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VI. CRIMINAL PROCEDURE

A. Anonymous Juries

In four closely-related decisions in 1995, the Minnesota Supreme Court held that anonymous juries do not inherently violate a defendant's fundamental right to an impartial jury or erode the presumption of innocence. Additionally, the court provided guidelines for the trial courts to follow to ensure that criminal defendants' constitutional rights are not violated. Consequently, anonymous juries are not an inherently prejudicial practice.

In the first case, State v. Bowles, the Minnesota Supreme Court articulated a two-part rule for lower courts to follow when impaneling an anonymous jury. A court impaneling an anonymous jury must: 1) have a strong reason to believe that jurors need protection from external threats; and 2) take reasonable precautions to minimize any prejudicial effect the jurors' anonymity may have on the defendant's presumption of innocence.

Shannon Bowles, a "footsoldier" of the Vice Lords street gang, was the first of the four cases heard by the Minnesota Supreme Court on the use of an anonymous jury. However, it was the second case tried in the lower court, being preceded by State v. Ford, 539 N.W.2d 214 (Minn. 1995). In Ford, the defendant argued that the district court violated rule 26.02(2) of the Minnesota Rules of Criminal Procedure which states that upon request the clerk shall furnish the parties with a list of names and addresses of the persons on the jury panel. However, Jury Management Rule 814(b) allows the court to restrict the addresses of the prospective jurors. Noting that the two rules are inconsistent, the Ford court requested the Advisory Committee on Rules of Criminal Procedure to propose a change to the rules to make them consistent. Ford, 539 N.W.2d at 223.

1. State v. Bowles, 550 N.W.2d 521 (Minn. 1995); State v. McKenzie, 532 N.W.2d 210 (Minn. 1995); State v. Flournoy, 535 N.W.2d 354 (Minn. 1995); State v. Ford, 539 N.W.2d 214 (Minn. 1995). All four defendants in these cases were members of the Vice Lords street gang. Three of the defendants were involved in the murder of police officer Jerry Haaf. The fourth defendant was involved in the murder of another Vice Lord member, Ed Harris. This review focuses on the Bowles and McKenzie decisions. For a more thorough analysis of the Bowles decision, see Jodene Jensen, Case Note, Constitutional Law: Minnesota’s First Anonymous Jury—State v. Bowles, 530 N.W.2d 521 (Minn. 1995), 22 WM. MITCHELL L. REV. 133 (1996) (in this issue).
2. Bowles, 530 N.W.2d at 530.
3. Id. at 530-31.
4. Bowles was the first of the four cases heard by the Minnesota Supreme Court on the use of an anonymous jury. However, it was the second case tried in the lower court, being preceded by State v. Ford, 539 N.W.2d 214 (Minn. 1995). In Ford, the defendant argued that the district court violated rule 26.02(2) of the Minnesota Rules of Criminal Procedure which states that upon request the clerk shall furnish the parties with a list of names and addresses of the persons on the jury panel. However, Jury Management Rule 814(b) allows the court to restrict the addresses of the prospective jurors. Noting that the two rules are inconsistent, the Ford court requested the Advisory Committee on Rules of Criminal Procedure to propose a change to the rules to make them consistent. Ford, 539 N.W.2d at 223.
5. Bowles, 530 N.W.2d at 530-31.
gang, was convicted of killing Officer Jerry Haaf, a uniformed police officer. Officer Haaf was shot in the back four times by Bowles and another member of the Vice Lords, Mwati McKenzie, while he was having coffee in the Pizza Shack restaurant in Minneapolis. The shooting was planned and carried out by the Vice Lords "in retaliation for the alleged beating of a blind, elderly black man by the Metropolitan Transit Commission police." Immediately after the shooting incident, Bowles and McKenzie went to the home of Ed Harris, another Vice Lord member, to change their clothes, dispose of their guns and wash their hands. Two weeks after the murder of Officer Haaf, Ed Harris was found shot to death in an alley in south Minneapolis. The police department's theory was that the Vice Lords killed Ed Harris because they believed Harris was passing information to the police about the Haaf murder.

