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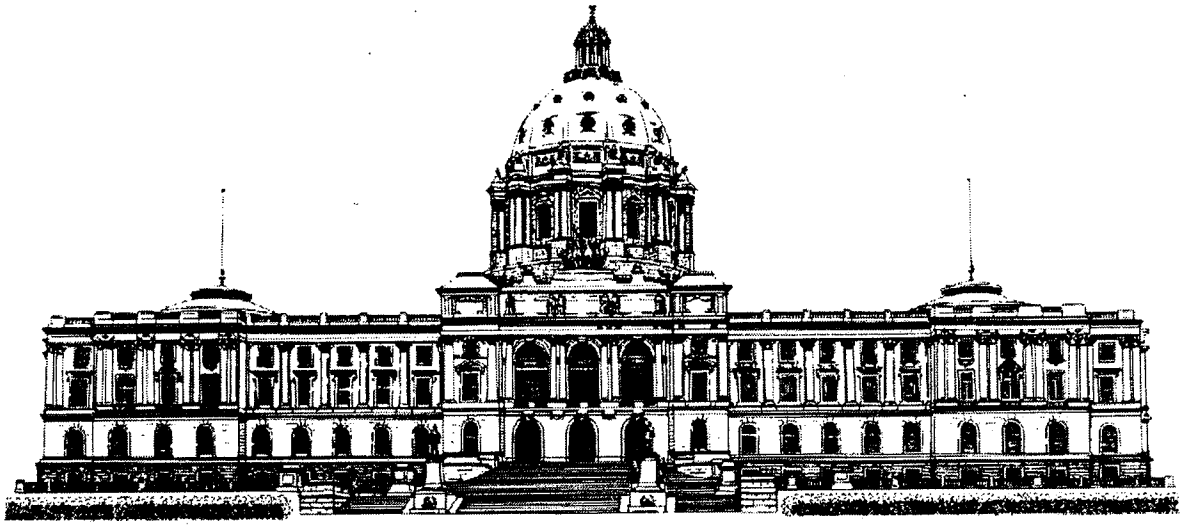
REPORT OF THE

REVISOR OF STATUTES

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS



Submitted to the Legislature of the State of Minnesota
November 2004

700 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155-1297
Phone: (651) 296-2778
Fax: (651) 296-0569
TTY: 1 (800) 627-3529
michele.timmons@revisor.leg.state.mn.us

Office of the Revisor of Statutes
Minnesota Legislature

Michele L. Timmons
REVISOR

November 15, 2004

The Honorable James P. Metzen
President of the Senate
Room 322, Capitol

The Honorable Steve Sviggum
Speaker of the House
Room 463, State Office Building

Dear Mr. President and Mr. Speaker:

Minnesota Statutes, section 3C.04, subdivision 3, requires the Office of the Revisor of Statutes to biennially report to the Legislature on statutory changes recommended or statutory deficiencies noted in opinions of the Supreme Court and Court of Appeals of Minnesota.

I am, therefore, pleased to transmit to you our report on opinions issued by those courts between October 1, 2002, and September 30, 2004.

Sincerely,

Michele L. Timmons
Revisor of Statutes

MLT:bv

cc: The Honorable Dean E. Johnson
Majority Leader of the Senate

The Honorable Erik Paulsen
Majority Leader of the House
of Representatives

The Honorable Dick Day
Minority Leader of the Senate

The Honorable Matt Entenza
Minority Leader of the House
of Represenatives

The Honorable Don Betzold
Chair, Senate Judicial Committee
and Members

The Honorable Steve Smith
Chair, House Civil Law Committee
and Members

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Ron Ray: **Lead Reporter and Coordinator**

Paul M. Marinac: **Editorial Review**

Kathleen Jents: **Production Coordinator**

Case Review:
Sandra Glass-Sirany
Craig Gustafson
Jeffrey S. Kase
Karen Lenertz
Craig E. Lindeke
Cindy K. Maxwell
Janet Rahm
Carla M. Riehle

Production Assistance:
Marilee Davis
Delano DuGarm
Sheila Pedersen
Mary Peterson

Administrative Assistance:
Shannon F. Kratzke
Andy Strom

Printing and Binding:
Dan Olson

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ACTIONS TAKEN

The Minnesota Legislature responded to recent constitutional, ambiguity, and other problems with statutory provisions, which were raised by Minnesota's Court of Appeals or Supreme Court.

