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Criminal Justice: Expanded Protections under the Minnesota Constitution

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CRIMINAL JUSTICE: EXPANDED PROTECTIONS UNDER THE MINNESOTA CONSTITUTION

JOHN R. TUNHEIM†

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I. INTRODUCTION

State constitutions, long overlooked by law schools, litigants, and judges as a source of protection for individual rights and liberties, are slowly and steadily coming into focus in the 1990s. In all fifty states, judges are being asked to interpret obscure provisions in state constitutions and to articulate standards that vary in application from the familiar federal constitutional models. While the intense and comprehensive focus on state constitutions as an important new source of individual rights is relatively recent, the die has been cast for nearly two decades. A sharp retreat from broad standards that had only recently been articulated by the Warren Court, vigorous encouragement from Justice William O. Brennan,¹ and the work of pioneering state court justices have combined to bring state constitutions back from the shadows.

The Minnesota judiciary is reacting to these developments in much the same manner as its colleagues in other jurisdictions. In some areas, the courts are blazing new trails, demonstrating a resolute independence in using the Minnesota Constitution to protect individual rights beyond the safeguards of the Federal

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Bill of Rights. In other areas, the courts have been reluctant to abandon the familiar, well-understood standards articulated by the United States Supreme Court. Without question, however, the Minnesota Supreme Court has delivered a clear and unmistakable message: The Minnesota Constitution is alive and well, and the court will not hesitate to use the state’s bill of rights to articulate standards that are broader in application than their federal counterparts. In many instances, that proclamation is simply a promise and nothing more. But for litigants, it means that the path ahead has grown ever more hazy, a journey with many possible destinations.

The Minnesota Constitution’s version of the bill of rights appears in article I and contains provisions that are textually identical or at least strikingly similar to provisions in the Bill of Rights in the United States Constitution. At the same time, it represents unfamiliar guarantees that have not been interpreted. Are these obscure passages an awakening giant, poised to change our lives and diminish significantly the role of the Federal Constitution in our state? Or is our own bill of rights a temporary source of protection that will be used only to “hold the line” until the high court pendulum swings back to the left? How important are the well-established federal precedents in analyzing the meaning of the often identical words in Minnesota’s article I? Is the Minnesota Constitution a newly-discovered document of mischief, a “second bite at the apple” for those who disagree with the political philosophies of United States Supreme Court Justices? Or is the Minnesota Constitution a reflection of our state’s unique perspective about individual rights?

However one approaches these questions, one answer is clear: The rebirth of state constitutional law has given states a remarkable opportunity to take a step back and examine how broadly individual rights should be protected. In an era of increasingly exclusive federal control over states, state constitutional protections are an important exception where, for the most part, state supreme court decisions are the final word. As a result, the reemergence of state constitutions presents the State of Minnesota with opportunities to interpret its constitution in a manner that truly reflects the unique values and interests of Minnesotans. Herein lies the greatest value of a state constitution—its ability to react to unique local concerns and conditions.

This article briefly surveys and analyzes developments under the Minnesota Constitution in six areas of importance to the
criminal justice system: the double jeopardy clause, the right to counsel, the right against self-incrimination, the right to an impartial jury trial, the protection against unreasonable searches and seizures, and the right to confront a witness.⁵ All of these clauses of the Minnesota Constitution contain language substantially similar to language in the United States Constitution.

II. DOUBLE JEOPARDY

The United States Supreme Court has described the guarantee against double jeopardy as "deeply ingrained in . . . the Anglo-American system of jurisprudence,"³ and "clearly fundamental to the American scheme of justice."⁴ The underlying principle of the double jeopardy guarantee balances the prejudice to a defendant from multiple prosecutions brought by the state with its many resources⁵ against the government’s inter-

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2. This article does not survey criminal constitutional developments under the Minnesota Constitution with respect to due process rights. The Minnesota Supreme Court has frequently stated that the protections afforded under the due process clauses of the federal and state constitutions are the same. See, e.g., Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988); Guilliams v. Commissioner of Revenue, 299 N.W.2d 138, 144 (Minn. 1980); Anderson v. City of St. Paul, 226 Minn. 186, 190, 32 N.W.2d 538, 541 (1948).

Recently, however, in State v. Davidson, 481 N.W.2d 51 (Minn. 1992), the Minnesota Supreme Court hinted that the due process protections in the federal and state constitutions may be different. "As for due process, we need not decide in this case whether more process is due under the Minnesota Constitution than under the federal Constitution." Id. at 56.


4. Id. at 796 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)). The Benton Court also stated that "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted." Id. at 795.

5. Green v. United States, 355 U.S. 184, 187-88 (1957). Double jeopardy primarily focuses on the threat of multiple prosecutions. United States v. Wilson, 420 U.S. 332, 336 (1975). See also State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985) (Wahl, J., dissenting) ("The protective doctrine of double jeopardy is nothing more than the declaration of an ancient and well established public policy that no man should be unduly harassed by the state's being permitted to try him for the same offense again and again until the desired result is achieved.") (quoting State v. Thompson, 241 Minn. 59, 62, 62 N.W.2d 512, 516 (1954)).

est in receiving one fair opportunity to convict the defendant.\textsuperscript{6} Double jeopardy generally limits a defendant to one punishment or prosecution for a single criminal offense, determined on the merits, usually by conviction or acquittal.\textsuperscript{7}

From very early on, Minnesota recognized the plea of double jeopardy as an established fundamental right grounded in the common law and safeguarded by state constitutional law.\textsuperscript{8} The Minnesota Supreme Court has stated that “[t]he protective doctrine of double jeopardy is nothing more than the declaration of an ancient and well-established public policy that no man should be unduly harassed by the state’s being permitted to try him for the same offense again and again until the desired result is achieved.”\textsuperscript{9} The double jeopardy bar guarantees that a defendant will experience the “great psychological, physical and financial burdens” of a criminal trial only once “for the same offense.”\textsuperscript{10}

The United States Constitution and the Minnesota Constitution both prohibit putting individuals twice in jeopardy for the same offense. The double jeopardy provision in the Minnesota Constitution closely tracks its federal counterpart. The Minnesota double jeopardy provision in article 1, section 7 provides that “no person shall be put twice in jeopardy of punishment for the same offense.”\textsuperscript{11} The Fifth Amendment to the United States


\textsuperscript{8} See State v. Fredlund, 200 Minn. 44, 47, 273 N.W. 353, 355 (1937).

\textsuperscript{9} State v. Thompson, 241 Minn. 59, 62, 62 N.W.2d 512, 516 (1954).

\textsuperscript{10} State v. Kjeldahl, 278 N.W.2d 58, 60 (Minn. 1979) (quoting Breed v. Jones, 421 U.S. 519, 519 (1976)).

\textsuperscript{11} MINN. CONST. art. I, § 7.
Constitution similarly provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." 12

In Oregon v. Kennedy, 13 the Supreme Court articulated the rule for determining when prosecutorial misconduct is the basis for a federal double jeopardy claim. 14 The Court held that Fifth Amendment double jeopardy prevents retrial only when the government intended to "goad" the defendant into requesting a mistrial. 15 The defendant in Kennedy, who faced theft charges in state court, successfully moved for a mistrial after the prosecution characterized the defendant as a "crook" during redirect examination of the prosecution's expert witness. 16 The state appellate court barred retrial on the theft charges on double jeopardy grounds. 17

The Supreme Court reversed, holding that federal double jeopardy protection based on prosecutorial misconduct is triggered only by intentional misconduct undertaken to compel the defendant to request a mistrial. 18 Prosecutorial negligence or harassment not specifically intended to cause a mistrial was insufficient to bar retrial. 19 The Court found that the prosecu-

14. Id. at 675-76. For a general review of how states are using their own constitutions to afford greater double jeopardy protections than the federal courts in cases of prosecutorial misconduct, see generally BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 145-52 (1991). State constitutional double jeopardy protections also arise for a variety of other reasons, including: successive prosecutions by a single jurisdiction, multiple punishments for the same offense in a single trial, and consecutive trials against the same defendant by state and federal courts (the "dual sovereignty" doctrine). Id.
15. Kennedy, 456 U.S. at 676. Prosecutorial intent, according to the Court, is to be inferred from objective facts. Id. at 675. Kennedy narrowed the federal double jeopardy protection previously afforded under United States v. Dinitz, 424 U.S. 600 (1976). Kennedy, 456 U.S. at 677-79. In Dinitz, the Supreme Court held that the Federal Double Jeopardy Clause barred retrial where prosecutorial bad faith conduct threatened harassment of a defendant by multiple prosecutions, or where prosecutorial conduct was specifically intended to give the prosecution a more favorable opportunity to convict the defendant. Dinitz, 424 U.S. at 611. The Court in Kennedy expressly refined Dinitz by removing prosecutorial bad faith conduct and harassment as grounds for the double jeopardy bar. Kennedy, 456 U.S. at 674-75. Kennedy concluded that this portion of the Dinitz test afforded no standards for assessing prosecutorial error. Id. at 675.
17. Id. at 670.
18. Id. at 676.
19. Id. at 674-76. According to the Court, "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defend-
tion's conduct was not intended to provoke the defendant into moving for a mistrial and, thus, double jeopardy did not bar retrial. 20 The Supreme Court indicated that the Kennedy intent standard "is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial." 21

The Minnesota Supreme Court addressed the issue of prosecutorial misconduct and its relationship to the double jeopardy protection afforded under the Minnesota Constitution in State v. Fuller. 22 Fuller came to trial facing multiple misdemeanor charges, including driving after suspension of his license. 23 Before trial started, both parties stipulated that the defendant's license was suspended at the time of the incident, that the defendant knew of the suspension, and that other evidence regarding these facts was inadmissible. 24 The prosecution, however, elicited testimony from its witness concerning the stipulated facts and the court granted the defendant's motion for a mistrial. 25 At the second trial the prosecution assured the court that the witness understood what had caused the first mistrial and the court directly warned the prosecution not to inquire into the stipulated facts. 26 A second mistrial was granted.

20. Id. at 679.
21. Kennedy, 456 U.S. 667, 673 (1982). The Kennedy decision is not without its critics. For instance, the Maryland Supreme Court has concluded that Kennedy requires an exclusive focus on the intent of the prosecutor in committing the error and not on the fact of prosecutorial error or on the impact of such error on a defendant. See Fields v. State, 626 A.2d 1037, 1047 (Md. 1993).

22. 374 N.W.2d 722 (Minn. 1985).
23. Id. at 724. The charges stemmed from a single incident reported by a woman who had lived with the defendant. The charges in the complaint were assault in the fifth degree, criminal damage to property, and driving after suspension. Id.
24. Id.
25. Id.
26. Id. at 724-25.
when the prosecution again breached the impermissible testimony.\textsuperscript{27}

Fuller's petition for a writ of prohibition to bar further prosecution on double jeopardy grounds was granted by the Minnesota Court of Appeals.\textsuperscript{28} The court acknowledged that under \textit{Kennedy}, Fifth Amendment double jeopardy was not implicated because the prosecutor did not intentionally elicit the improper testimony.\textsuperscript{29} The court of appeals, however, determined that Minnesota's double jeopardy provision afforded broader protection than the federal double jeopardy protections defined in \textit{Kennedy}.\textsuperscript{30} According to the court, the Minnesota interpretation, unlike the \textit{Kennedy} intentional conduct standard, also covered mistrials caused by prosecutorial gross negligence and bad faith.\textsuperscript{31} The court of appeals found that the prosecutor's failure to adequately prepare his witness to avoid repeating the improper testimony met this threshold.\textsuperscript{32}

In addition, the court focused on the harm suffered by Fuller, noting that mistrials caused by the prosecution forced him to appear, far from his home, for trial three times without receiving a complete and fair trial.\textsuperscript{33} The court of appeals concluded that Minnesota's double jeopardy bar applied when mistrials caused by prosecutorial bad faith created economic hardship likely to make the defendant plead guilty to avoid further trial appearances.\textsuperscript{34}

In effect, the Minnesota Court of Appeals rejected \textit{Kennedy}'s narrowing of the federal double jeopardy protection in cases involving prosecutorial negligence.\textsuperscript{35} The court recognized that \textit{Kennedy} removed prosecutorial bad faith harassment and overreaching as grounds for a federal double jeopardy claim.\textsuperscript{36} Nevertheless, \textit{Fuller} proceeded to fashion the Minnesota double jeopardy

\textsuperscript{27} Fuller, 374 N.W.2d at 725.
\textsuperscript{28} State v. Fuller, 350 N.W.2d 382, 384 (Minn. Ct. App. 1984).
\textsuperscript{29} Id. at 385-86.
\textsuperscript{30} Id. at 386.
\textsuperscript{31} Id.
\textsuperscript{32} Id. Specifically, the court of appeals determined that the prosecutor's conduct in eliciting the testimony was "gross negligence constituting bad faith." Id.
\textsuperscript{33} Fuller, 350 N.W.2d at 386.
\textsuperscript{34} Id.
\textsuperscript{35} Id. For a discussion of the Supreme Court's previous double jeopardy standard articulated in United States v. Dinitz, 424 U.S. 600 (1976), see supra note 14 and accompanying text.
\textsuperscript{36} Fuller, 350 N.W.2d at 385.
jeopardy bar to include instances in which mistrials resulted from prosecutorial bad faith harassment.\textsuperscript{37}

On appeal, the Minnesota Supreme Court indicated that "[i]t is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution," and that the court was "independently responsible for safeguarding the rights of [Minnesota] citizens."\textsuperscript{38} The court, however, did not believe that Fuller presented an appropriate case to decide whether the Minnesota Constitution's double jeopardy clause provided broader protection than its federal counterpart with respect to prosecutorial misconduct.\textsuperscript{39}

The Minnesota Supreme Court determined that retrial of Fuller would not offend the Minnesota double jeopardy clause for several reasons. First, referring to Kennedy, the court noted that a Supreme Court interpretation of a federal constitutional provision textually identical to a Minnesota Constitutional provision was "of inherently persuasive, although not necessarily compelling, force."\textsuperscript{40} Second, and more important, the court found that the prosecutor was \textit{merely} negligent, not grossly negligent as

\textsuperscript{37} Id. The court of appeals noted that in State v. Gwara, 311 Minn. 106, 247 N.W.2d 417 (1976), the Minnesota Supreme Court first addressed whether double jeopardy protection applies after a mistrial, stating:

\begin{quote}
If jeopardy attached and the declaration of mistrial was at defendant's request or with his consent, then the rule is that the state may retry defendant unless the mistrial was necessitated by bad-faith, intentional misconduct of the trial court or the prosecutor purposely designed to prejudice defendant's chances for an acquittal or to goad him into requesting a mistrial. 
\end{quote}

\textit{Fuller}, 350 N.W.2d at 385 (quoting \textit{Gwara}, 311 Minn. at 108, 247 N.W.2d at 419).