On motion from the state, the trial court impaneled an anonymous jury. The trial court determined, over Bowles's objections, that an anonymous jury was necessary because of the "exceptional circumstances peculiar to this case." The trial judge was referring to the retaliatory nature of both the killing of Mr. Harris and the killing of Officer Haaf. However, during voir dire the judge explained to the jury the reason for anonymity was potential harassment by members of the me-

6. See Ford, 539 N.W.2d at 217 (noting specifically that Bowles and McKenzie, who carried out the shooting were "footsoldiers," the lowest rank of the Vice Lords, in contrast with Ford, who was second in command).
7. Bowles, 530 N.W.2d at 525.
10. Id.
11. Id.
12. Id.
13. Id. Another member of the Vice Lords was convicted for the murder of Ed Harris. See State v. Flournoy, 535 N.W.2d 354, 356 (Minn. 1995).
14. Bowles, 530 N.W.2d at 528.
15. Id. The court further stated that, "those exceptions and circumstances involve the . . . violence associated with what occurred or is alleged to have occurred after the killing of Officer Haaf, specifically the violence associated with Mr. Harris." Id. at 526.
16. Id. at 531. Haaf was killed in retaliation for the beating of an elderly blind man by the MTC police. Harris was killed in retaliation for passing information to the police.
At Bowles's request, the jury was not given a special instruction on the presumption of innocence at the close of trial. On appeal, Bowles argued that an anonymous jury destroyed his presumption of innocence, and consequently he was denied his fundamental right to a trial by an impartial jury. The Minnesota Supreme Court determined that if the trial court follows certain precautions when impaneling an anonymous jury, it presents "little risk of actual prejudice to a defendant."

The Bowles court supplied a two-part test to be the analytical framework used by the lower courts when impaneling an anonymous jury. First, the trial court must have "strong reasons" to believe that the jurors need protection. The second element is the need to protect the defendant's constitutional right to a fair trial by an impartial jury. The "strong reasons" prong of the test may be satisfied if the trial court believes that the jury needs protection from outside threats, such as organized crime and gang-related violence. Further, for highly-publicized cases, the trial court may feel the jurors need

17. Id. After voir dire the court instructed the impaneled jurors that they will only be addressed by juror number to maintain anonymity. Id. at 529.
18. Id. at 529. The state proposed the following instruction to be added to the standard jury instruction: "You are further instructed that the fact that the jury selection process which has been conducted anonymously cannot be considered by you as in any way suggesting guilt." Id.
19. Id.
20. Id. at 531.
21. Id. at 530. The two-part rule was first developed by federal courts in cases involving Racketeer Influenced and Corrupt Organization (RICO) prosecutions of organized crime figures. Id. The court cited United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991), cert. denied, 550 U.S. 1220 (1992), in which the defendant was a member of the Gambino family. In this highly-publicized trial, many of the government's witnesses received threats. Paccione, 949 F.2d at 1192-93. Similarly, in United States v. Crockett, 979 F.2d 1204 (7th Cir. 1992), cert. denied, 507 U.S. 998 (1993), the defendants, members of violent criminal organizations, attempted to intimidate witnesses in a case with extensive pretrial publicity. Crockett, 979 F.2d at 1216. In United States v. Thomas, 757 F.2d 1359, 1363 (2d Cir. 1985), cert. denied, 474 U.S. 819 (1986), and cert. denied, 479 U.S. 818 (1986), the defendants were members of an organized criminal group charged with murdering government witnesses. Thomas, 757 F.2d at 1362, 1364.
22. Bowles, 530 N.W.2d at 530.
23. Id. at 529-30.
24. Id. at 531. In Bowles, the murder of Ed Harris by the Vice Lords because he was thought to be a government informant, coupled with the retaliatory nature of the Haaf murder, may lead jurors to conclude that they or their families would be vulnerable to harassment or retaliation from other members of the Vice Lords. Id.
protection from media harassment. The second prong of the test requires the trial court to take “reasonable precautions to minimize any prejudicial effect the jurors’ anonymity might have on the defendant.” This part of the test may be satisfied through “extensive voir dire to expose juror bias” and instructions designed to eliminate any implication of the defendant’s guilt. By following the guidelines provided in Bowles, the court held that an anonymous jury would be properly impaneled, and therefore, not inherently prejudicial.

The court explicitly stated that the trial court need not make a written finding on the jury’s need for protection. However, the court did instruct the lower courts to keep a clear and detailed record explaining the facts underlying the determination, showing “strong reason to believe the jury needs protection from external threats.” The trial court may explain to the jurors the reason for anonymity, but “should not unnecessarily burden the defendant’s presumption of innocence.” Lastly, the Bowles court noted “[t]he decision to impanel an anonymous jury must take place ‘in the light of reason, principle and common sense.’”