In ***Erlandson v. Kiffmeyer***, the Minnesota Supreme Court found constitutional defects with Minnesota Statutes 2002, section 204B.41, relating to replacement absentee election ballots following the death of U.S. Senator Paul Wellstone. The legislature amended the statute in Laws 2004, chapter 293, article 2, section 23.

In ***Fosselman v. Commissioner of Human Services***, the Minnesota Court of Appeals held that Minnesota Statutes 1998, section 245A.04, subdivision 3b, paragraph (e), to the extent that the commissioner's decision was the final administrative agency action on disqualification of certain medical professionals, denied them due process. The legislature authorized a contested case hearing process in Laws 2003, chapter 15, article 1, section 28.

In ***Martin ex rel. Hoff, and State v. City of Rochester***, the Minnesota Supreme Court resolved an ambiguous medical assistance assignment statute, Minnesota Statutes 2000, section 256B.056, subdivision 6, to limit the state's assignment right to only medical care. The legislature amended the statute in Laws 2003, chapter 14, article 2, section 16.

In ***Wells Fargo v. Newton***, the Minnesota Court of Appeals resolved an ambiguous statute, Minnesota Statutes 2000, section 507.02, regarding the spousal signature requirement to convey a homestead and the purchase money mortgage exception to that requirement. The legislature amended the statute in Laws 2004, chapter 234, sections 1 and 2.

In ***Decker v. Brunkow***, the Minnesota Court of Appeals proposed to resolve a conflict in a third-party tortfeasor's right to contribution under former Minnesota Statutes, section 604.02, subdivision 1. The legislature amended the provision in Laws 2003, chapter 71, section 1.

In ***In re The Welfare of C.R.M.***, the Minnesota Supreme Court held that possession of a dangerous weapon on school property was not a strict liability crime but required proof that the offender knew he possessed a knife with a four-inch blade while on school property. The legislature amended the statute in Laws 2003, chapter 28, article 2, section 2, to require the offender to know he or she was on school property.

Minnesota Statutes, sec. 65B.43, subd. 18
Statute of Limitations for Uninsured Motorist Benefits

Miklas v. Parrott
Minnesota Supreme Court
July 29, 2004

The mother, as trustee, of children killed in a vehicle accident brought a claim for uninsured motorist benefits based on wrongful death. The claim was brought after the lapse of three years but within six years of the accident.

The issue before the court was which statute of limitations period applied to this claim: the three-year wrongful death statute of limitations urged by the defendants and insurance company or the six-year contract statute of limitations urged by the appellant trustee.

Minnesota Statutes, section 65B.43, subdivision 18, defines uninsured motorist coverage as "coverage for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles and hit-and-run vehicles." To bring the claim, the trustee must be found to have filed the claim within the required statutory time and be "legally entitled to recover damages" under the statute. The court found the quoted phrase to be ambiguous.

The court found for the trustee by holding that Minnesota Statutes, section 65B.43, subdivision 18, "does not require an insured, who has a wrongful death claim, to comply with the three-year wrongful death limitation period. 'Legally entitled to recover damages' is read to only mean that an insured must establish fault and damages to be entitled to uninsured motorist benefits."