\textit{Gwara} articulated a standard for applying double jeopardy to bar retrial following a mistrial caused by prosecutorial misconduct that echoed the Supreme Court's decision in United States v. Dinitz, 424 U.S. 600, 611 (1976). \textit{Gwara}, 311 Minn. at 108-09, 247 N.W.2d at 419.

\textsuperscript{38} State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985) (quoting O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979)).

\textsuperscript{39} Id. at 727. In State v. Schroepfer, 416 N.W.2d 491 (Minn. Ct. App. 1987), the court of appeals once again addressed a defendant's request for expansion of Minnesota's double jeopardy protection beyond the \textit{Kennedy} standard. \textit{Id.} at 493. The court concluded that the prosecutor's misconduct did not meet the \textit{Kennedy} intent standard, and also failed to present facts more egregious than those presented in Fuller. \textit{Id.} In addition, the court stated that "[a]t some point, prosecutorial misconduct will exceed the level found in Fuller. Then it will be time to determine what the appropriate double jeopardy standard is under the Minnesota Constitution. This is not such a case." \textit{Id.} at 493-94.

\textsuperscript{40} \textit{Fuller}, 374 N.W.2d at 727.
the court of appeals had found. Notably, the supreme court did not completely reject the gross negligence standard employed by the court of appeals to construe the Minnesota double jeopardy provision. Rather, the court indicated that these circumstances did not rise to the level of gross negligence.

In dissent, Justice Wahl urged the court to use the "independent protective force of state law," rather than federal standards, to define the scope of Minnesota's constitutional prohibition against double jeopardy. Buttressed by an earlier supreme court decision, the dissent argued that the primary purpose of Minnesota's double jeopardy bar is to protect a criminal defendant from a second trial on the same offense. The Kennedy intent standard inadequately furthers this purpose by focusing on punishing or deterring intentional prosecutorial misconduct rather than on the nature and extent of harm caused the defendant. In the dissent's view, the majority's reliance on Kennedy not only improperly focuses on prosecutorial misconduct, but places on the defendant the impossible burden of proving that the prosecutor acted with the subjective intent to cause a mistrial instead of an intent simply to prejudice the defendant. For Justice Wahl, the court's decision in Fuller virtually denies

41. Id. The court characterized the prosecutor's conduct as merely negligent because the prosecutor had warned the witness against referring to the inadmissible testimony in the retrial and, therefore, had no reason to expect that his question would lead to the improper statement. The Court also noted that the defense counsel did not object to the prosecutor's question, only to the answer given by the witness. Id. at 726.

42. Id. The court stated its adherence to the principle that "[s]tate courts are, and should be, the first line of defense for individual liberties within the federalist system." Id. at 727.

43. Id. at 727 (Wahl, J., dissenting).

44. Id. at 727 (citing State v. Thompson, 241 Minn. 59, 62, 62 N.W.2d 512, 516 (Minn. 1954)). The Thompson court held that the Minnesota Constitution is intended "to protect a defendant in a criminal case from a second trial for the same offense, not to punish an official for intentional misconduct." Thompson, 241 Minn. at 62, 62 N.W.2d at 516.

45. Fuller, 374 N.W.2d at 727-29.

46. Id. at 729. See generally Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393 (1992). The author argues:

Short of an outright admission by the prosecutor that his conscious purpose was to provoke a mistrial, however, the prosecutor's motive would be almost impossible to prove. Under the Kennedy standard, a prosecutor with a weak or damaged case is encouraged to commit prejudicial conduct. If he gets away with it, he has a better chance of winning. If the defendant objects, and succeeds in obtaining a mistrial, the prosecutor will be able to retry the defendant with a better-prepared case unless the defendant is able to prove that the prosecutor committed the misconduct with the purpose of securing a mistrial.

Id. at 440 (footnote omitted).
criminal defendants who are highly prejudiced by prosecutorial misconduct the ability to obtain the double jeopardy remedy.\textsuperscript{47}

Justice Wahl approved the "gross negligence constituting bad faith" standard that the court of appeals had applied to determine that the Minnesota Constitution barred retrial after mistrial caused by prosecutorial misconduct.\textsuperscript{48} She found that retrial under this standard was barred due to the prosecutor's inadequate witness preparation and deliberate inquiry about the improper testimony, in spite of the court's express warnings.\textsuperscript{49}

Justice Wahl also noted that the Oregon Supreme Court refused to apply the Supreme Court's intentional misconduct standard to the Oregon double jeopardy provision when it considered \textit{Kennedy} on remand.\textsuperscript{50} The Oregon Supreme Court, relying on an Oregon provision identical to Minnesota's double jeopardy provision, found that the purpose of the guarantee was furthered by a recklessness standard it defined as knowing misconduct coupled with indifference toward the probable risk of mistrial.\textsuperscript{51} The Oregon court concluded, however, that the prosecutorial misconduct in the case before it did not bar a retrial.\textsuperscript{52} Applying the recklessness standard to the facts of \textit{Fuller}, Justice Wahl concluded that, by refusing to heed the court's order to refrain from asking about the subject of the inadmissible testimony, the prosecutor demonstrated indifference to the prejudice caused the defendant.\textsuperscript{53}

Justice Wahl approved the Oregon Supreme Court's recklessness test as another reasonable alternative to the \textit{Kennedy} intent standard.\textsuperscript{54} In her view, this standard ensures that appropriate defendants receive double jeopardy protection without requiring such defendants to prove that the intent to cause a mistrial actually motivated the prosecutor.\textsuperscript{55} Justice Wahl also believed that the recklessness standard sufficiently preserves the state's interest in the fair administration of justice.\textsuperscript{56}

\begin{flushleft}
\textsuperscript{47} Fuller, 374 N.W.2d at 729.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. (citing State v. Kennedy, 666 P.2d 1316, 1326 (Or. 1983)).
\textsuperscript{51} State v. Kennedy, 666 P.2d 1316, 1326 (Or. 1983). \textit{See generally LATZER, supra note 13, at 144-45.}
\textsuperscript{52} Kennedy, 666 P.2d at 1327.
\textsuperscript{53} State v. Fuller, 374 N.W.2d 722, 729 (Minn. 1985).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\end{flushleft}
Arizona and Pennsylvania, states with constitutional double jeopardy provisions identical to Minnesota's provision,57 have adopted more expansive double jeopardy protections than those afforded under the federal standard in *Kennedy.*58 A small number of other states, including Michigan,59 have shown signs of moving in that direction.60


59. *See, e.g.*, People v. Dawson, 427 N.W.2d 886, 897 (Mich. 1988) (holding that, because the federal standard applied, there was no need to address whether the state constitution afforded more protection in this case); *see also infra* notes 93-100 and accompanying text.

60. *See, e.g.*, State v. Hopson, 778 P.2d 1014, 1019 (Wash. 1989). In this case, a mistrial resulted after the prosecutor elicited improper testimony. *Id.* at 1015. The Washington Supreme Court declined to bar a retrial under either the Oregon or federal double jeopardy standards. *Id.* at 1019. The court, however, expressly left open whether the state double jeopardy provision provided broader protection than the federal standard. *Id.* "When a set of facts that would require different results under the Oregon and federal analyses is before the court, we will determine the scope of [the Washington constitution's double jeopardy clause]." *Id.*

*See also* Robinson v. Commonwealth, 439 S.E.2d 622 (Va. Ct. App. 1994). Here, the dissent argued that the prosecutor's repeated improper conduct in the face of continued warnings from the trial judge barred retrial under the provision of the Virginia Constitution. *Id.* at 626-28. The dissent found that the Oregon state double jeopardy standard articulated in *Kennedy*—knowing misconduct coupled with indifference toward the probable risk of mistrial—"better protects the right to be free from multiple trials when the record contains proof of [repeated] improper prosecutorial misconduct." *Id.* at 628.
In *Pool v. Superior Court*, the Arizona Supreme Court rejected Kennedy's focus on deterring intentional prosecutorial misconduct. Instead, the court, finding support in Arizona precedent, stated that the purpose of Arizona's double jeopardy bar was to protect a defendant's interest in avoiding multiple trials. The *Pool* court held that Arizona's double jeopardy clause bars retrial when: (1) mistrial is granted because of improper prosecutorial conduct or actions; (2) such conduct does not merely constitute "legal error, negligence, mistake or insignificant impropriety," but as a whole constitutes "intentional conduct which the prosecutor knows to be improper and prejudicial," undertaken for "any improper purpose with indifference to a significant resulting danger of mistrial or reversal," and (3) the conduct causes prejudice to the defendant curable only by mistrial.

The court found that the prosecutor engaged in intentional misconduct "with indifference, if not specific intent" to prejudice the defendant and avoid probable acquittal. The prosecutor had erred in fashioning the indictment and in severing the defendant's trial from another defendant's trial. The defendant raised a defense made possible by the defect in the indictment. The prosecutor indicated in court that he would "forestall" any acquittal by terminating the trial and beginning again with a new indictment. Most important, the court found that the prosecutor's cross examination of the defendant was egregiously improper and done with indifference or specific intent to "avoid the significant danger of acquittal which had arisen, prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal."

In *Commonwealth v. Smith*, the Pennsylvania Supreme Court found that Pennsylvania's double jeopardy clause afforded greater protection than the Federal Double Jeopardy Clause. The court held that the Pennsylvania clause prohibits retrial of a defendant not only when prosecutorial misconduct is intended

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62. Id.
63. Id. at 271-72.
64. Id. at 272.
65. Id. at 270.
66. Pool, 677 P.2d at 270.
67. Id.
68. Id. at 272.
70. Id. at 325.
to provoke a mistrial, but also when the prosecutor deliberately engages in bad faith conduct to harass the defendant and thereby deprive him or her of a fair trial.\footnote{71}{Id. See also Commonwealth v. Rightley, 617 A.2d 1289 (Pa. 1992). In Rightley, the Superior Court of Pennsylvania, shortly after Smith was decided, observed that “[b]ad faith conduct or harassment of defendant . . . is not necessarily designed to seek a second trial, but its effect may deprive a defendant of a fair trial, thereby warranting a new trial.” Id. at 1292.}

The Smith prosecutor attempted to convict the defendant of murder by concealing material and potentially exculpatory evidence.\footnote{72}{Smith, 615 A.2d at 323.} The prosecutor suppressed such evidence while arguing in favor of a death sentence and also attempted to discredit a state trooper who testified about the existence of the exculpatory evidence.\footnote{73}{Id. at 324.} The court concluded that, although the prosecutor did not intend to goad the defendant into moving for a mistrial, the prosecutor deliberately sought to subvert the truth-determining process and to secure a conviction against the defendant through the tainted process.\footnote{74}{Id. at 325.} According to the court, such prosecutorial misconduct violated “all principles of justice and fairness embodied in the Pennsylvania Constitution’s double jeopardy clause.”\footnote{75}{Id. at 324.}

The Smith court observed that Pennsylvania had historically viewed its double jeopardy bar as coextensive with the federal provision.\footnote{76}{Id. at 325.} Prior to Kennedy, Pennsylvania’s double jeopardy bar followed United States v. Dinitz\footnote{77}{424 U.S. 600 (1976). The Pennsylvania Supreme Court adopted Dinitz in Commonwealth v. Starks, 416 A.2d 498, 500 (Pa. 1982).} and applied both to prosecutorial misconduct intended to provoke a mistrial to secure a retrial and to prosecutorial conduct undertaken in bad faith to harass and prejudice the defendant.\footnote{78}{Smith, 615 A.2d at 324.} When Kennedy

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71. Id. See also Commonwealth v. Rightley, 617 A.2d 1289 (Pa. 1992). In Rightley, the Superior Court of Pennsylvania, shortly after Smith was decided, observed that “[b]ad faith conduct or harassment of defendant . . . is not necessarily designed to seek a second trial, but its effect may deprive a defendant of a fair trial, thereby warranting a new trial.” Id. at 1292.

The United States Supreme Court has proscribed this type of prosecutorial misconduct, noting that the prosecutor:

[M]ay prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). The question for the Court is whether the same result would undoubtedly have been reached without the misconduct. Id. at 89.

72. Smith, 615 A.2d at 323.
73. Id. at 324.
74. Id. at 325.
75. Id. at 324.
76. Id. at 325.
78. Smith, 615 A.2d at 324.
redefined the federal standard, Pennsylvania initially followed suit, content that *Kennedy* did not diminish a defendant's double jeopardy rights. 79 *Smith*, however, reintroduced the bad faith harassment standard and signaled the Pennsylvania Supreme Court's discontent with what it saw as *Kennedy*'s overly restrictive standard. 80 The court took advantage of its independent state authority to redress a perceived weakness in the federal standard.