In State v. McKenzie, Mwati McKenzie was also convicted of the first-degree murder of Officer Haaf. McKenzie, another “footsoldier” in the Vice Lords, went to the Pizza Shack along with Shannon Bowles, and shot Officer Haaf. McKenzie went to the home of Ed Harris after the shooting to change his

25. Id. at 531 n.15. The court took judicial notice of a highly publicized case in which the jury acquitted the defendant of the sexual assault and murder of a four-year-old child. In that case, the jurors experienced harassment from the media and the public after the acquittal. Id.
26. Id. at 531.
27. Id. In Bowles, both the defendant and the prosecution engaged in extensive voir dire to determine the jurors’ ability to be impartial, their belief in the presumption of innocence and the effect of their anonymity. Id.
29. Bowles, 530 N.W.2d at 529-30. The court distinguished courtroom practices that would be inherently prejudicial, for example shackles and gags, which may have a significant effect on the jury’s feelings about the defendant. Id. at 529 n.14.
30. Id. at 531.
31. Id.
32. Id.
33. Id. (quoting United States v. Thomas, 757 F.2d 1359, 1363 (2d Cir. 1985), cert. denied, 474 U.S. 819, (1986), and cert. denied, 479 U.S. 818 (1986)).
34. McKenzie, 532 N.W.2d 210, 213 (Minn. 1995).
35. Id.
clothes and hide the guns.\textsuperscript{36} Again, the trial court authorized the use of an anonymous jury over objections by the defense.\textsuperscript{37} In a preliminary instruction to the entire jury pool, the trial court stated the reasons for anonymity, focusing on outside influence.\textsuperscript{38} Before voir dire, the trial court read an instruction to each individual potential juror on the reasons for anonymity focusing on publicity and the curious public.\textsuperscript{39} Further, the trial court expressed concern that the jurors’ attention could be diverted from the evidence in the case.\textsuperscript{40}

McKenzie challenged the use of an anonymous jury, arguing that impaneling an anonymous jury destroyed the presumption of innocence and consequently denied him the fundamental right to a trial by an impartial jury.\textsuperscript{41} McKenzie further argued that the trial court’s instruction failed to limit the prejudicial impact but actually exacerbated the problem.\textsuperscript{42} Although the court urged future trial courts to provide greater detail for the basis of its decision to impanel an anonymous jury, the McKenzie court concluded that the trial court met the first prong of the test: “strong reason . . . in the light of reason, principle and common sense.”\textsuperscript{43} Specifically, the first prong was satisfied for several reasons: 1) the two preceding trials\textsuperscript{44} concerning the

\begin{itemize}
  \item \textsuperscript{36} \textit{Id.} at 213-14.
  \item \textsuperscript{37} \textit{Id.} at 215.
  \item \textsuperscript{38} \textit{Id.} The explanation was prepared by defense counsel and included the following:
    \begin{quote}
      [T]he reason for this is to make sure that you are not bothered by anyone, whether it’s the media or anyone else with an interest in this case, trying to have any kind of influence on you. We are proceeding in this way to make absolutely sure that each juror who decides the case does so solely on the evidence produced in court and under the rules of law and evidence as they will be applied.
    \end{quote}

\textit{Id.} at 215-16.
  \item \textsuperscript{39} \textit{Id.} at 216.
  \item \textsuperscript{40} \textit{Id.} The trial court stated to each juror:
    \begin{quote}
      The Court does not wish to allow such outside influences to divert the jury’s attention from the evidence or to cause people to pry into the personal affairs of the jurors . . . . Anonymity will ward off curiosity that might infringe on a juror’s privacy and will insulate the jury from improper influence that might interfere with its sworn duty to judge the evidence fairly.
    \end{quote}