Minnesota Statutes, sec. 168.0422
Unconstitutional Stop of Vehicle With Special Series Plates

State v. Henning
Minnesota Supreme Court
July 31, 2003

Minnesota Statutes, sections 168.041 and 169A.60, authorize the issuance of specially marked license plates, in certain situations following impoundment of the regular plates, that indicate that an owner of the vehicle has been convicted of a DWI-related offense. In December 1995 the Minnesota Court of Appeals issued a decision in *State v.Greyeagle*, 541 N.W.2d 326 (Minn. App. 1995), holding that ". . . a police stop of a . . . vehicle based solely on the fact that {the} vehicle bore special statutorily issued license plates violated appellant's constitutional right to be free from suspicionless searches."

In 1997 the legislature enacted Minnesota Statutes, section 168.0422. That statute reads in pertinent part:

> A peace officer who observes the operation of a motor vehicle within this state bearing special series registration plates . . . may stop the vehicle for the purpose of determining whether the driver is operating the vehicle lawfully under a valid driver's license.

Henning was stopped in a vehicle based solely on the fact that the vehicle was displaying special series plates. The district court held that section 168.0422 is unconstitutional, but the fact of the presence of the plates provided the peace officer with "reasonable and articulable suspicion of criminal activity justifying the stop." The Minnesota Court of Appeals held that " . . . by applying for and displaying special series plates . . . , a party implicitly consents to a vehicle stop based solely on the display of those plates . . . ." and ruled the statute to be constitutional.

Henning appealed, arguing partly that the statute was an unconstitutional "attempt to override the . . . ruling in *State v. Greyeagle* . . . ; violates the Fourth Amendment of the United States Constitution and its counterpart, Article I, Section 10 of the Minnesota Constitution; . . . and cannot form the sole basis for the stop of a motor vehicle."

The court found that the statute "appeared to have been passed in response to the court of appeals' decision in *Greyeagle.*" It stated, "The primary issue is whether the statute is prohibited by the {U.S. and Minnesota Constitutions}."

The court stated, "Generally, an officer stopping a vehicle on the open road in order to check the driver's license is a 'seizure' under the Fourth Amendment. {citation omitted} An officer must have reasonable articulable suspicion of wrongdoing in order to justify such a stop." It rejected the state's argument, essentially an argument of implied consent, that use of the vehicle "carried with it a condition giving the police the statutory authority to stop the vehicles bearing those plates without reasonable articulable suspicion . . . {and} 'destroyed' any

reasonable expectation of privacy he may have had which would allow him to object to the search." The court disagreed and reversed the Court of Appeals, finding that persons other than the offending owner who gave rise to the impoundment of the original plates may be lawfully driving the vehicle and are also subject to the possibility of numerous stops that are not based on an articulable suspicion. Thus, the mere presence of the plates does not, by itself, give rise to an articulable suspicion of wrongdoing.

The court concluded that "Minn. Stat., § 168.0422 is unconstitutional under the Fourth Amendment {of the U.S. Constitution} and Article I, Section 10 of the Minnesota Constitution . . . . We reverse the court of appeals and hereby vacate appellant's convictions . . . . We limit the retroactive application of this ruling to cases pending on the date of this decision in which the constitutionality of this statute has been properly raised in a timely fashion."

Minnesota Statutes, sec. 256B.15, subd. 2
County's Recovery from Estate for Medicaid Costs

In re Estate of Gullberg
Minnesota Court of Appeals
October 29, 2002

Walter and Jean Gullberg purchased a homestead as joint tenants. About nine years later, Walter conveyed his interest to Jean by quitclaim deed. Less than one month later he applied for and was granted medical assistance by the county, which amounted to about $40,000 by the time of his death 15 months later. More than six years later, Jean died leaving an estate consisting of the homestead valued at $119,000. The county filed a claim with the estate for its medical assistance costs, which was denied by the estate's personal representative, the Gullberg's daughter. The county brought suit to recover the costs based on this state's estate recovery statute, Minn. Stat., § 256B.15, subd. 2 (2000), which "defines 'estate' to include any property that was jointly owned at any time during the marriage." The district court held with the personal representative and denied the claim because "federal law limits the definition of 'estate' to property and assets in which the {medical assistance} recipient had legal title at the time of death, {and} federal law preempts Minnesota's . . . statute . . . ." The county appealed and the state intervened.

