by Jenson. Only after these repeated violations of *Miranda* and Minnesota Statute section 481.10, did Jenson make the incriminating statements.

Tape recording made it possible for the court to determine that Jenson's *Miranda* rights had been repeatedly violated and the statements were properly ruled inadmissible. However, because of other evidence, Jenson eventually pleaded guilty to a lesser offense and was incarcerated. Goodhue County engaged the services of an independent Washington County prosecutor to investigate the actions of the FBI agent and, presumably, the Goodhue County officers with whom the agent worked. Following the investigation, the independent prosecutor publicly announced that the FBI agent had, in fact, violated Jenson's request to speak with an attorney on numerous occasions, but that there were no Minnesota statutes under which he could be held accountable for the constitu-


166. Burcum, *supra* note 161 and accompanying text.

167. *Id.* Public Defender Mary Winfield stated during the interrogation that the FBI agent "brushed off" Jenson's requests for counsel, promising to get him an attorney, but never did. *Id.* Nor did the agent give Jenson access to a telephone to call an attorney. *Id.*

168. *Id.*

169. *Infra* notes 174, 175, 180.

170. Richard Meryhew, *Strategy in Jenson Confession Criticized*, MINNEAPOLIS STAR TRIB., Apr. 25, 2000 at 1A. Jenson pled guilty to second-degree manslaughter in the death of Jessica Swanson and is presently serving a six-year sentence. *Id.*
tional violations he had committed. 171

VII. ANALYSIS OF MINNESOTA V. JENSON

Following the decision of the U.S. Supreme Court in U.S. v. Dickerson, it is quite clear that the Dakota County District Court properly refused to allow the statements taken from Jenson into evidence. But, the Jenson case also reveals how critically important the Minnesota "recorded confession" rule is for courts to be able to have a factual record upon which to rule on the admissibility of confessions taken by police from persons in custody. 172 It seems fair to surmise that, had the tape recording not existed, the court would have had to base its ruling on reconstructions of the events based on the memories of those present: principally the FBI agent who had broken the law, the officers who witnessed the violations and did not reported them, and the defendant.

According to Hennepin County Chief Judge Kevin Burke, the value of the Minnesota "recorded confession" rule is that it makes it much easier for trial judges to rule correctly on suppression motions. 173 Because the factual basis upon which to decide the admissibility of recorded confessions is less subject to the vagaries of memory, perception, and the bias that is inherent in the "often competitive practice of law enforcement" 174 that inevitably effects all reconstructions of interrogations that need not be recorded, it is likely that the Minnesota "recorded confession" rule provides greater accuracy in the application of Miranda and Dickerson. The Jenson case is an example of the value of the recorded confession rule to insure accurate judicial decision-making.

In addition, the Jenson case also gives some indication that the very existence of the rule may have a deterrent effect on law enforcement officials who might be inclined to violate their obliga-

171. Id. The Washington County Prosecutor stated that the FBI agent’s actions were “[t]he most blatant violations of the U.S. Constitution I've seen,” but concluded that “no state laws were broken.” Id.


173. Almanac (MN Public Television broadcast, Fri. Sep. 17, 1999) (panel discussion, in which the author and The Honorable Kevin Burke were participants, concerning the confession of Dale Jenson).

174. Johnson v. United States, 333 U.S. 10, 13-14 (1948). The United States Supreme Court recognized that “the officer engaged in the often competitive enterprise of ferreting out crime” is not a neutral party and that judicial oversight is necessary because of the very nature of the investigative process. Id.
tion to uphold the Constitution. Of course, it is possible that the FBI agent's violations of *Miranda* were part of a strategy to get the information, irrespective of whether it could be used to secure a conviction. "Just knowing what happened to the body," even if prosecution was not possible, may have been the agent's motivation for intentionally violating the Constitution. 175 Whatever the motivation of the FBI agent or other officers who were aware of the techniques he employed, the *Jenson* case reveals an inherent weakness in the deterrent value of suppression of evidence as a means of preventing violations of *Miranda* or *Dickerson*.