\textit{Id.}
  \item \textsuperscript{41} \textit{Id.} at 219.
  \item \textsuperscript{42} \textit{Id.}
  \item \textsuperscript{43} \textit{Id.} at 220.
  \item \textsuperscript{44} McKenzie was preceded in the trial court by State v. Ford, 539 N.W.2d 214 (Minn. 1995) and State v. Bowles, 530 N.W.2d 521 (Minn. 1995).
\end{itemize}
murder of Officer Haaf impaneled anonymous juries;\textsuperscript{45} 2) although there was no indication of outside influence, the trial court was concerned about influence by the media and outside demonstrators;\textsuperscript{46} and 3) the retaliatory nature of the murder of Ed Harris provided a legitimate supporting basis for the court's decision.\textsuperscript{47}

In examining the second prong of the test, the supreme court found that the trial court took reasonable precautions to minimize the impact on the presumption of innocence.\textsuperscript{48} Also, the supreme court further refined the second prong of the test requiring "1) extensive voir dire of the jurors to expose bias; and 2) instructions from the trial court designed to eliminate any implication as to the defendant's guilt."\textsuperscript{49} The court provided a preliminary instruction to the entire jury pool on the need for anonymity, as well as an instruction to each potential juror before voir dire began.\textsuperscript{50} Secondly, during voir dire the questioning was directed to the issue of anonymity and a determination that the jury understood that the basis for the anonymous jury was "a concern about outside influence from the media or others."\textsuperscript{51} Lastly, the jury was instructed on the defendant's presumption of innocence and the state's burden to prove the defendant's guilt beyond a reasonable doubt.\textsuperscript{52} Based on satisfying both prongs, the court concluded that the decision to impanel an anonymous jury did not violate the defendant's right to trial by an impartial jury.\textsuperscript{53}

\textit{B. Electronic Recording of Custodial Interrogations}

After numerous attempts to encourage law enforcement officials to tape record custodial interrogations,\textsuperscript{54} the Minnesota

\begin{itemize}
\item \textsuperscript{45} McKenzie, 532 N.W.2d at 219.
\item \textsuperscript{46} \textit{Id}.
\item \textsuperscript{47} \textit{Id}. at 219-20.
\item \textsuperscript{48} \textit{Id}. at 220.
\item \textsuperscript{49} \textit{Id}.
\item \textsuperscript{50} \textit{Id}.
\item \textsuperscript{51} \textit{Id}. The extensive voir dire included a 20-page written questionnaire and questions regarding the juror's ability to judge impartially.
\item \textsuperscript{52} \textit{Id}.
\item \textsuperscript{53} \textit{Id}.
\item \textsuperscript{54} State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994). The court cited previous cases in which disputes could have been avoided if the custodial interrogation had been taped. Specifically, in State v. Robinson, 427 N.W.2d 217 (Minn. 1988), the court found that disputes about the denial of a defendant's constitutional rights would be avoided
\end{itemize}
Supreme Court in *State v. Scales* exercised its supervisory power by requiring the tape recording of all custodial interrogations that occur at a place of detention, and where feasible, at any point in the interrogation where information is provided about rights or waivers of those rights, or where any questioning occurs.55

Michael Scales was convicted of brutally killing Otha Brown, the mother of his girlfriend Angela Walker, and the grandmother of his two-year-old son.56 At 1:00 A.M. on October 4, 1992, Scales woke Ms. Brown and asked for a ride to the hospital, claiming he was sick.57 At 7:00 A.M. Ms. Brown's body was discovered with twenty-six stab wounds.58 Scales was taken into custody at about 7:00 P.M. that evening.59 Law enforcement officials questioned Scales for about three hours without recording the session.60 Then officials conducted a formal question-and-answer statement that was simultaneously transcribed.61 At the subsequent Rasmussen hearing,62 Scales disputed much of the content of the interview, including the Miranda warnings,63 waiver of his rights, information about fingerprints on the weapon, and whether he actually made the statements attributed to him.64 On appeal to the Minnesota Supreme Court, Scales argued that his due process rights under the Minnesota Constitution were violated when his entire

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55. *Scales*, 518 N.W.2d at 591.
56. *Id.* at 589.
57. *Id.*
58. *Id.* at 587.
59. *Id.* at 590.
60. *Id.*
61. *Id.*
62. *Id.* A Rasmussen hearing is a pre-trial hearing to determine the admissibility of evidence obtained by the police. *See State v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1966).
64. *Scales*, 518 N.W.2d at 590.
interrogation by law enforcement officials was not recorded electronically.66 Scales further claimed that by failing to preserve the entire interrogation the police ignored the warnings of the Minnesota Supreme Court.66