The court phrased the issue as, "Did the district court err in concluding that Minnesota's estate recovery statute is preempted by federal law, thus disallowing the county's claim in its entirety?"

The federal law requires states to recover the costs of certain medical assistance from a recipient's estate but only after the death of the surviving spouse. United States Code, title 42, section 1396p, subsection (b), paragraph (4), subparagraph (A), allows a state to include in a recipient's estate, " . . . any other real and personal property . . . in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, . . . , or other arrangement."

The court found that even though Walter had conveyed legal title in the homestead, he had ". . . continued to have some legal 'interest' in the homestead because he and Jean Gullberg were still married at the time of his death" and that " . . . the law recognizes that spouses have a common ownership interest in property acquired during . . . {the marriage}, regardless of who holds title." It concluded that the state law was in conflict with the federal law, but only partially, and that the conflict did not require the state law to be preempted entirely.

The court held that the state law " . . . allows claims against a surviving spouse's estate only to the extent of the value of the recipient's interest in marital or jointly owned property at the time of the recipient's death. This construction allows some tracing of assets back through the marriage, but restricts recovery to the value of the recipient's interest in those assets at the time of the recipient's death." The court remanded the case "to determine and reevaluate Walter

Gullberg's interest in the homestead at the time of his death. The county's claim is limited to recovering only to the extent of that interest."

Minnesota Statutes, sec. 260B.130, subd. 5
Unconstitutional Denial of Jail Credit for Juveniles

State v. Garcia
Minnesota Court of Appeals
July 15, 2004

Appellant Garcia, after negotiating a plea agreement, pleaded guilty to aggravated robbery, was designated and adjudicated as an extended jurisdiction juvenile (EJJ), and was sentenced as an adult to 58 months in prison. The adult sentence was stayed, he was placed on juvenile probation, and required to complete a residential treatment program. Within one month of completing the treatment program, Garcia violated his probation and was required to complete a residential juvenile corrections program at the Minnesota Correctional Facility at Red Wing (MCF-Red Wing). Within one year after completing the corrections program, he was arrested and charged with violating his probation and seven new felonies. The court vacated the stay of execution and imposed the adult sentence of 58 months, except that it granted credit for the time he spent in jail awaiting decision on the EJJ matter. The court declined credit for the time spent at MCF-Red Wing. Garcia appealed. The Court of Appeals affirmed on the grounds that Minnesota Statutes 2002, section 260B.130, subdivision 5, as amended in 2000, precluded credit.

That statute reads in pertinent part:

> Subd. 5. {EXECUTION OF ADULT SENTENCE.} . . . .{If} the court finds that reasons exist to revoke the stay of execution of sentence, the court shall treat the offender as an adult and order any of the adult sanctions authorized by section 609.14, subdivision 3, except that no credit shall be given for time served in juvenile facility custody prior to a summary hearing . . . . Upon revocation, the offender's extended jurisdiction status is terminated and juvenile court jurisdiction is terminated. The ongoing jurisdiction for any adult sanction, other than commitment to the commissioner of corrections, is with the adult court.

Among other arguments, Garcia argued that the subdivision was unconstitutional as a violation of the equal protection clause of the Minnesota Constitution because it has no rational basis for denying credit for EJJs while allowing credit to juveniles certified as adults. The court found the two groups of juveniles to be "similarly situated," that "to punish . . . EJJs more severely than juveniles certified as adults" for similar conduct to be not rational, and that the argued distinctions separating them are "manifestly arbitrary and fanciful and not genuine and substantial." The court further found that "there is no evident connection between the distinctive needs peculiar to EJJs as compared to certified juveniles and the prescribed remedy."