Suppression of illegally obtained statements may cause a case to be lost at trial 176 and in some instances law enforcement officials may decide that getting the information is more important than being able to use that information to convict. In such circumstances, suppression of evidence can have little, if any deterrent impact. However, suppression of statements can have a deterrent effect only if the persons present at the interrogation report that the interrogation was conducted in an improper manner. Also, law enforcement agencies often evaluate the performance of individual officers on their success in closing cases by arrest, irrespective of whether the evidence upon which a an arrest is based can be admitted at trial or results in a conviction. Thus, individual law enforcement officials rarely have to consider being held personally responsible if they fail to uphold their Constitutional duties. This fact of life makes the provisions of Minnesota Statute section 481.10 extremely important as an additional protection for the rights described in *Miranda* and *Dickerson*.

The most unique aspect of Minnesota Statute section 481.10 is that it establishes individual responsibility for law enforcement officials in a way that merely suppressing statements cannot. For example, had the FBI agent been aware not only that his violations of *Miranda* were being recorded but that he would also be personally

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175. *Scales*, 518 N.W.2d at 591 (citing *Stephan*, 711 P.2d at 1158 (demonstrating only Minnesota and Alaska require taped interviews)); see also FBI Agent Says He Had Officials' Approval to Deny Jenson Lawyer, MINNEAPOLIS STAR TRIB., Jan. 6, 2000, at 2B. FBI agent Dan Craft contended that he asked local authorities how far he should push "the envelope." *Id.* Craft maintained he pursued the Jenson confession out of the desire to find the missing child and that he always "plays by the rules—except in this case." *Id.* Contrary to Craft's testimony, Goodhue County Attorney Stephen Betcher stated he had advised Craft to give Jenson his Miranda rights and record everything. *Id.*

176. *Scales*, 518 N.W.2d at 592.
subject to criminal prosecution for each incident in which he refused or ignored a request for counsel, the incentives for the FBI agent to follow the dictates of the United State Supreme Court would have been greatly enhanced.

Of course, in order for a prosecution to occur under Minnesota Statute section 481.10, another law enforcement official, such as the Washington County prosecutor in the Jenson case, must exercise his or her discretion to file criminal charges against fellow law enforcement officials. Despite the existence of a Minnesota statute that over 100 years has criminalized actions such as those of the FBI agent in the Jenson case for, he was not charged. As a result, the Jenson case makes clear that imposing criminal sanctions on law enforcement officials is dependent upon considerations other than whether clear evidence exists that a law enforcement officer has committed more than a dozen criminal acts.

Whatever the basis of the decision not to prosecute the FBI agent, the Jenson case reveals the importance of Mullins v. Churchill in establishing that the civil remedy under Minnesota Statute section 481.10 is not dependent upon a criminal conviction. If the civil remedy in Minnesota Statute section 481.10 was dependent not only on a charge being filed, but on a conviction on that charge, the civil remedy would be so tenuous as to be virtually meaningless, and any deterrent effect that the Legislature might have intended to create would have been rendered a nullity. After Mullins v. Churchill, it is now clear that Mr. Jenson retains a civil cause of action for each of the violations committed by the FBI agent, as well as potential causes of action against each officer that was aware of the requests for counsel and failed to respond.

177. MINN. STAT. § 481.10, subd. 4; Mullins v. Churchill, 616 N.W.2d 764, 767 (Minn. Ct. App. 2000).
178. Infra Part IIIA.
179. Mullins, 616 N.W.2d at 767 (stating MINN. STAT. § 481.10 “prescribes both criminal and civil remedies; neither of which is a prerequisite to the other”).
180. Id. Since Mr. Jenson’s involvement action did not include the DOC staff members exempted under Minnesota Statute section 481.10, subd. 4, the Court of Appeals opinion in Mullins has supplied Jenson the grounds for a civil cause of action. Although it is beyond the scope of this article, it is worth noting that a secondary effect of the “constitutionalization” of Miranda and Dickerson is availability of attorney’s fees, pursuant to 42 United States Code section 1988 violations of the right to consult with counsel under Miranda and Minnesota Statute section 481.10.
VIII. CONCLUSION