The court agreed67 that the recording of custodial interrogations "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."68 A recording provides a more accurate record of a defendant's interrogation and so reduces the number of disputes over law enforcement official's handling of the custodial interrogation, with respect to the defendant's rights.69 Also, a recording serves to protect the state against meritless claims.70 Furthermore, a recording requirement will discourage unfair and psychologically coercive police tactics, resulting in more professional law enforcement.71

The Minnesota Supreme Court exercised its supervisory power to "insure the fair administration of justice"72 by holding 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.73 If law enforcement officials fail to comply with the recording requirement, then the interrogation may be suppressed at trial.74 The

65. Id. at 589.

66. Id. at 591. The defendant relied on a holding from an Alaska case, Stephan v. State, 711 P.2d 1156 (Alaska 1985), in which the unexcused failure to electronically record a custodial interrogation violated a suspect's right to due process under the Alaska Constitution. Stephan, 711 P.2d at 1158.

67. Scales, 518 N.W.2d at 592. Even though the court agreed with the defendant on the need to record custodial interrogations, the court nevertheless affirmed the trial court's conviction of Scales. Id.

68. Id. (citing Stephan, 711 P.2d at 1160).

69. Id. at 591 (citing Stephan, 711 P.2d at 1160-62).

70. Id.

71. Id. The court noted that Uniform Rule of Criminal Procedure 243 (1974) provides that information about rights, any waiver and all questioning shall be recorded where feasible, and must be recorded when the questioning occurs at a place of detention. The court also noted that section 130.4(3) of the Model Code of Pre-Arraignment Procedure (1975) also contains a recording requirement.

72. Id.

73. Id. at 592.

74. Id. The exclusionary rule will be decided on a case by case basis, but suppression will be required if the violation is deemed "substantial." Substantiality is
court held this rule will apply prospectively from the time of the filing of the *Scales* decision.\(^{75}\)

This decision broadens a defendant's rights beyond the requirement of due process in the federal Constitution.\(^{76}\) However, the Minnesota Supreme Court noted that it has power to provide broader individual rights under the Minnesota Constitution than are permitted under the U.S. Constitution.\(^{77}\) In her dissent, Justice Tomljanovich argued that the Minnesota decision goes beyond what is required under the due process requirements of the U.S. Constitution,\(^{78}\) and that suppressing the statement was a drastic remedy for a failure to record the custodial interrogation.\(^{79}\) Justice Tomljanovich suggested the exclusionary rule should only apply after a full hearing of the policy implications and adequate notice to law enforcement officials.\(^{80}\)

In a later case, *State v. Thagaard*,\(^{81}\) the court further explained the requirement to record custodial interrogations is not to help criminal defendants or to help the state.\(^{82}\) "Rather the primary purpose is to assist the trial court in the resolution of evidentiary disputes and in more accurately determining the underlying facts.\(^{83}\) Recordings will also aid the appellate review of rulings on motions to suppress confessions.\(^{84}\)

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to be determined by the trial court using Model Code of Pre-Arraignment Procedure section 150.3(2) and (3). If the trial court finds the violation substantial, the reasons for the finding must be placed on the record. *Id.*

\(^{75}\) *Id.* at 593. The *Scales* decision was filed on June 30, 1994. *Id.*

\(^{76}\) *Id.*

\(^{77}\) *Id.* (citing *State v. Murphy*, 380 N.W.2d 766, 770 (Minn. 1986)).

\(^{78}\) *Id.* at 593-94. (Tomljanovich, J., dissenting).

\(^{79}\) *Id.* at 594.

\(^{80}\) *Id.* Justice Tomljanovich noted, "This is particularly true where a right is not found to be rooted in the state constitution." *Id.*

\(^{81}\) 527 N.W.2d 804 (Minn. 1995). In *Thagaard*, the defendant was subjected to an unrecorded "preinterview" interview, at which, the defendant claimed, the law enforcement official promised a referral into drug treatment if the defendant would "tell him up front what happened." The defendant subsequently confessed, but moved to suppress the confession on the basis that he was tricked into confessing. If *Scales* applied and the entire interrogation was recorded, then the issues of deception and trickery on the part law enforcement officials would not be a question. *Id.* at 807.

\(^{82}\) *Id.*

\(^{83}\) *Id.* at 807-08.

\(^{84}\) *Id.* at 808.