The Michigan Court of Appeals, in *People v. Dawson*, 81 concluded that Michigan's double jeopardy clause primarily shields individuals from prosecutorial harassment and confers broader-reaching protection than under the *Kennedy* standard. 82 The court observed that "[i]t is well recognized that state constitutions can provide greater protections than those afforded by the United States Constitution." 83 The court held that the defendant could not be retried because the prosecutor's questioning constituted conduct that the prosecutor "knew [was] improper, and that he [proceeded] with indifference, if not a specific intent to create unfair prejudice." 84 The *Dawson* court expressly adopted the standard articulated by the Arizona Supreme Court in *Pool v. Superior Court*. 85

On appeal to the Michigan Supreme Court, the State conceded that the prosecutor's conduct violated the *Kennedy* intent standard and urged the court to reject the *Pool* standard. 86 The supreme court, on that basis, declined to extend the protections under Michigan's double jeopardy bar beyond the federal protections under *Kennedy*. 87 The *Dawson* court did not disapprove of the lower court's adoption of the *Pool* standard on substantive grounds, nor did it reject adoption of such a standard in the future. 88

Under the right circumstances, the Minnesota Supreme Court could expand the protection of the *Kennedy* test. In fact, it seems likely, given the views of Justice Wahl and the experiences of

79. *Id.* at 325.
80. *Id.*
82. *Id.* at 282-84.
83. *Id.* at 281 (citation omitted).
84. *Id.* at 284.
85. *Id.*
86. 427 N.W.2d 886, 897 (Mich. 1988).
87. *Id.* at 897.
88. *Id.*
other states with similar double jeopardy provisions, that the court will expand the Minnesota double jeopardy bar to cover the types of persistent prosecutorial misconduct found in Pool and Smith. In those cases, the prosecutors did not seek to provoke a mistrial, but rather sought to convict the defendant by deliberately prejudicing the defendant’s right to a fair trial. The "gross negligence constituting bad faith standard," accepted by the court of appeals and Justice Wahl, could be augmented by focusing on the harm to the defendant arising from a subverted truth-determining process. The court seems most likely to expand Minnesota’s double jeopardy protections beyond the Kennedy standard where the objective facts demonstrate that a prosecutor engaged not in a singular instance of improper conduct, but rather in persistent, harassing conduct that deprived a defendant of a fair trial. The weakness of the federal standard is most clearly highlighted when repeated prosecutorial misconduct, after warnings from the court, fails to trigger Kennedy double jeopardy protection. State courts can fashion a broader

89. In Bennett Gershman’s article The New Prosecutors, the author argues that “prosecutorial misconduct that triggers a mistrial, when committed by the prosecutor with a deliberate bad faith purpose to unfairly prejudice the defendant’s right to a fair trial, should be sufficient to allow the defendant to invoke double jeopardy to bar retrial.” Gershman, supra note 53, at 440 (footnote omitted). Gershman reasons:

That the defendant has a “valued right to have his trial completed by a particular tribunal” is undisputed. When a prosecutor engages in misconduct that taints the jury, the defendant faces a “Hobson’s choice” between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error.” If a defendant believes that he must sacrifice his chosen jury because it has been irreparably tainted by “bad faith” prosecutorial misconduct, double jeopardy protects the defendant against being forced to stand trial again and thereby “afford[ing] the prosecutor a more favorable opportunity to convict.” Id. at 440 n.289 (citations omitted).

90. In Kennedy, the plurality decision indicated that when a defendant moves for a mistrial, the defendant deliberately elects to forego a determination in front of the first fact finder and thereby renounces the right to double jeopardy protection. Oregon v. Kennedy, 456 U.S. 667, 672 (1982). The Court, however, set forth a narrow exception to this rule in cases where the prosecutor intentionally goads the defendant into requesting a mistrial. In such circumstances, the defendant’s “valued right to complete his trial before the first jury would be a hollow shell if [such circumstances] were held to prevent [invocation of the double jeopardy bar].” Id. at 673. However, there is a strong argument that where the prosecutor engages in a pattern of harassing conduct that deprives a defendant of a fair trial, a defense motion for a mistrial can hardly be deemed a meaningful decision by the defendant to relinquish her right to a verdict by the first fact finder chosen to hear her case. See Steven A. Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. PA. L. REV. 1365, 1423 (1987).
and definable double jeopardy standard that, unlike the *Kennedy* test, addresses such conduct.91

Moreover, the narrow federal standard set forth in *Kennedy* arose from a case where only one instance of prosecutorial misconduct constituted overreaching.92 *Kennedy* did not involve a sequence of prosecutorial overreaching or repeated misconduct after adverse rulings and warnings. Justice Powell, who cast the deciding vote in *Kennedy*, emphasized in his concurring opinion that a "court—in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case," and that the facts in *Kennedy* "would have been a close case . . . if there had been substantial factual evidence of intent beyond the [one improper] question itself."93 Similarly, many state cases that deny double jeopardy protection are situations, like *Kennedy*, where prosecutors have engaged in a single, unrepeated instance of misconduct.94

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One author observes that the Minnesota Supreme Court traditionally has analyzed several factors in deciding whether to interpret a state constitutional provision differently than a comparable federal provision:

First, the court looks at whether textual similarities between the state and federal provisions reflect the framers' intention for similar interpretation. Second, the court looks at Minnesota's constitutional history for an appropriate interpretation of a Minnesota constitutional provision. Third, the court determines whether existing state law helps to define the scope of the state constitutional provision. Fourth, the court considers whether matters of particular state or local concern justify an independent interpretation. Finally, experimentation and a search for a 'better rule of law,' while susceptible to criticism if used as the sole basis for independent interpretation, may properly be considered as a ground for independent interpretation. *See* Ingrid Kane, *No More Secrets: Proposed Minnesota State Due Process Requirement that Law Enforcement Officers Electronically Record Custodial Interrogation and Confessions*, 77 MINN. L. REV. 983, 1002-03 (1993) (footnotes omitted).

93. *Id.* (Powell, J., concurring).
94. *See*, e.g., Pruitt v. State, 829 P.2d 1197, 1200-01 (Alaska Ct. App. 1992) (finding that the prosecutor's attempt to impeach the defendant during cross examination, which violated the rules of evidence, warranted mistrial but did not bar retrial); State v. Hamala, 834 P.2d 275, 277 (Haw. 1992) (finding that a statement elicited by the prosecutor regarding prior bad acts was improper and highly prejudicial, justifying reversal, but not barring retrial); Wheat v. State, 599 So. 2d 963, 965 (Miss. 1992) (finding that the district attorney's impermissible closing argument in a murder case required reversal, but did not bar retrial).
III. RIGHT TO COUNSEL

The Sixth Amendment right to assistance of counsel is a fundamental right made obligatory on the states by the Fourteenth Amendment. 95 An accused defendant's need for counsel was eloquently articulated by Justice Sutherland in Powell v. Alabama: 96

> The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law.

> ... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. 97

The language recognizing the right to assistance of counsel in the Minnesota Constitution is virtually identical to the text of the Federal Constitution. Article I, section 6 of the Minnesota Constitution requires that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense.” 98 The United States Constitution provides that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” 99 As early as 1887, the Minnesota Legislature provided a right to the assistance of counsel for persons “restrained of liberty.” 100

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96. 287 U.S. 45 (1932).
97. Id. at 68-69.
98. MINN. CONST. art. I, § 6.
99. U.S. CONST. amend. VI.
100. The Minnesota General statute provided:

That all public officers . . . having in custody any person . . . restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law who may have been retained by or in behalf of such person so restrained of his liberty, or whom such person may desire to see or consult, to see such person and consult with him alone and in private, at the jail or other place of custody.

1887 MINN. LAWS ch. 187, § 1. The statute further provided:

That all public officers or other persons having in custody any person arrested . . . or restrained of his liberty for any alleged cause whatever, shall, upon being requested so to do by such person so restrained of his liberty, and before other proceedings shall be had, and as soon as practicable after such request is made, notify a practicing attorney at law . . . that such person desires to see and consult with the attorney so notified.

1887 MINN. LAWS ch. 187, § 2.
ern version of that early statute reflects its original intent and form. 101

Since the inception of the right, the issue of when the right to counsel attaches has been vigorously debated in both state and federal courts. 102 Historically, Minnesota has been characterized as "rather sympathetic to the plight of the indigent criminal defendant." 103 By the early 1960s, the right to counsel in Minnesota attached earlier in the criminal process and continued later in the process than in the federal system. 104 For example, in Minnesota, indigent defendants were provided counsel "prior to [their] preliminary examination by a magistrate" 105 while the federal rules did not provide the right to counsel until the defendant "appears in court without counsel." 106

The point when the right to counsel attaches under the Sixth Amendment was clarified in 1972 when the United States Supreme Court decided Kirby v. Illinois. 107 A plurality of the court determined that the Sixth Amendment right to assistance of counsel does not attach until a "critical stage" 108 in the criminal process is reached through "[t]he initiation of judicial criminal proceedings." 109 The point where "judicial criminal proceedings" commence may include the "formal charge, preliminary hearing, indictment, information, or arraignment." 110 The "critical stage" of a prosecution is the point in the proceed-

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101. The Minnesota Statute providing for the assistance of counsel, as it appeared in 1993, read:

All officers or persons having in their custody a person restrained of liberty, except in cases where imminent danger of escape 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. 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.

MINN. STAT. § 481.10 (Supp. 1993).


103. Id. at 2.

104. Id. at 2-3.

105. Id. at 2 (quoting MINN. STAT. § 611.07 (1961)).

106. Id. at 2 n.3 (quoting FED. R. CRIM. P. 44 (1961)).


108. Id. at 690 (citing Simmons v. United States, 390 U.S. 377, 382-83 (1968)).

109. Id. at 689.

110. Id.
ings when counsel’s presence is necessary to secure later trial rights, such as the right to a fair trial, effective assistance of counsel, and confrontation and cross examination of witnesses.\textsuperscript{111} The Sixth Amendment right to counsel, therefore, only applies to the commencement of “formal” adversary judicial proceedings.\textsuperscript{112}

The mere possibility that an informal proceeding may later have important consequences at trial is not enough to trigger the right to counsel under the Sixth Amendment.\textsuperscript{113} Thus, the Sixth Amendment right does not attach during police investigation or interrogation.\textsuperscript{114} There is no right to counsel under the United States Constitution until the “government’s role shifts from investigation to accusation”—in other words, not until formal charges are initiated.\textsuperscript{115} This interpretation finds support in the text of the United States Constitution, which explicitly refers to “criminal prosecutions.”\textsuperscript{116}

In Minnesota, disputes involving an accused’s right to counsel under article I, section 6 of the Minnesota Constitution typically are raised in driving while intoxicated (DWI) proceedings. The Minnesota “implied consent” statute requires that motorists who refuse to submit to a breathalyzer or chemical test lose the right to drive for a minimum period of one year.\textsuperscript{117} In \textit{State v. Palmer},\textsuperscript{118} the Minnesota Supreme Court ruled that under both the federal and state constitutions, there is no right to have assistance of counsel before deciding to submit to a chemical test.\textsuperscript{119} The suspension of a drivers license was characterized as “civil or administrative” in nature and, therefore, not a “criminal prosecution” that triggers the right to counsel.\textsuperscript{120} At the time,

\begin{itemize}
\item \textsuperscript{111} United States v. Wade, 388 U.S. 218, 226-27 (1967).
\item \textsuperscript{112} The Sixth Amendment right to counsel applies in proceedings for petty offenses (punishable by imprisonment for less than six months) and misdemeanors, as well as non-petty crimes. \textit{See}, e.g., Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (holding that an indigent defendant must be appointed counsel to defend a petty offense accusation).
\item \textsuperscript{113} Moran v. Burbine, 475 U.S. 412, 432 (1986).
\item \textsuperscript{114} \textit{Id.} at 431.
\item \textsuperscript{115} \textit{Id.} at 430.
\item \textsuperscript{116} U.S. CONSTR. amend. VI.
\item \textsuperscript{117} MINN. STAT. § 169.123, subd. 2(b), subd. 4 (1992).
\item \textsuperscript{118} 291 Minn. 302, 191 N.W.2d 188 (1971).
\item \textsuperscript{119} \textit{Id.} at 306, 191 N.W.2d at 190.
\item \textsuperscript{120} \textit{Id.}
\end{itemize}
this interpretation was accepted in other states with "virtual unanimity." 121

Shortly after Palmer, the Minnesota Supreme Court decided Prideaux v. State Department of Public Safety, 122 reversing the court's earlier position, to hold that the decision whether to submit to chemical testing is arguably a "critical stage" and requires a limited right to consult with counsel. 123 The court based its decision not on constitutional grounds, but, rather, on the legislative intent behind the 1887 statute 124 which was said to reflect "a longstanding Minnesota policy to allow accused persons immediate access to counsel." 125 In 1978, in response to Prideaux, the legislature amended the implied consent statute to allow limited access to counsel prior to chemical testing. 126

In 1984, the implied consent statute was again amended to deny the right to consult with an attorney prior to chemical testing. 127 This provision was subsequently challenged under the Sixth Amendment to the United States Constitution in Nyflot v. Commissioner of Public Safety. 128 The Nyflot court determined that with the 1984 amendment, the legislature intended to abandon the limited right to counsel conferred by Prideaux. 129 The court held that the decision to submit to chemical testing is not a "critical stage" of a criminal prosecution where the Sixth Amendment right to counsel attaches. 130 In his dissent, however, Justice