The court held that "section 260B.135, subdivision 5, fails the Minnesota rational basis test because there is no 'reasonable connection between the actual, and not just the theoretical,

effect of the challenged classification and the statutory goals.' Consequently, Garcia is entitled to receive jail credit for the time he served at MCF-Red Wing."

Minnesota Statutes, secs. 273.11, subd. 1a
Property Tax Equalization Relief

Harris v. County of Hennepin
Minnesota Supreme Court
May 27, 2004

The taxpayer, Harris, qualified for property tax relief under the equalization relief provision of Minnesota Statutes, section 278.05, subdivision 4, and the limited market value provision of Minnesota Statutes, section 273.11, subdivision 1a. The equalization relief provision was ". . . . designed to alleviate the impact of unequal assessment among similarly situated, comparable properties . . . ." The limited market value provision was ". . . designed to alleviate the impact of rapidly increasing market" . . . by placing a cap ". . . on the rate at which a taxpayer's property tax assessment can increase from one year to the next." Both parties agreed that Harris is entitled to relief from either or both; the issue involves ". . . in what order the two types of property tax relief are to be applied." The tax owed by Harris depended on which relief was first applied. The tax court concluded that equalization relief was based on the property's limited market value. The county appealed.

Minnesota Statutes, section 273.11, subdivision 1a, reads in pertinent part:

> Subd. 1a. {LIMITED MARKET VALUE.}
> . . . .
> For purposes of the assessment/sales ratio study . . ., and the computation of state aids . . ., market value and net tax capacities determined under this subdivision . . ., shall be used.

Harris argued ". . . the legislature intended to employ limited market values in both assessment/sales ratio studies and state aid calculations." The court stated that the provision ". . . does not clearly and unambiguously lead us to conclude that limited market values are the basis for equalization proceedings." The court felt that an equally plausible interpretation was that the legislature could have intended that limited market values would be used for an assessment/sales ratio study ". . . as it relates to the computation of state aids." The latter interpretation would allow use of limited market values for only the state aids calculation.

After considering and discussing applicable canons of construction, the history and constitutional underpinnings of equalization relief, the effect of applying one provision before another, and the purposes of equalization, the court held ". . . when a taxpayer qualifies for both equalization relief under Minn. Stat., § 278.05, subd. 4, and limited market value relief under Minn. Stat., § 273.11, subd. 1a, the taxpayer's equalization reduction must first be applied to the property's actual market value before its limited market value is determined." Reversed.

Minnesota Statutes, sec. 317A.241, subd. 1

Nonprofit Corporation's Authority to Appoint
Special Litigation Committee

Janssen v. Best & Flanagan

Minnesota Supreme Court
May 22, 2003

Janssen is a member of a nonprofit corporation that administers a pension plan, the Minneapolis Police Relief Association (MPRA), which made a bad investment in a company that 2lost the MPRA about $15,000,000. Janssen and others brought a derivative suit on behalf of MPRA alleging malpractice by Best & Flanagan regarding the investment. Janssen did not enjoy an attorney-client relationship with Best & Flanagan so the suit required MPRA to join as a plaintiff. MPRA appointed a special counsel to investigate and determine whether to join in the suit. The special counsel recommended that MPRA not join in the lawsuit. MPRA brought a motion to dismiss the suit "under the principle of law that the court should defer to the business judgment of {special counsel}, MPRA's special litigation committee."

Along with other issues, MPRA and Janssen disagreed on the authority of MPRA to appoint a special litigation committee, which in this case consisted of the special counsel. The court framed the issue as, "whether the Minnesota Nonprofit Corporations Act prohibits a nonprofit corporation's board of directors from establishing an independent committee with authority to make decisions about derivative lawsuits . . . ." Minnesota Statutes, section 317A.241, subdivision 1, reads:

> Subdivision 1. {GENERALLY.} A resolution approved by the affirmative vote of a majority of the board may establish committees having the authority of the board in the management of the business of the corporation to the extent provided in the resolution. Committees are subject at all times to the direction and control of the board.