Under Minnesota Statute section 481.10, all law enforcement officials in the State of Minnesota have an "absolute duty" to respond to a request to speak with a lawyer by any person in their custody by contacting a lawyer and setting up a private interview and that failure to do so creates both criminal and civil liability. This right to consult with counsel can be "vindicated" by either a private consultation in the place of confinement, or by making telephone access to counsel available in a "reasonably" confidential setting. The recent Minnesota Court of Appeals decision in Mullins v. Churchill confirms that the criminal penalty and the civil remedy are independent remedies and that the person aggrieved may bring a civil cause of action for $100 irrespective of whether a criminal conviction has been obtained. Although recent amendments may have limited the availability of remedies for Department of Corrections personnel, all other law enforcement officials are clearly subject to the penalties imposed by Minnesota Statute section 481.10.

This statute applies to the custody and interrogation settings in which the United States Supreme Court has recognized a presumption of coerciveness which under Miranda and Dickerson require law enforcement officers to provide warnings that include the right to consult with counsel. And, like Miranda and Dickerson, Minnesota Statute section 481.10 requires consultation with counsel to be provided before questioning can continue. However, in addition to suppression of any statements taken in violation of this right to consult with counsel, Minnesota Statute section 481.10 permits individual officers to be held criminally and civilly liable.

Because the Minnesota Constitution requires that confessions

182. Minn. Dep't of Pub. Safety v. Kneisl, 251 N.W.2d 645, 646 (Minn. 1977); Minn. Dep't of Pub. Safety v. Held, 246 N.W.2d 863, 864 (Minn. 1976); Prideaux, 247 N.W.2d at 391-92, 394.
183. Mullins, 616 N.W.2d at 767.
186. Schabert, 15 N.W.2d at 589.
187. Mullins, 616 N.W.2d at 767; see also Kneisl, 251 N.W.2d at 649; Held, 246 N.W.2d at 864.
must be recorded to be admitted at trial and Minnesota Statute section 481.10 has been interpreted to impose individual criminal and civil liability on law enforcement officers for violation of the right to consult with counsel, the courts of Minnesota have created a more effective means of enforcing the rights enunciated in Miranda, and for deterring violations of those rights, than any other state in the nation. The Jenson case, in which an FBI agent who clearly committed multiple violations of Miranda during an interrogation that was taped, demonstrates the value of the “recorded confession” rule. However, the fact that the FBI agent in the Jenson case was not prosecuted under Minnesota Statute section 481.10 demonstrates that the separate civil penalties brought by the “person aggrieved,” which was recognized by the Minnesota Court of Appeals in Mullins v. Churchill, is a necessary addition to the enforcement mechanism for jurisdictions, like Minnesota, that are serious about making the protections of Miranda and Dickerson truly effective.

In jurisdictions which lack the recording requirement, it is impossible to determine whether the factual basis upon which suppression decisions are made are accurate, given the adversarial nature of the process and the fact that often only law enforcement officials and the accused can describe what occurred in the closed room where the interrogation occurred. The failure of law enforcement officials to prosecute the FBI agent who committed numerous violations of Minnesota Statute section 481.10 in the Jenson case demonstrates why other jurisdictions that are committed to protecting the Miranda right-to-counsel that was recently reinforced in Dickerson could well benefit from adopting criminal and civil remedies for violations of Miranda that now exist in Minnesota, in addition to suppression of evidence.

188. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).
189. Mullins, 616 N.W.2d at 767.
190. Scales, 518 N.W.2d at 592; Mullins, 616 N.W.2d at 767. See also Margaret Zack, Miranda Error Frees Suspect In Homicide, MINNEAPOLIS STAR TRIB., Aug. 26, 2000, at 2B (stating Perry D. Skinaway, Jr.’s statement had to be suppressed because the Miranda warning he was given was interrupted and considered insufficient).
191. Burcum, supra notes 162, 167 and accompanying text. The fact that the tapes clearly depicted Jenson requested a lawyer fourteen times is irrefutable evidence that is not subject to memory interpretation at a later hearing regarding the circumstances that may have transpired. See also supra note 180 and accompanying text.