121. Prideaux v. State Dep't of Pub. Safety, 247 N.W.2d 385, 388 n.3 (Minn. 1976) (listing state courts that characterize chemical testing as a civil proceeding and not a "critical stage" requiring constitutional protection).
122. Id.
123. Id. at 394.
124. Id. at 391-92; see also supra note 111 and accompanying text.
125. Prideaux, 247 N.W.2d at 391.
126. 1978 MINN. LAWS 792, ch. 727, § 3, subd. 2(b)(3). The North Dakota Supreme Court relied directly on Prideaux to determine that a motorist has a qualified statutory right to consult with an attorney before deciding whether to submit to a chemical test. Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 287 (N.D. 1987). The North Dakota court construed a similar implied consent statute and based its decision on statutory rather than state constitutional grounds. Id. However, in quoting the Minnesota Supreme Court, it stated that based on the "fundamental nature of the right [§ 481.10] affords ... the chemical-testing process is a 'proceeding' within the meaning of [the statute] before which consultation with counsel is to be accorded." Id. (quoting Prideaux, 247 N.W.2d at 393). Cf. Clontz v. Jensen, 416 N.W.2d 577, 580 (Neb. 1987) (finding no right exists for a motorist to consult with an attorney prior to submitting to a chemical test).
128. 369 N.W.2d 512 (Minn. 1985).
129. Id. at 515.
130. Id. at 515-16.
Yetka referred to the Minnesota Constitution and posited that "[a] state is free to offer its citizens greater protection in its constitution than is offered by the federal law."\textsuperscript{131}

The right to counsel under the implied consent law was then challenged under article I, section 6 of the Minnesota Constitution in \textit{Friedman v. Commissioner of Public Safety}.\textsuperscript{132} In \textit{Friedman}, a motorist arrested for suspicion of driving while intoxicated failed to respond after being read the implied consent advisory.\textsuperscript{133} The police interpreted her lack of response as a refusal, and her license was revoked for one year.\textsuperscript{134} On appeal, Friedman argued that her right to counsel under the state constitution was violated since she was unable to consult with an attorney until after testing.\textsuperscript{135} The court of appeals was not persuaded that a higher standard of protection was required under the Minnesota Constitution than its federal counterpart.\textsuperscript{136}

The Minnesota Supreme Court reversed, holding that a limited right to counsel exists at the point when an individual is requested to undergo chemical testing.\textsuperscript{137} Writing for the majority, Justice Yetka rejected the argument that license revocation is a purely civil proceeding and held that a driver stopped for a possible DWI violation is at a "critical stage" of a criminal proceeding.\textsuperscript{138} The court further stated that because the Federal Bill of Rights was recently eroded, states could appropriately expand their protection of individual liberties through state bills of rights.\textsuperscript{139}

\textsuperscript{131} Id. at 523.

\textsuperscript{132} 455 N.W.2d 93 (Minn. Ct. App. 1990).

\textsuperscript{133} Id. at 94. "The advisory stated that Friedman's driver's license would be revoked for [one] year if she refused the chemical test for blood alcohol, that the refusal or the results of the test would be used against her at trial, and that she had a right to consult an attorney after testing." \textit{Friedman v. Commissioner of Pub. Safety}, 473 N.W.2d 828, 829 (Minn. 1991).

\textsuperscript{134} \textit{Friedman}, 473 N.W.2d at 829.

\textsuperscript{135} \textit{Friedman}, 455 N.W.2d at 97.

\textsuperscript{136} Id. at 96.

\textsuperscript{137} \textit{Friedman}, 473 N.W.2d at 835. The court, relying on article I, § 6 of the Minnesota Constitution, held that "an individual has the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." \textit{Id.}

\textsuperscript{138} Id. at 833. The court relied on Gerstein v. Pugh, 420 U.S. 103, 122 (1975), which defined "critical stage" as "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." \textit{Friedman}, 473 N.W.2d at 833.

\textsuperscript{139} \textit{Friedman}, 473 N.W.2d at 835.
On the same day the opinion was issued, the implications of Friedman were tested in the case of McDonnell v. Commissioner of Public Safety.\textsuperscript{140} In this consolidated action, several motorists arrested for suspicion of driving while intoxicated were told by police that pursuant to the implied consent statute, they were subject to criminal charges for refusal to undergo a breath test and could consult with an attorney after testing was completed.\textsuperscript{141} In three cases, revocation of the motorists' drivers licenses was rescinded by the supreme court after the court concluded that, based on Friedman, the right to counsel independently guaranteed by article I, section 6 of the Minnesota Constitution attaches earlier than its federal counterpart.\textsuperscript{142}

Whether Minnesota courts are willing to construe the state constitutional right to counsel more expansively in other areas of the criminal law is unclear. In at least one other area, police interrogations, the right to counsel has briefly been addressed. Under the Sixth Amendment to the United States Constitution, once an arrested defendant indicates a desire to consult with counsel, interrogation must cease until counsel is present.\textsuperscript{143} In State v. Everett,\textsuperscript{144} the defendant was arrested pursuant to a warrant for probation revocation and subsequently was questioned with regard to an unrelated murder investigation.\textsuperscript{145} The defendant contended that the uncounseled interrogation violated his right to counsel under both the federal and state constitutions.\textsuperscript{146} Relying on the United States Supreme Court, the Minnesota court concluded that the right to counsel does not attach during an investigatory stage, despite the defendant's current representation by counsel in some unrelated matter.\textsuperscript{147} The court, therefore, declined in this instance to provide expanded rights under the Minnesota Constitution.

There may, however, be support for expanded rights to counsel under the state constitution for guilty pleas elicited from an

\begin{footnotesize}
\textsuperscript{140} 473 N.W.2d 848 (Minn. 1991).
\textsuperscript{141} Id. at 850-52.
\textsuperscript{142} Id. at 853.
\textsuperscript{143} Massiah v. United States, 377 U.S. 201, 206 (1964).
\textsuperscript{144} 472 N.W.2d 864 (Minn. 1991).
\textsuperscript{145} Id. at 866.
\textsuperscript{146} Id. at 867.
\textsuperscript{147} Id. at 868. The court cited McNeil v. Wisconsin, 501 U.S. 171 (1991), which held that a Miranda right to counsel is "offense-specific" in the sense that the right may not be intertwined with an unrelated, uncharged offense. Everett, 472 N.W.2d at 868.
\end{footnotesize}
indigent defendant. In *Bolstad v. State*, the trial court accepted an indigent defendant's guilty plea, made without the assistance of counsel, to a felony charge. The guilty plea was suppressed from a sentencing determination that followed a later criminal conviction since it was elicited without the benefit of counsel.

The *Bolstad* court reasoned that Minnesota case law and rules of criminal procedure guarantee rights to counsel beyond those provided by federal dictates. While waiver of the right to counsel under the federal rules simply requires the intentional relinquishment of a known right, the Minnesota Rules of Criminal Procedure require the appointment of counsel for an indigent defendant in felony or gross misdemeanor cases, even where the defendant specifically refuses the right to counsel. Although this decision may implicate constitutional issues, it appears to be based on statutory rather than constitutional grounds. In summary, while the Minnesota Supreme Court has used the Minnesota Constitution to expand the right to counsel in DWI cases, the court has thus far declined to extend additional protection in other areas of criminal law.

**IV. Right Against Self-Incrimination**

An accused's right against self-incrimination can be traced to outrage against the "inquisitorial and manifestly unjust" methods of interrogation used in England as early as 1688. This right, as provided in the Fifth Amendment, is intended to protect individuals against "overzealous police practices." As Justice Goldberg stated in *Escobedo v. State of Illinois*.

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149. *Id.* at 51.
150. *Id.* at 52.
151. *Id.* (citing State v. Edmison, 379 N.W.2d 85, 87 (Minn. 1985)).
153. MINN. R. CRIM. P. 5.02 subd. 1.
We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.\textsuperscript{157}

With respect to the right against compelled self-incrimination, the United States Constitution and the Minnesota Constitution are identically worded. The relevant language of each provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."\textsuperscript{158}

Self-incrimination challenges often concern the admissibility of statements obtained from persons subjected to custodial police interrogation.\textsuperscript{159} In order to safeguard the privilege against self-incrimination guaranteed by the Fifth Amendment, a \textit{Miranda} warning is given prior to questioning.\textsuperscript{160} An accused may waive the right against self-incrimination if the waiver is made "voluntarily, knowingly, and intelligently."\textsuperscript{161} The State must show by a preponderance of the evidence that a confession was voluntarily given.\textsuperscript{162} The prosecution is also required to prove, by a preponderance of the evidence, an effective waiver of \textit{Miranda} rights.\textsuperscript{163}

With one exception, Minnesota courts have declined to expand the privilege against self-incrimination beyond that protected by the Federal Constitution.\textsuperscript{164} The supreme court recognizes that, although the United States Supreme Court's interpretation of the Fifth Amendment is persuasive, it is not a

\textsuperscript{157} Id. at 488-89.


\textsuperscript{159} See, e.g., Miranda v. Arizona, 384 U.S. 436, 444 (1966). "Custodial interrogation" refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} Lego v. Twomey, 404 U.S. 477, 484 (1972).


compelling force when interpreting the self-incrimination clause in the Minnesota Constitution.\textsuperscript{165}

In \textit{State v. Murphy},\textsuperscript{166} the defendant was convicted of first degree murder based on statements he made to his probation officer who supervised him on an unrelated matter.\textsuperscript{167} The terms of Murphy's probation required him to be truthful in all matters during his sex offender treatment plan.\textsuperscript{168} After the defendant confessed to his probation officer that he committed a rape and murder, the officer reported the confession to police.\textsuperscript{169} At an omnibus hearing, Murphy moved to suppress the confession, alleging a violation of his Fifth Amendment rights.\textsuperscript{170} The district court denied the motion and certified the question to the Minnesota Supreme Court.\textsuperscript{171} The Minnesota Supreme Court held that the probation officer's failure to warn Murphy of his rights before questioning barred the use of the confession at trial.\textsuperscript{172}

The State petitioned for a writ of certiorari and the case was reviewed by the United States Supreme Court.\textsuperscript{173} The Court determined that the confession was not obtained in a coercive setting and was not compelled within the meaning of the Fifth Amendment.\textsuperscript{174} On remand, Murphy was convicted.\textsuperscript{175} He then challenged the conviction under article I, section 7 of the Minnesota Constitution.\textsuperscript{176} The Minnesota Supreme Court declined to expand the protection afforded by the state constitution, finding that the United States Supreme Court's interpretation was "inherently persuasive" absent evidence of a contrary philosophy in the Minnesota criminal justice system.\textsuperscript{177}

In her dissent, Justice Wahl distinguished Minnesota interpretations of voluntariness and the effective waiver of counsel from

\textsuperscript{165} State v. Murphy, 380 N.W.2d 766, 770-71 (Minn. 1986) [hereinafter Murphy II].

\textsuperscript{166} Id. at 769-70.

\textsuperscript{167} Id.

\textsuperscript{168} Id. at 769.

\textsuperscript{169} Id. at 770.

\textsuperscript{170} Murphy II, 380 N.W.2d at 770.

\textsuperscript{171} Id.

\textsuperscript{172} State v. Murphy, 324 N.W.2d 340, 344 (Minn. 1982) [hereinafter Murphy I].


\textsuperscript{174} Id. at 440.

\textsuperscript{175} Murphy II, 380 N.W.2d at 770.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 771. The court viewed the issue as "whether the unique relationship existed between probationer and probation officer as seen in the light of the philosophy of the Minnesota criminal justice system requires us to adopt a view contrary to that expressed by the United States Supreme Court . . . ." Id.
federal decisions.\textsuperscript{178} She concluded that, under Minnesota law, "any sense of compulsion" to incriminate oneself may constitute an ineffective waiver of self-incrimination rights that precludes the use of such evidence.\textsuperscript{179} By contrast, under the Federal Constitution, voluntariness is presumed if an individual makes incriminating statements rather than explicitly claiming a Fifth Amendment right.\textsuperscript{180} Although Murphy's confession did not violate his Fifth Amendment rights, Justice Wahl would afford greater protection under the Minnesota Constitution to suppress the incriminating statements.\textsuperscript{181}

The Minnesota Court of Appeals, in \textit{Collins v. State}, also declined to expand rights under the Minnesota Constitution.\textsuperscript{182} Here, a burglary suspect made a spontaneous, pre-\textit{Miranda} incriminating statement to his arresting officers during routine questioning while he was being booked.\textsuperscript{183} The court, relying on a United States Supreme Court decision, held that routine questioning was not "interrogation" and therefore did not require a \textit{Miranda} warning.\textsuperscript{184} The court further determined that these facts did not warrant a broader grant of self-incrimination rights than provided by federal law.\textsuperscript{185}

The court of appeals was willing, however, to expand rights against self-incrimination under the Minnesota Constitution in \textit{State v. Brown}.\textsuperscript{186} This case involved the prosecution of a mother for physically assaulting her two-year-old daughter.\textsuperscript{187} Initially, Brown's live-in boyfriend was arrested and charged with the assault and the child was put into foster care.\textsuperscript{188} A court order directed Brown to undergo psychological and drug dependency

\begin{itemize}
\item \textsuperscript{178} Id. at 774-75 (Wahl, J., dissenting).
\item \textsuperscript{179} Id. at 774 (relying on State v. Iosue, 220 Minn. 283, 19 N.W.2d 735 (1945)).
\item \textsuperscript{180} Murphy II, 380 N.W.2d at 775.
\item \textsuperscript{181} See id. at 776-77.
\item \textsuperscript{182} 385 N.W.2d 52 (Minn. Ct. App. 1986).
\item \textsuperscript{183} Id. at 53.
\item \textsuperscript{184} Id. at 54 (citing Rhode Island v. Innis, 446 U.S. 291 (1980)).
\item \textsuperscript{185} Id. at 55. Another appellate court reached a similar result in State v. Tuomi, 396 N.W.2d 847 (Minn. Ct. App. 1986). Under federal law, the Fifth Amendment does not require the suppression of statements made after a \textit{Miranda} warning is accompanied by a valid waiver. The defendant in this case argued that pre-\textit{Miranda} statements should be suppressed under the "fruit of the poisonous tree doctrine." \textit{See} Oregon v. Elstad, 470 U.S. 298, 303 (1985). The Minnesota Court of Appeals, however, found the Supreme Court decision "inherently persuasive" and declined to expand its interpretation. \textit{Tuomi}, 396 N.W.2d at 851.
\item \textsuperscript{186} 488 N.W.2d 848 (Minn. Ct. App. 1992) [hereinafter \textit{Brown I}].
\item \textsuperscript{187} Id. at 850.
\item \textsuperscript{188} Id.
evaluations before visitation would be permitted.\textsuperscript{189} Relying on the advice of counsel, Brown did not undergo the evaluations.\textsuperscript{190} She was advised that the evaluations might incriminate her if charges were eventually brought against her for the assault.\textsuperscript{191}