The court found the statute to be ambiguous as subject to two reasonable interpretations: as interpreted by MPRA, "subject at all times to the direction and control of the board" only applies to the possibility, not the necessity, of board control or, as interpreted by Janssen, the phrase denies a committee sufficient independence to profit from the deference afforded the committee by a court under the business judgment rule. The court examined contemporaneous legislative history and compared the Nonprofit Corporations Act with the Business Corporation Act and found that insufficient legislative intent could be discerned from those factors. The court based its decision on considerations of the consequences of a particular interpretation, particularly:

(1) the burden on the court system;
(2) the similar characteristics of nonprofit corporations and for-profit corporations to justify similar treatment;

(3) the common law tradition; and
(4) the existence of a corporation's incidental powers.

The court held, " . . . the Minnesota Nonprofit Corporations Act does not prohibit corporations from appointing independent committees with the authority to decide whether the corporation should join a member's derivative suit."

Minnesota Statutes, sec. 487.08, subd. 5
Unconstitutional Jurisdiction of Judicial Officer

State v. Harris
Minnesota Supreme Court
August 21, 2003

Defendant Harris was convicted of two counts of murder following a district court trial presided over by a judicial officer appointed by the chief judge of the district under the authority of Minnesota Statutes, section 487.08, subdivision 5, which reads in pertinent part:

> Subd. 5. {SUBJECT TO CHIEF JUDGE'S AUTHORITY.} All judicial officers are subject to the administrative authority and assignment power of the chief judge of the district as provided in section 484.69, subdivision 3. They shall be learned in the law, and shall hear and try matters as assigned to them by the chief judge.
>
> . . . .

No objections to the judicial officer presiding over the trial were raised during the trial or during sentencing. Harris appealed, arguing that the judicial officer did not have jurisdiction to hear and try his case and that assignment of a judicial officer to a felony-level trial was unconstitutional as violating article VI, section 1, of the Minnesota Constitution, which reads:

> Section 1. The judicial power of the state is vested in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish.

The court considered the history of judicial officers who were authorized for and appointed by county courts beginning in 1971, ostensibly to continue some of the limited judicial work done by the municipal courts who were mostly abolished that year in favor of county courts. The position was later abolished but personnel occupying those positions and the positions in certain counties, including St. Louis County in which Harris was tried, were "grandfathered" in. At some later time, some judicial officers began to be appointed to preside over felony-level cases and other district court-level matters.

The court stated that its first question to be determined was, "Did the legislature intend to grant authority in the chief judge of a judicial district to assign any district court matter to a judicial officer?" After reviewing the pertinent statutory language and the fact that by 1980 the legislature was aware of the fact that judicial officers were being used as "the functional equivalent of judges," the court concluded that the legislature did intend to grant this authority.

The court framed the critical issue as "Does granting authority to the chief judge of a district to assign any district court matter to a judicial officer, including a felony jury trial, violate the Minnesota Constitution?"

The court examined the legislature's constitutional authority to establish additional courts and found that it could establish courts (1) in the constitution's original language, only below the level of the Supreme Court, and (2) after the constitution was amended in 1956 and later, only below the level of the district court. The court likened the level of the inferior court to the level of a judicial officer and stated: "If an inferior court is one that has limited and specified rather than general jurisdiction, then it naturally follows that for a judicial officer to remain inferior to the district court under article VI, the judicial officer must have limited and specified jurisdiction. In other words, the judicial officer must be a person having limited rather than general jurisdiction." However, the judicial officer "presided over this entire felony trial and was utilized as the functional equivalent of a district court judge."

The court noted that the judicial officer in this case was neither elected nor appointed by the governor as required by article VI, sections 7 and 8, and did not enjoy the salary protection of article VI, section 5, so "Therefore . . . met none of the requirements and received none of the protections of a district judge."