At her boyfriend's trial, Brown testified that she alone was responsible for the child's injuries.\textsuperscript{192} As a result, the boyfriend was acquitted.\textsuperscript{193} Brown was then charged and tried for the assault.\textsuperscript{194} Brown testified on her own behalf and recanted the testimony she gave at the prior trial.\textsuperscript{195} She said she perjured herself in order to exculpate her boyfriend and thereby convince him not to leave her.\textsuperscript{196} During cross examination, Brown was asked, over defense counsel's objection, whether she had visited her daughter since the child was put into foster care.\textsuperscript{197} She stated that she had not, and also testified that her attorney had counseled her not to submit to the evaluations required by the court because they might incriminate her.\textsuperscript{198} Brown was convicted of the assault charge.\textsuperscript{199}

Brown's conviction was upheld on appeal.\textsuperscript{200} On petition for further review, the Minnesota Supreme Court affirmed the appellate court's decision regarding all issues reached, but remanded the case for a determination of whether allowing the cross examination about the reasons why Brown failed to visit her daughter amounted to prejudicial error.\textsuperscript{201} The court of appeals found that the cross examination violated Brown's right against self-incrimination under the Minnesota Constitution.\textsuperscript{202} On subsequent appeal, Brown's conviction was reinstated by the Minnesota Supreme Court.\textsuperscript{203}

\textsuperscript{189.} Id.
\textsuperscript{190.} Id.
\textsuperscript{191.} Brown I, 488 N.W.2d at 850.
\textsuperscript{192.} Id.
\textsuperscript{193.} Id.
\textsuperscript{194.} Id.
\textsuperscript{195.} Id.
\textsuperscript{196.} Brown I, 488 N.W.2d at 850.
\textsuperscript{197.} Id.
\textsuperscript{198.} Id.
\textsuperscript{199.} Id.
\textsuperscript{201.} Brown, 488 N.W.2d at 852.
\textsuperscript{202.} Id.
\textsuperscript{203.} State v. Brown, 500 N.W.2d 784, 788 (Minn. 1993) [hereinafter Brown II].
The United States Supreme Court has held that the Fifth Amendment prohibits use of a defendant’s post-arrest, post-Miranda silence for impeachment.\textsuperscript{204} However, the use of a defendant’s post-arrest silence before the administration of Miranda is not barred.\textsuperscript{205} Nor does the Federal Constitution bar use of a defendant’s pre-arrest silence to impeach a defendant’s credibility.\textsuperscript{206} However, the Minnesota Court of Appeals distinguished these cases in Brown because they did not involve a defendant who remained silent upon the advice of counsel.\textsuperscript{207} The court concluded that while it was unclear whether Brown’s Fifth Amendment right against self-incrimination was violated under the Federal Constitution, it was violated under the Minnesota Constitution.\textsuperscript{208} “[W]e believe the Minnesota Constitution, article I, section 7, extends her right against self-incrimination beyond minimal federal constitutional guarantees.”\textsuperscript{209} The court relied on State v. Billups\textsuperscript{210} for the proposition that Minnesota law rejects any distinction between counseled pre-Miranda silence and counseled post-Miranda silence.\textsuperscript{211} Therefore, the court of appeals found that the cross examination regarding Brown’s counseled pre-arrest decision not to undergo possibly incriminating evaluations violated her rights under the Minnesota Constitution.\textsuperscript{212}

The Minnesota Supreme Court reversed and reinstated the conviction.\textsuperscript{213} The court held that the right against compelled self-incrimination was not properly invoked and, therefore, the Minnesota Constitution was not implicated.\textsuperscript{214} The privilege against self-incrimination was not implicated by prosecutorial questioning, according to the court, unless the required answers to those questions would “in themselves support a conviction or furnish a link in the chain of evidence needed to prosecute the

\textsuperscript{204} Doyle v. Ohio, 426 U.S. 610, 619 (1976).
\textsuperscript{205} Fletcher v. Weir, 455 U.S. 603, 607 (1982).
\textsuperscript{207} Brown I, 488 N.W.2d at 851.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} 264 N.W.2d 137 (Minn. 1978).
\textsuperscript{211} Brown I, 488 N.W.2d at 852.
\textsuperscript{212} Id. Billups was decided before the United States Supreme Court’s decisions in Fletcher v. Weir, 455 U.S. 603 (1982) and Jenkins v. Anderson, 447 U.S. 231 (1980). See Billups, 264 N.W.2d at 137 (1978). Moreover, the Billups decision interpreted the scope of protection offered by the Fifth Amendment, not the state constitution. Id. at 138-39.
\textsuperscript{213} Brown II, 500 N.W.2d at 788.
\textsuperscript{214} Id. at 787.
The court reasoned that answers to the prosecutor's questions about whether Brown visited her daughter or underwent the required chemical dependency evaluations would not in themselves support a conviction or furnish a link in the chain of evidence needed to prosecute.

The Brown decision appears to negate the broader protection against self-incrimination which surfaced, albeit temporarily, under Minnesota law. The right combination of facts, however, may convince the supreme court to abandon the "persuasive" federal standard.

V. RIGHT TO IMPARTIAL JURY TRIAL

The right to an impartial jury trial is founded on reluctance to entrust decisions that affect an accused's life and liberty to one judge or group of judges. This policy is sustained by the participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case. Providing defendants with the right to be judged by their peers, guards "against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." Both the federal and state constitutions require that "[i]n all criminal prosecutions the accused shall enjoy the right to a . . . public trial by an impartial jury . . . ." In 1869, twelve years after the adoption of the Minnesota Constitution, the Minnesota Supreme Court decided State v. Everett, which determined that an "impartial jury" must consist of twelve members. By contrast, the right to trial by a jury of twelve is not guaranteed under the Federal Constitution.

215. Id.
216. Id. The defendant argued that testimony about her lawyer's advice to forego the evaluations could implicate her in front of the jury by implying that she admitted guilt to her attorney. The court responded by stating that "[w]hile there is some remote possibility that a jury could infer that Defendant had 'told her attorney that she was guilty,' such an inference requires a leap of faith which this court, on the facts before us, is unwilling to make." Id.
219. Duncan, 391 U.S. at 156.
220. Compare U.S. Const. amend. VI with Minn. Const. art. 1, § 6.
221. 14 Minn. 330 (1869).
222. Id. at 332.
223. See, e.g., Duncan, 391 U.S. at 155 (citing Maxwell v. Dow, 176 U.S. 581, 604 (1900)).
The United States Supreme Court has determined that, under the Sixth Amendment to the United States Constitution, a jury consisting of five persons is unconstitutional because it is of inadequate size to promote deliberations, insulate members from outside intimidation, and provide a representative cross-section of the community.\(^{224}\) A conviction by a less than unanimous six-member jury deprives an accused of the constitutional right to trial by jury as well.\(^{225}\) In *Williams v. Florida*,\(^{226}\) however, the Court held that a twelve-person jury is not required for certain non-capital criminal offenses under the Sixth Amendment; in these cases, a six-person jury is permissible.\(^{227}\)

Following the *Williams* decision, the Minnesota Legislature enacted a statute that allowed a six-person jury in misdemeanor cases.\(^{228}\) This statute was challenged under the Minnesota Constitution in *State v. Hamm*.\(^{229}\) In this case, the defendant moved for a trial by a twelve-person jury after being charged with driving while intoxicated.\(^{230}\) The motion was denied and Hamm was convicted by a panel of six jurors.\(^{231}\) On appeal, the Minnesota Supreme Court reversed the conviction and struck the statute as unconstitutional, holding that article I, section 6 required a twelve-person jury.\(^{232}\) Writing for the court, Justice Yetka rejected the *Williams* decision.\(^{233}\) He restated his firmly held view that Minnesota courts “must remain independently responsible for safeguarding the rights of our own citizens.”\(^{234}\) Justice Yetka also rejected arguments for overruling *Everett*, contending that the only way that the Minnesota Constitution should be changed is by “consent of the people in the form of a constitutional

\(^{227}\) *Id.* at 86, 102-03.
\(^{228}\) *See* MINN. STAT. § 593.01, subd. 1 (1986).
\(^{229}\) 423 N.W.2d 379 (Minn. 1988).
\(^{230}\) *Id.* at 380.
\(^{231}\) *Id.*
\(^{232}\) *Id.* at 382. Minnesota Statute § 593.01, subd. 1 (1986) was repealed in 1990. *See* MINN. STAT. § 593.01 (1992).
\(^{233}\) *Hamm*, 423 N.W.2d at 382. “In our view, the conclusion of the United States Supreme Court in *Williams* ... is of little relevance here today.” *Id.* “In interpreting our state constitution, we decline to follow the same path taken by *Williams* in interpreting the federal Constitution.” *Id.* at n.2.
\(^{234}\) *Id.*
amendment.” Yetka reached this conclusion despite a lack of express language in the constitution requiring a jury of twelve. Hamm makes it clear that the court continues to interpret the Minnesota Constitution to guarantee an expanded right to trial by an impartial jury, a broader right than under the United States Constitution.

VI. UNREASONABLE SEARCHES AND SEIZURES

The right against unreasonable searches and seizures can be traced to an early decision in England that prohibited the issuance of general search warrants. Lord Camden wrote, “The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.”

The principles articulated by Lord Camden “affect the very essence of constitutional liberty and security.” In his nomination hearings before the Senate Committee on the Judiciary, Justice Rehnquist stated, with respect to an individual’s state constitutional search and seizure rights, that:

The Federal Constitution certainly lays down one rule for all [fifty] States, and if some States want a more stringent prohibition against searches and seizures than that provided by the fourth amendment, it just makes sense that they ought to have it. If some States are content with the Federal provision, which everybody has to live up to, it seems to me that makes

235. Id. at 383.
236. Id. at 382.
237. In State v. Hegg, 410 N.W.2d 152 (N.D. 1987), the North Dakota Supreme Court reached a similar result. In Hegg, a statute required a written demand for a jury of 12. Id. at 153. The defendant appealed his conviction by a six-person jury, contending that the conviction violated his right to a twelve-person jury under the North Dakota Constitution. Id. The court found that the statute violated the defendant’s right to a jury of twelve guaranteed under the state constitution. Id. at 154.

Article I, § 13 of the North Dakota Constitution provides:
The right of trial by jury shall be secured to all, and remain inviolate. A person accused of a crime for which he may be confined for a period of more than one year has the right of trial by a jury of twelve. The legislative assembly may determine the size of the jury for all other cases, provided that the jury consists of at least six members. All verdicts must be unanimous.


238. Boyd v. United States, 116 U.S. 616, 626-27 (1886) (citing Entick v. Carrington and Three Other King’s Messengers, 19 Howell’s St. Trials 1029 (1765)).
239. Id. at 627 (quoting Entick, 19 Howell’s St. Trials at 1029).
sense for them to have that . . . I do not think the [United States Supreme] Court is necessarily the final arbiter of the law of the land. It is the final arbiter of the U.S. Constitution and of the meaning of Federal statutes and treaties. But we still live in a somewhat pluralistic society where the States' highest courts are the final arbiters of the meaning of their State constitutions. That is just as it ought to be . . . .

The Minnesota and United States Constitutions each provide that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..." In several areas of search and seizure, the Minnesota Constitution has been interpreted to afford greater protection than that provided by the Federal Constitution. One example is the application of the exclusionary doctrine.

The exclusionary doctrine provides that evidence obtained in violation of the Fourth Amendment is inadmissible at trial in state court. However, the "good faith" exception to the exclusionary rule that exists under the Fourth Amendment has not been recognized under the Minnesota Constitution. Under the Federal Constitution, the exclusionary rule does not apply where evidence is obtained by police officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate that is ultimately found to be unsupported by probable cause or is otherwise invalid. Thus, where police have acted in objective good faith, evidence obtained in violation of the Fourth Amendment may be used in the prosecution's case-in-chief. By contrast, this "good faith" exception to the exclusionary rule has been held not to apply to article I, section 10 of the Minnesota Constitution. In Minnesota, evidence obtained in violation of article I, section 10 of the state constitution is suppressed from trial regardless whether the police acted in good faith.

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245. Id. Since the purpose of the exclusionary rule is to deter police misconduct, punishing the errors of judges would not serve the deterrent purpose. Id. at 918-21.
247. Id. at 109.
In *State v. Albrecht*, an anonymous informant told police that Albrecht was a marijuana dealer. The informant provided police with a description of the suspect's vehicle, but was unable to provide a specific address. A magistrate issued a search warrant based on probable cause, but, because easily verifiable facts were not corroborated, the supreme court upheld the trial court's determination that probable cause was insufficient under article I, section 10 of the Minnesota Constitution. The state urged the court to adopt a good faith exception to the exclusionary rule to allow the use of evidence obtained by officers who act in reasonable reliance on an ultimately invalid search warrant that was issued by a detached and neutral magistrate. The supreme court refused to adopt the good faith exception. By rejecting the good faith exception to the exclusionary rule, Minnesota affords greater rights under its constitution than does the Federal Constitution.

Another example of expanded rights under the Minnesota Constitution is found in our definition of what constitutes a "seizure." The United States Supreme Court ruled, in *California v. Hodari*, that "seizure" under the Fourth Amendment may occur in either of two ways: (1) when a law enforcement officer physically lays a hand on the person, or (2) when the person submits to the officer's show of authority. The Minnesota Supreme Court explicitly rejected this definition of seizure under the state constitution in *In re Welfare of E.D.J.*

In that case, E.D.J. and two other men turned and began walking in the opposite direction after noticing an approaching police car. After police ordered the men to stop, E.D.J. continued for approximately five additional steps, dropped something, took two more steps, and then stopped and turned...
Tests later revealed that the bag dropped by E.D.J. contained crack cocaine. The defendant moved to suppress the evidence as fruit of an illegal seizure. The motion was denied when the district court, relying on *Hodari*, determined that the cocaine was abandoned prior to the seizure and, therefore, the constitutional protections for seizures did not apply. The court of appeals, also relying on *Hodari*, affirmed the definition of seizure and declined to interpret the state constitution differently than the interpretation given to the Federal Constitution.

Exercising its independent authority to interpret the state constitution, the Minnesota Supreme Court reversed the court of appeals and rejected the *Hodari* decision. The court concluded that the definition of seizure under the Minnesota Constitution will continue to be the broader "totality of the circumstances" approach which analyzes whether a reasonable person in the defendant's shoes would have concluded that he or she was not free to leave. Thus, under the Fourth Amendment standard, there was no "seizure" of E.D.J. until after he actually stopped and submitted to the police, and the evidence obtained was not the suppressible fruit of an illegal seizure. Under the Minnesota Constitution, however, there was a "seizure" when the police directed E.D.J. to stop, and the evidence was suppressed on these grounds.

A recent decision by the Minnesota Supreme Court provided perhaps the clearest example of expanded search and seizure protection. The court, on appeal, reconciled a pair of inconsistent decisions by the Minnesota Court of Appeals regarding the constitutionality of sobriety checkpoint roadblocks. The

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258. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 830-31.
263. *In re E.D.J.*, 502 N.W.2d at 781.
264. *Id.* at 783.
265. *Id.* at 783.
266. *Id.* at 783. E.D.J. dropped the bag after he was directed to stop. *Id.*
United States Supreme Court has held that a Fourth Amendment "seizure" occurs during a sobriety checkpoint stop.\textsuperscript{268} Determining whether such a seizure is reasonable involves a three-prong analysis, known as the Brown test, which weighs: (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty.\textsuperscript{269}

In \textit{Ascher v. Commissioner of Public Safety},\textsuperscript{270} the court of appeals relied on \textit{Michigan v. Sitz}\textsuperscript{271} to determine that the sobriety checkpoint provided a reasonable method of dealing with drunk driving and, therefore, reasonably advances the public interest.\textsuperscript{272} Thus, prong two of the Brown test was satisfied under the Fourth Amendment of the Federal Constitution.\textsuperscript{273} However, the court also analyzed this issue under the Minnesota Constitution and determined that the second prong of the Brown test was not satisfied.\textsuperscript{274} The court based its decision on a lack of empirical evidence to suggest that sobriety checkpoint arrests represent an increase in the number of arrests over what would have occurred through conventional methods of law enforcement.\textsuperscript{275} With respect to the degree that sobriety checkpoints advance the public interest, the court declined to limit the protection afforded by the state constitution to that provided by the Fourth Amendment.\textsuperscript{276}

In a decision filed on the same day as \textit{Ascher}, the court of appeals in \textit{Gray v. Commissioner of Public Safety}\textsuperscript{277} held that sobriety

\begin{itemize}
  \item \textsuperscript{268} \textit{Michigan v. Sitz}, 496 U.S. 444, 450 (1990).
  \item \textsuperscript{269} \textit{Brown v. Texas}, 443 U.S. 47, 50-51 (1979).
  \item \textsuperscript{270} \textit{Ascher}, 505 N.W.2d at 362.
  \item \textsuperscript{271} 496 U.S. at 454-55 (holding that there only needs to be a demonstration that the sobriety checkpoint provided a reasonable method of dealing with drunk driving to satisfy the second prong of the Brown test).
  \item \textsuperscript{272} \textit{Ascher}, 505 N.W.2d at 365.
  \item \textsuperscript{273} \textit{Id}. The court dismissed the first prong of the Brown analysis with little discussion, noting that, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." \textit{Id} at 365 (citing \textit{Sitz}, 496 U.S. at 448-49).
  \item \textsuperscript{274} \textit{Id}. at 368.
  \item \textsuperscript{275} \textit{Id}.
  \item \textsuperscript{276} \textit{Id} at 367.
  \item \textsuperscript{277} 505 N.W.2d 357 (Minn. Ct. App. 1993).
\end{itemize}
checkpoints do not violate either the state or federal constitutions. In applying the Sitz analysis, the court determined that prong two of the Brown test was satisfied since the roadblock provided a reasonable method of dealing with drunk driving. The court rejected the argument that because this particular roadblock was instituted solely by the police, it was flawed because no politically accountable individuals were involved. The court explicitly declined to afford greater protection under the Minnesota Constitution.

In June 1994, the Minnesota Supreme Court ruled that sobriety checkpoints are unconstitutional under the Minnesota Constitution, finding that there was no persuasive reason to dispense with the individualized suspicion standard that Minnesota courts have "long held" to be required under article I, section 10 of the Minnesota Constitution. The majority, relying on the Brennan and Stevens dissents in Sitz, concluded that the Sitz analysis was too "radical" a departure from the Brown test because it allowed police officers to decide for themselves the reasonableness of their own conduct.

VII. CONFRONTATION

A criminal defendant's right to confront adverse witnesses at the time of trial forms "the core of the values furthered by the Confrontation Clause." The United States Supreme Court has observed that:

[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross examine, and whose testimony he may impeach in every mode authorized by the

278. Id. at 362.
279. Id. at 360-61.
280. Id. In Sitz, the court noted that the choice among which law enforcement procedures to employ should be borne by politically accountable officials. See Sitz, 496 U.S. at 453-54. The Gray court rejected this argument, reasoning that police officers are still answerable to elected officials and consequently to the public. Gray, 505 N.W.2d at 361.
281. Gray, 505 N.W.2d at 362.
283. Id.
established rules governing the trial or conduct of criminal cases.\textsuperscript{285}

The right of confrontation expresses "something deep in human nature that regards face-to-face confrontation between accused and accuser [as] 'essential to a fair trial.'"\textsuperscript{286} "A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.'"\textsuperscript{287} Face-to-face confrontation, which admittedly may also upset truthful witnesses, remains valuable because it can "confound and undo the false accuser."\textsuperscript{288}

In language nearly identical to the Sixth Amendment guarantee for an accused "to be confronted [by] the witnesses against him,"\textsuperscript{289} the Minnesota Constitution provides that "[t]he accused shall enjoy the right . . . to be confronted with the witnesses against him."\textsuperscript{290} The Fourteenth Amendment makes the Sixth Amendment right of confrontation binding on the states.\textsuperscript{291}

The right of confrontation assures both that an accused receives an opportunity to cross examine adverse witnesses and that the jury will be able to weigh the demeanor and credibility of such witnesses.\textsuperscript{292} United States Supreme Court cases that address the Sixth Amendment's Confrontation Clause "fall into two broad,

\begin{itemize}
  \item \textsuperscript{285} Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Kirby v. United States, 174 U.S. 47, 55 (1899)). Justice Blackmun argues that the Confrontation Clause is most concerned with giving the trier of fact the right to observe the testifying witness:
    
    The primary object of the [Confrontation Clause] was to prevent depositions or \textit{ex parte} affidavits . . . being used against the prisoner in lieu of a personal examination and cross examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.
    
    \textit{Id.} at 1026 (Blackmun, J., dissenting, joined by Rehnquist, J.) (quoting Kentucky v. Súncer, 482 U.S. 730, 736-37 (1987)).
  \item \textsuperscript{286} Id. at 1017 (citing Pointer v. Texas, 380 U.S. 400, 404 (1965)).
  \item \textsuperscript{287} Id. at 1019 (quoting \textsc{Zechariah Chaffee, Jr., The Blessings of Liberty} 35 (1956)).
  \item \textsuperscript{288} Id. at 1020.
  \item \textsuperscript{289} U.S. Const. amend. VI. "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." \textit{Id.}
  \item \textsuperscript{290} Minn. Const. art. I, \textsection 6.
  \item \textsuperscript{291} See, e.g., Pointer v. Texas, 380 U.S. 400, 403 (1965); State v. Hansen, 312 N.W.2d 96, 102 (Minn. 1981).
  \item \textsuperscript{292} See also, Coy v. Iowa, 487 U.S. 1012, 1017 (1988); Pennsylvania v. Ritchie, 480 U.S. 39, 51-52 (1987); State v. Hamilton, 289 N.W.2d 470, 475 (Minn. 1979) (citing Barber v. Page, 390 U.S. 719, 725 (1968)) (stating that "[t]he right to confrontation includes both the opportunity to cross examine and the occasion for the jury to weigh the demeanor of the witness").
\end{itemize}
albeit not exclusive, categories: ‘cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross examination.’ ”

The Supreme Court has held that “the [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial.” Under the leading federal case of Ohio v. Roberts, two general requirements protect an accused's Sixth Amendment right of confrontation with respect to out-of-court statements. First, the prosecution must either produce or demonstrate the unavailability of the witness whose out-of-court statement the prosecution wishes to use against the

For an analysis of the importance of cross examination, see White v. Illinois, 112 S. Ct. 736, 743 (1992) (citing California v. Green, 399 U.S. 149, 158 (1970) (stating that cross examination is "the greatest legal engine ever invented for the discovery of truth"). See also Davis v. Alaska, 415 U.S. 308, 319 (1974) (finding that a criminal defendant must be allowed to impeach prosecution's juvenile witness based on the witness' delinquency record despite the state's high interest in preserving the confidentiality of juvenile delinquency determinations); Chambers v. Mississippi, 410 U.S. 284, 297-98 (1973) (finding that a party has a right to impeach the party's own witness through cross examination); Pointer v. Texas, 380 U.S. 400, 405 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").


294. Maryland v. Craig, 497 U.S. 836, 847 (1990). In Idaho v. Wright, 497 U.S. 805, 813 (1990), the Court observed:

From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause. We reaffirmed only recently that "[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'"

Id. at 813-14 (citations omitted) (quoting Bourjaily v. United States, 483 U.S. 171, 182 (1987)). Cf. White v. Illinois, 112 S. Ct. 736, 744-48 (1992) (Thomas & Scalia, JJ., concurring) (stating that the "Confrontation Clause should be implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials").

295. 448 U.S. 56 (1980). In Roberts, the Supreme Court rejected a Confrontation Clause challenge to the introduction at trial of a probable cause hearing transcript containing testimony from a witness not produced at trial but who was cross examined at the hearing. Id.

296. Id. at 65.
297. *Id.* The prosecution must show that it made a good faith effort to secure its witnesses for trial. *Id.* at 74-75. In State v. Lanam, 459 N.W.2d 656 (Minn. 1990), cert. denied, 498 U.S. 1033 (1991), the Minnesota Supreme Court determined that the prosecution satisfied this good faith requirement by attempting to have the child witness declared competent to testify. *Id.* at 659.

298. *Roberts,* 448 U.S. at 65-66. *See also* Bourjaily v. United States, 483 U.S. 171, 183 (1987) (finding that the state need not show independent indicia of reliability to admit an unavailable co-conspirator’s out-of-court statements because such statements constitute a firmly rooted hearsay exception to the hearsay rule); Lee v. Illinois, 476 U.S. 530, 543 (1986) (finding that “even if certain hearsay evidence does not fall within ‘a firmly rooted hearsay exception’ and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a ‘showing of particularized guarantees of trustworthiness’ ”) (footnote and citation omitted).

In Idaho v. Wright, 497 U.S. 805 (1990), the Supreme Court indicated that “[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of experience in assessing the trustworthiness of certain types of out-of-court statements.” *Id.* at 817 (citing Mattox v. United States, 156 U.S. 237, 243, (1895); *Roberts,* 448 U.S. at 66; Bourjaily 483 U.S. at 183; Lee v. Illinois, 476 U.S. 530, 552 (1986)). The *Wright* Court cited the “excited utterance,” “dying declaration,” and “medical treatment” exceptions to the hearsay rule as firmly-rooted hearsay exceptions, but concluded that a residual hearsay exception is not firmly rooted for Confrontation Clause purposes. *Wright,* 497 U.S. at 819-20.


301. *Id.*

302. *Id.* at 816. The Supreme Court noted that the trial court found the alleged child victim was incapable of communicating with the jury and defense counsel agreed with this conclusion. *Id.* The Court also observed that the appellate court neither questioned this finding nor discussed the general requirement of unavailability. *Id.*
The Wright Court then held that, under Roberts' second prong, the out-of-court statements of a child witness will be admissible only if there were adequate indicia of reliability that arose solely from the circumstances surrounding the statement and cross examination would be of marginal utility. The Court therefore concluded that "[f]or purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause." Id.

303. As in Roberts, the Wright Court indicated that the alleged child victim's statements would have been presumptively reliable if they had fallen into a firmly rooted hearsay exception. Id. at 815-18.

304. Id. at 819-20. The Supreme Court in Wright stated that the particular guarantees of trustworthiness must be drawn only from the circumstances that surround the making of the statement and "not by reference to other evidence at trial." Id. at 822. The Court expressly disapproved considering such corroborating evidence, which would "permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." Id. at 823. Therefore, "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." Id. at 821. The Supreme Court found that the trial court's reliance on physical evidence of abuse, the opportunity the respondent had to commit the offense, and the older daughter's corroborating identification of the accused were "irrelevant to a showing of the 'particularized guarantees of trustworthiness' necessary for admission of hearsay statements under the Confrontation Clause." Id. at 826. The remaining factors that the lower court considered—whether the child had a motive to fabricate the statements and whether the statements were of the type that one would expect a child of her age to fabricate—were relevant and admissible. Id.

In a dissenting opinion, joined by Chief Justice Rehnquist and Justices White and Blackmun, Justice Kennedy disapproved of the majority's refusal to consider corroborating evidence, stating that according to common sense, "one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence." Id. at 828. Kennedy, indicating that this is a new rule in Federal Confrontation Clause analysis, noted that "[s]tates are of course free, as a matter of state law, to demand corroboration of an unavailable child declarant's statements as well as other indicia of reliability before allowing the statements to be admitted into evidence." Id. at 830-31. Justice Kennedy further indicated that:

Until today . . . no similar distinction could be found in [Supreme Court] precedents interpreting the Confrontation Clause. If anything, the many state statutes requiring corroboration of a child declarant's statements emphasize the relevance, not the irrelevance, of corroborating evidence to the determination whether an unavailable child witness' statements bear particularized guarantees of trustworthiness, which is the ultimate inquiry under the Confrontation Clause. In sum, whatever doubt the Court has with the weight to be given the corroborating evidence found in this case is no justification for rejecting the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness.

Id. at 832.

305. The Court stated that "if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." Wright, 497 U.S.
identified reliability indicators to include: (1) spontaneity and consistent repetition; (2) use of terminology unexpected of a child of similar age; (3) statements elicited without leading questions; and (4) lack of motive to fabricate. \(^{306}\) The Court concluded that the statements by the child to a doctor were unreliable because they were elicited during a highly suggestive interview. \(^{307}\)

With respect to out-of-court statements, the Minnesota Supreme Court has consistently relied on federal case law to define the scope of a defendant's right of confrontation under the state constitution. \(^{308}\) In *State v. Lanam*, \(^{309}\) a sex abuse case, the defendant claimed that the admission of a nontestifying child witness's statements to her doctor violated the right of confrontation. \(^{310}\) The Minnesota Supreme Court, relying heavily on *Wright*, applied the general two-step Federal Confrontation

at 820. "Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821 (citations omitted).

\(^{306}\) *Id.* at 821-22.

\(^{307}\) *Id.* at 826-27.

\(^{308}\) *But cf.* *State v. Lanam*, 459 N.W.2d 656, 663 (Minn. 1990) (Kelley, J., dissenting), *cert. denied*, 498 U.S. 1033 (1991) [hereinafter *Lanam II*]. In *State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1989), the court indicated that:

The use of hearsay statements deprives the defendant of the right to confront and cross examine the witness, and violates the requirement that testimony be sworn, all of which are intended to protect the integrity of the factfinding process by ensuring that only reliable evidence will be used against a defendant. Thus hearsay can be used against a criminal defendant at trial only if its use is necessary, and only if the hearsay evidence is demonstrably reliable.

*Id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980); *State v. Hansen*, 312 N.W.2d 96, 102 (Minn. 1981)).

\(^{309}\) *Lanam II*, 459 N.W.2d at 656.

\(^{310}\) *Id.* at 658. In *Lanam II*, the statements of the child witness were admitted pursuant to MINN. STAT. § 595.02, subd. 3 (1988). *Lanam II*, 459 N.W.2d at 658. At the time of the decision, subd. 3 provided:

An out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child . . . not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child . . . either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and there is corroborative evidence of the act; and
Clause analysis.\textsuperscript{311} The court determined that, to the extent the unavailability requirement applied,\textsuperscript{312} the alleged victim was unavailable for Confrontation Clause purposes because she was produced for a competency hearing and found incompetent to testify at trial.\textsuperscript{313} The \textit{Lanam II} court then concluded that the

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\item (c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.
\end{itemize}
\end{quote}

For purposes of this subdivision... [a]n unavailable witness includes an incompetent witness.

\textbf{MINN. STAT.} § 595.02, subd. 3 (1988). Section 595.02 specifically provided that an incompetent witness is "unavailable" for purposes of the statute. \textit{Id.}

\textsuperscript{311} \textit{Lanam II}, 459 N.W.2d at 659-61. Thus approving Wright's two generalized inquiries, the \textit{Lanam II} court noted that "it seems clear that the United States Supreme Court is willing to admit any kind of hearsay statement despite the confrontation clause if the declarant is unavailable and the statement is sufficiently reliable." \textit{Id.} at 659.

\textsuperscript{312} The court, following \textit{Idaho v. Wright}, indicated that it reached its conclusion "without deciding that the general requirement of unavailability applic[ed]." \textit{Id.} at 659.


The \textit{Lanam II} court specifically cited the language in \textit{Wright} holding that a child witness deemed incompetent is "an unavailable witness within the meaning of the Confrontation Clause." \textit{Lanam II}, 459 N.W.2d at 659. The Minnesota Supreme Court also pointed to \textit{Wright}'s specific rejection of the per se unreliability of a child's statements simply because the trial court has found the child incompetent to testify. \textit{Id.} at 661. The court identified reasons that justified a finding of unavailability under the \textit{Wright} analysis to include "incompetence, the... Rules of Evidence grounds for unavailability, the danger of severe psychological injury to a child victim from testifying, and an unwillingness or inability to testify." \textit{Id.} at 659 (quoting Michael H. Graham, \textit{The Confrontation Clause, the Hearsay Rule, and Child Sex Abuse Prosecutions: The State of the Relationship}, 72 \textit{Minn. L. Rev.} 523, 554 (1988)).

The trial court in \textit{Lanam I} deemed the child incompetent to testify, concluding that she was susceptible to suggestion and leading questions would easily elicit the sought after response. State v. Lanam, 444 N.W.2d 882, 884 (Minn. Ct. App. 1989) [hereinafter \textit{Lanam I}]. In its order, the court also stated that "[t]he child's inability to recount recent events (her summer vacation), and her apparent lack of understanding about common, everyday occurrences, led the court to conclude that she was not competent to testify as a witness." \textit{Id.}

The Minnesota Supreme Court upheld the trial court's finding that the alleged child victim was incompetent at the time of trial to give testimony. \textit{Lanam II}, 459 N.W.2d at 659-61. The supreme court pointed out that the trial court had not determined that the child was incompetent at the time she made the statements. \textit{Id.} at 660. Under \textit{Lanam II}, a competency hearing addressed the ability of the witness to "remember or to relate" events. \textit{Id.} at 659. "Ability" meant the ability to remember and relate events generally, not the anticipated testimony. \textit{Id.} at 659-60. \textit{Accord State v. Scott}, 501 N.W.2d 608, 613 (Minn. 1993) (holding that the trial court erroneously asked the child about the subject matter of the criminal charges involved and instead the court should have asked questions pertaining to name, age, school, and perception of a "lie"); \textit{see also Kentucky v. Stincer}, 482 U.S. 730, 741 (1987) (stating that "questions at a competency hearing usually are limited to matters that are unrelated to the basic issues of the trial" such as name, age, school, and perception of a "lie").
child's statements, although not covered by a firmly rooted hearsay exception,\(^{314}\) satisfied the reliability factors set forth in \textit{Wright},\(^{315}\) and, therefore, did not violate the defendant's con-

\(^{314}\) In effect, the court concluded that Minnesota's residual hearsay exception is not firmly rooted for Confrontation Clause purposes. \textit{Lanam II}, 459 N.W.2d at 659. In Minnesota, exceptions to the general confrontation rule also exist. \textit{See}, e.g., \textit{State v. Salazar}, 504 N.W.2d 774, 777 (Minn. 1993) (including statements made for the purpose of medical diagnosis or treatment where the child knew she was speaking to medical personnel and that it was important she tell the truth); \textit{State v. Daniels}, 380 N.W.2d 777, 785-86 (Minn. 1986) (addressing excited utterances); \textit{State v. Olson}, 291 N.W.2d 203, 206 (Minn. 1980) (allowing dying declarations).

\(^{315}\) The Minnesota Supreme Court, in \textit{Lanam II}, echoed the United States Supreme Court reliability factors set forth in \textit{Wright}, concluding that:

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[Statements admissible under a state's residual hearsay exception satisfy the confrontation clause reliability requirement only if the state establishes that the totality of the circumstances surrounding the making of the statements show the statements were 'sufficiently trustworthy'—that is, that it is 'particularly likely' that the declarant was telling the truth at the time of making the statements. Stated differently, the focus is not on all the circumstances, . . . but only on those circumstances actually surrounding the making of the statements. These circumstances include, but are not limited to, whether the statements were spontaneous, whether the person talking with the child had a preconceived idea of what the child should say, whether the statements were in response to leading or suggestive questions, whether the child had any apparent motive to fabricate, and whether the statements are the type of statements one would expect a child of that age to fabricate.]
\end{quote}

\textit{Lanam II}, 459 N.W.2d at 661 (citations omitted) (citing Idaho v. \textit{Wright}, 497 U.S. 805, 821 (1990)). \textit{Accord State v. Edwards}, 485 N.W.2d 911, 915 (Minn. 1992) (citing \textit{Wright}, 497 U.S. at 819) (finding that the trustworthiness of out-of-court statements depend on the circumstances surrounding the making of such statements, not the evidence corroborating the statements).

The \textit{Lanam II} court noted that the reliability finding was justified because the child: (1) made her initial statement about the abuse spontaneously; (2) answered questions from her foster mother and others by consistently describing the abuse; (3) identified the defendant by name as the perpetrator; (4) identified where the defendant worked and lived; (5) stated that the defendant often sat with her at her mother's house; (6) pointed out defendant's house one day as she and her foster mother drove by it; (7) identified defendant when she saw him accidentally in the hall at the courthouse on the day of a hearing; (8) had no apparent motive to fabricate; and (9) made statements that were not the type of statements one would expect a child of her age to fabricate. \textit{Lanam II}, 459 N.W.2d at 661. The court also found it important that the foster mother had no motive to falsely implicate defendant. \textit{Id. Accord State v. Salazar}, 504 N.W.2d 774, 777 (Minn. 1993) (applying \textit{Wright} and admitting the statements of the alleged victim and her brother as reliable because the mother did not want the alleged victim to identify the defendant as the abuser, the victim and her brother had no apparent motive to fabricate, and the statements were not the type of statements one would expect children of their age to fabricate).

\textit{See also State v. Oslund}, 469 N.W.2d 489, 493-94 (Minn. Ct. App. 1991). In \textit{Oslund}, the court of appeals applied \textit{Roberts} and \textit{Wright} to find that the alleged child victim's statements had sufficient guarantees of trustworthiness under the totality of the circumstances including: They were in language one would expect a child of her age to use; the acts she demonstrated and described were of a nature one would not expect a three-year-old to know; her statements were reasonably spontaneous; leading questions
frontation right under either the Minnesota or the United States constitutions. The Minnesota Supreme Court did not undertake an independent analysis of the defendant’s rights under the Minnesota confrontation clause.

Justice Kelley’s dissent in Lanam II, joined by two other justices, urged that Minnesota courts offer a broader right of confrontation under the Minnesota Constitution. Kelley observed that “historically, not only the framers of the Minnesota Constitution, but this court itself has generally tended to maximize the basic constitutional right that an accused be afforded the right to confront the accuser.” Justice Kelley argued that both article I, section 6 of the Minnesota Constitution and the Minnesota cases construing the clause have “histories independent of federal Sixth Amendment interpretations” and together demonstrate a strong preference for face-to-face confrontation at trial. However, no Minnesota cases subsequent to Lanam II were not overly suggestive; and three witnesses testifying to the child’s statements had no motive to fabricate. Id.

316. Lanam II, 459 N.W.2d at 661-62. The court also determined that the child’s statements met the reliability requirements under MINN. STAT. § 595.02, subd. 3(a) (1988), which required “an examination of the time, content, and circumstances of the statement and the reliability of the person to whom the statement was made.” Lanam II, 459 N.W.2d at 660. In determining reliability under the statute, unlike under the federal and state confrontation clauses, the court may consider corroborating physical evidence. Id.

317. Lanam II, 459 N.W.2d at 662 (Kelley, J., dissenting, Popovich, C.J., Yetka, J., joining). Justice Kelley cited with approval the Fuller exhortation, “as the highest court of this state, we are independently responsible for safeguarding the rights of [our] citizens.” Id. at 663 n.1 (quoting State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985)).

318. Id. at 663 n.1.

319. Id. at 663.

320. Id. at 665-66. Justice Kelley turned to the Minnesota constitutional debates to find one delegate’s explanation of the meaning in the language, “the accused shall enjoy . . . the right to be confronted with the witnesses against him,” as follows:

I refer here again to the Constitution of the United States, framed by wiser heads than ours, and I find the language there used the same as that proposed . . . “to be confronted with the witnesses against him.” What does that mean? It means that when a charge is made against any person, he may demand that the government shall bring the witnesses before his face, and that they shall there, in his presence and under his eye, make the charge against him.

. . . [T]he provision that he shall be confronted with the witnesses against him, compels the government to bring the witnesses bodily into the presence of the accused.

Id. (quoting Debates and Proceedings of the Constitutional Convention 102-03 (1857) (Republican Convention)). Justice Kelley also found significant that state courts were not required to undertake a Federal Confrontation Clause analysis until 1965, when the Sixth Amendment was made applicable to the states through the Fourteenth Amendment in Pointer v. Texas, 380 U.S. 400 (1965). Id. The justice acknowledged that the history
have elected to follow Justice Kelley's dissent to expand the right of confrontation under the Minnesota Constitution and impose tighter restriction on the use of out-of-court testimony.\textsuperscript{321}

Subsequent to \textit{Roberts}, the Supreme Court held in \textit{United States v. Inadi}\textsuperscript{322} that the unavailability of a witness is not necessarily a prerequisite to the admission of hearsay statements in a criminal case.\textsuperscript{323} The \textit{Inadi} Court recognized an exception to the general

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Other states with "face-to-face" language in their state confrontation clauses have afforded no greater protection than that afforded under the federal test. \textit{See}, e.g., \textit{State v. Campbell}, 706 P.2d 694, 704-05 (Or. 1985) (applying the two-prong test); \textit{State v. McCafferty}, 356 N.W.2d 159, 163 (S.D. 1984), \textit{cert. denied}, 476 U.S. 1172 (applying the two-prong test); \textit{State v. Caussy}, 706 S.W.2d 628, 631 (Tenn. 1986) (applying the two-prong test); \textit{State v. Burns}, 332 N.W.2d 757, 763-64 (Wis. 1983) (finding that preliminary hearing testimony is not prohibited under the federal or Wisconsin constitutions based on application of the two-prong test).

322. \textit{475 U.S. 387} (1986). \textit{See also} \textit{Ohio v. Roberts}, 448 U.S. 56, 65 n.7 (1980) (indicating that "[a] demonstration of unavailability ... is not always required").


\end{footnotesize}
unavailability requirement by admitting statements of nontestifying, available co-conspirators that were made in the course of a conspiracy.\(^\text{324}\) The Court indicated that the unavailability rule was developed in cases that involved admission of former testimony.\(^\text{325}\) Such cases warrant a preference for live testimony unless the witness is shown to be unavailable.\(^\text{326}\) "[F]ormer testimony often is only a weaker substitute for live testimony . . . [and] seldom has independent evidentiary significance of its own."\(^\text{327}\)

The same reasoning is inapplicable to extrajudicial statements that derive much of their significance from the non-trial context in which they are made.\(^\text{328}\) The Court further rejected an unavailability requirement because it would impose a significant practical burden on the prosecution to produce the declarants when it was clear neither the prosecutor nor the defense wished to examine the declarants at trial.\(^\text{329}\) The Supreme Court has affirmed *Inadi* to make an unavailability analysis a necessary part of the Confrontation Clause inquiry only with respect to former testimony.\(^\text{330}\)

The Minnesota Supreme Court, in *State v. Larson*,\(^\text{331}\) followed *Inadi* to hold that statements of child victims are admissible even if the nontestifying child is available.\(^\text{332}\) The court, however, adopted a rule based on state evidentiary law rather than on constitutional law to require that the prosecution must call the child if the defense so requests.\(^\text{333}\) On remand, the *Larson II*\(^\text{334}\) majority upheld the conviction because the hearsay testimony bore particularized guarantees of trustworthiness under the factors

\begin{itemize}
\item \(^\text{324\) Id. at 394-95.}\n\item \(^\text{325\) Id. at 394.}\n\item \(^\text{326\) Id. at 394-95.}\n\item \(^\text{327\) Id.}\n\item \(^\text{328\) Inadi, 475 U.S. at 395-96.}\n\item \(^\text{329\) According to the Court: Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule. We hold today that the Confrontation Clause does not embody such a rule. Id. at 399-400.}\n\item \(^\text{330\) See, e.g., White v. Illinois, 112 S. Ct. 736, 741 (1992).}\n\item \(^\text{331\) 453 N.W.2d 42 (Minn. 1990) [hereinafter Larson I].}\n\item \(^\text{332\) Id. at 45-46.}\n\item \(^\text{333\) Id. at 46.}\n\item \(^\text{334\) State v. Larson, 472 N.W.2d 120 (Minn. 1991) [hereinafter Larson II].}\n\end{itemize}
enumerated in *Lanam II* and *Wright*.

The majority, nonetheless, concluded that the *Inadi* unavailability reasoning applied and that a contrary interpretation was "at odds with that advanced by leading commentators." In *State v. Scott*, the Minnesota Supreme Court addressed a confrontation clause challenge to the admission into evidence of an audiotape interview of a nontestifying child sex abuse witness. The court, following *Wright*, applied the confrontation clause rule to admit hearsay at trial only if there are adequate indicia of reliability and if cross-examination would be of marginal utility. The trial court was determined to have erroneously admitted the audiotape into evidence because the audiotape was not sufficiently reliable to "overcome the presumption that cross-examination of the declarant would be useful." In the other broad category of right of confrontation cases, those involving a defendant's right to face and cross examine adverse witnesses appearing at trial, the Supreme Court has held

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335. *Id.* at 125 (citing *Lanam II*, 459 N.W.2d at 661; *Idaho v. Wright*, 497 U.S. 805, 817-21 (1990)).

336. *Id.* at 123 n.1. The *Larson II* court stated that "it is not at all clear that it was in the interest of the defendant that the declarant be called by either side." *Id.* (quoting *Larson I*, 453 N.W.2d at 45-46).

337. *Id.* at 124 n.1.

338. 501 N.W.2d 608 (Minn. 1993).

339. The court stated:

> Whatever factors are deemed relevant to a trial court when determining whether hearsay is reliable, we believe that this determination must always be made against the background of the general concerns expressed by the Supreme Court in *Wright.* Looking at the totality of the circumstances and all of the factors bearing on reliability, the trial court must arrive at the conclusion that cross-examination would be fruitless as to the hearsay testimony in question.

*Id.* at 618 (using the factors set out in *Idaho v. Wright*, 497 U.S. 805, 817-21 (1990)).

340. *Id.* at 619. The court concluded that cross examination of the declarant would have been more valuable than in *Lanam*. The Court noted that:

> In this case, the initial statement was in response to a sexual abuse allegation against her father. ... In this case, unlike *Lanam*, there has not been a consistent repeating of the same story. Additionally, in this case, the ... questions were asked in a suggestive and sometimes leading way. Further, although the judge found that [the declarant] did not have a motive to fabricate, there was little evidence about whether [she] had a motive to fabricate; it seems worth noting that the state bears the burden of proving reliability. The absence of a motive to fabricate standing alone does not mean that a statement is reliable.

Of additional importance, in *Lanam*, the allegations of sexual abuse were more lurid than they were in this case. ... A 3-year old would not be expected to be familiar with [such activities or language] in the absence of abuse. In this case, no allegations have been made in language one would not expect a nine-year-old to know.

*Id.* at 618.
that, based on individualized findings, a testifying witness will not have to face the defendant. In *Maryland v. Craig*\(^{341}\) and *Coy v. Iowa*,\(^{342}\) the Court considered the constitutionality of in-court procedures that allowed a testifying child witness to avoid facing the defendant charged with sexually assaulting the child.

In *Coy*, the Court vacated a conviction that resulted from a trial where a child witness testified from behind a screen because "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."\(^{343}\) The Court hinted that it might make an exception to the face-to-face confrontation clause requirement based on particularized findings and where necessary to further an important public policy.\(^{344}\) The Court concluded that such a showing had not been made in the instant case.\(^{345}\) The *Craig* Court upheld the admissibility of a child's testimony, seen in the courtroom by closed-circuit television, after the trial court determined that the use of the procedure was necessary to prevent psychological harm to the child from testifying in the defendant's presence.\(^{346}\)

In *State v. Conklin*,\(^{347}\) the Minnesota Supreme Court decided a confrontation clause challenge similar to *Coy*. The case specifically considered the circumstances under which a defendant in a child sexual abuse case can be removed from the room during the testimony of the alleged child-abuse victim without violating the defendant's constitutional right to confront the testifying witnesses.\(^{348}\) As authorized by statute, the child witness's testimony was taken and videotaped for use at trial.\(^{349}\) After the vide-

\(^{342}\) 487 U.S. 1012 (1988).
\(^{343}\) Id. at 1016 (Marshall, J., dissenting) (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749-50 (1987)). With respect to the use of the screen, the Court indicated that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.* at 1020. In reaching its conclusion the Court observed: "[F]ace to face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." *Id.*
\(^{344}\) *Id.* at 1021.
\(^{345}\) *Id.* at 1020-21.
\(^{346}\) *Maryland v. Craig*, 497 U.S. 836, 836 (1990). The Court expressly confirmed *Coy* in finding that the right of confrontation will only yield to an individualized showing that the defendant's presence during testimony causes the child witness trauma. *Id.* (citing *Coy*, 487 U.S. at 1019-20, 1025-32).
\(^{347}\) 444 N.W.2d 268 (Minn. 1989).
\(^{348}\) *Id.* at 269.
\(^{349}\) *MINN. STAT.* § 595.02, subd. 4(c) (1992). The statute provides:
otaping was commenced, the court granted the state’s motion to remove the defendant from the room and the defendant viewed the remainder of the testimony through a one-way video monitor located in another room.\(^{350}\)

Adopting \textit{Coy}, the Minnesota Supreme Court concluded that the Minnesota statute for child witness protection was constitutional on its face because it required an individualized finding that the defendant’s presence during testimony would psychologically traumatize the witness.\(^{351}\) However, the court found that the defendant’s right to actual face-to-face confrontation under both the Minnesota and Federal Constitutions was violated.\(^{352}\) The trial court had failed to properly apply \textit{Coy} and determine, prior to removing the defendant, that the defendant’s presence caused the testifying child witness psychological trauma.\(^{353}\) The \textit{Conklin} court held that the violation of the de-

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The court shall permit the defendant in a criminal or delinquency matter to observe and hear the testimony of the child in person. If the court, upon its own motion or the motion of any party, finds in a hearing conducted outside the presence of the jury, that the presence of the defendant during testimony taken pursuant to this subdivision would psychologically traumatize the witness so as to render the witness unavailable to testify, the court may order that the testimony be taken in a manner that:

- (1) the defendant can see and hear the testimony of the child in person and communicate with counsel, but the child cannot see or hear the defendant; or
- (2) the defendant can see and hear the testimony of the child by video or television monitor from a separate room and communicate with counsel, but the child cannot see or hear the defendant.
\end{quote}

\textit{Id.}\(^{350}\). \textit{Conklin}, 444 N.W.2d at 270.

\(351.\) \textit{Id.} at 272-73. The Court observed that \textit{Minn. Stat.} § 595.02, subd. 4(c) (1988) established a permissible exception to the face-to-face confrontation clause requirement because it furthered the important public policy of protecting child witnesses under 10 years of age based on an individualized finding of necessity. \textit{Conklin}, 444 N.W.2d at 272.

\(352.\) \textit{Conklin}, 444 N.W.2d at 274.

\(353.\) \textit{Id.} The Minnesota Supreme Court indicated that:

\begin{quote}
[1] In every case it must be established by specific evidence that the particular witness is or would be psychologically traumatized and that traumatization is substantially caused by the presence of the defendant rather than by other reasons. The evidence of psychological traumatization "must show more than mere nervousness or excitement or some reluctance to testify."
\end{quote}

\textit{Id.} (quoting Craig v. State, 560 A.2d 1120, 1129 (Md. 1989)).

The court found the absence of such a finding in this case troubling because the child had testified that she was not afraid of the defendant. \textit{Id.} The court also found it persuasive that other state courts, in addition to \textit{Craig}, have applied \textit{Coy} in the same manner. \textit{Id.} (citing State v. Vincent, 768 P.2d 150, 160-61 (Ariz. 1989); People v. Thomas, 770 P.2d 1324, 1328 (Colo. Ct. App. 1988) \textit{cert. granted} (Colo. 1989); State v. Eastham, 530 N.E.2d 409, 412 (Ohio 1988)).

Indeed, numerous additional state court decisions have adopted the \textit{Coy} requirement that actual face-to-face confrontation yield only to case-specific evidence establish-
fendant's right of confrontation was not harmless error. The supreme court gave no indication that a separate confrontation clause analysis was required under the Minnesota Constitution.

VIII. CONCLUSION

The Minnesota judiciary, like its counterparts in other states, has recognized and availed itself of the power it has to shape constitutional law in directions away from national norms. This recognition, however, is counterbalanced by a reluctance to break from familiar federal constitutional standards, especially the standards that are well-written and persuasive.

In examining six rights to the criminally accused protected under the Minnesota constitution, which are nearly identical to rights provided under the United States Constitution, no clear pattern emerges on the extent to which Minnesota courts are willing to interpret the state constitution more broadly. What is clear, however, is that the Minnesota Constitution will continue to be an important source of individual rights for litigants in the years to come.

Subsequent to Conklin, the Minnesota Court of Appeals decided a similar case in State v. Ross, 451 N.W.2d 231 (Minn. Ct. App. 1990), cert. denied, 498 U.S. 837 (1990). The court upheld use of a two-way video procedure under MINN. STAT. § 595.02, subd. 4 to obtain the child witness' testimony. The court indicated that "[t]he confrontation clause and the statute itself require a 'particularized finding' that a procedure shielding the child from face-to-face confrontation is necessary to prevent traumatization." Ross, 451 N.W.2d at 235 (citing Conklin, 444 N.W.2d at 272; Coy v. Iowa, 487 U.S. 1012, 1021 (1988)). The court of appeals held that the trial court had made the requisite finding. Id. at 235.

The Minnesota Supreme Court followed Coy to apply the harmless error rule to the violation of the defendant's right of confrontation. Id. The Conklin court found that the state did not prove beyond a reasonable doubt that the removal of the defendant during testimony did not contribute to the conviction. Id. The court rejected speculating about what weight the jury would give to the out-of-court statements of the witness and whether such evidence would have independently resulted in the defendant's conviction. Id.