The court held, ". . . the legislative grant of authority to the chief judge of a judicial district to assign any district court matter to a judicial officer pursuant to Minn. Stat., § 487.08, subd. 5, violates Article VI, Section 1 of the Minnesota Constitution, because the grant of authority runs afoul of the constitutional mandate that judicial officers be inferior in jurisdiction to the district court."

Minnesota Statutes, sec. 609.035, subd. 2, para. (f)

12-Person Jury for Felony-level Sentence

State v. Blooflat

Minnesota Court of Appeals

November 18, 2003

Blooflat was convicted of driving a vehicle after his driver's license was canceled and four counts of driving while impaired, each offense a gross misdemeanor, under circumstances subjecting Blooflat to consecutive sentences exceeding one year under Minnesota Statutes (1999 Supplement), section 609.035, subdivision 2, paragraph (g) (now paragraph (f)). That paragraph states in pertinent part ". . . the court shall sentence the offender to serve consecutive sentences for the offenses, notwithstanding the fact that the offenses arose out of the same course of conduct." Blooflat was denied a 12-person jury and was convicted by a six-person jury on all counts. He appealed.

After finding that driving after cancellation is not a lesser included offense of driving while impaired, the court considered the issue of whether paragraph (g) (now (f)) is . . . "unconstitutional because it subjects non-felony defendants to felony-like sentences, while only providing six-person juries?"

Minnesota Constitution, article 1, section 6, entitles a person accused of committing a felony to a trial before a 12-member jury.

The court found a previous case authoritative, *State v. Baker,* 590 N.W.2d 636 (Minn.1999), in which the Minnesota Supreme Court struck down the laws enacted to establish a level of crime called enhanced gross misdemeanors allowing six-member juries to impose confinement sentences for more than one year. The court in *Baker* found that these laws deprived a defendant subject to a felony-level sentence of the right to trial before a 12-person jury. *Baker* determined that felonies had historically been defined as any crime for which the accused may be imprisoned for more than one year. Regarding Blooflat, the court said: "By mandating consecutive sentences, the legislature effectively created two-year sentences for a single behavioral incident while continuing to label the crimes gross misdemeanors, so as to deny defendants their constitutional right to a 12-person jury. This, as *Baker* notes, is expressly forbidden."

The court held, ". . . the legislature overstepped its constitutional authority in enacting . . . subd. 2(g)." It stated further, ". . . we conclude . . . subd. 2(g) (Supp.1999) is unconstitutional because, by mandating consecutive sentences, it deprives defendants facing more than one year incarceration of their constitutional right to a 12-person jury."

Minnesota Statutes, sec. 609.375, subd. 2b

Prosecution Prerequisite for Failure to Pay Child Support

State v. Nelson

Minnesota Court of Appeals
November 18, 2003

The state charged Nelson with five counts of felony nonsupport of a child for continuing nonsupport violations for five different periods of time. Each period exceeded 180 days, in violation of Minnesota Statutes, section 609.375, subdivision 2a, with the last period being July 1, 2001, through January 24, 2002. Minnesota Statutes, section 609.375, subdivision 2b, became effective August 1, 2001. That subdivision reads:

> Subd. 2b. {ATTEMPT TO OBTAIN CONTEMPT ORDER AS PREREQUISITE TO PROSECUTION.} A person may not be charged with violating this section unless there has been an attempt to obtain a court order holding the person in contempt for failing to pay support or maintenance under chapter 518. This requirement is satisfied by a showing that reasonable attempts have been made at service of the order.

Although the state had obtained at least two contempt orders against Nelson before filing the criminal complaint, it had not attempted to obtain a contempt order for each of the 180-day periods. The district court ruled against Nelson's motion to dismiss reasoning that "the statute did not contain a time limitation . . . to obtain a court order, and . . . sufficient probable cause existed because the attempt {to obtain a court order} requirement had been satisfied by previous contempt orders." The district court eventually found Nelson guilty on all five counts and Nelson appealed.

The court affirmed the convictions for the four counts for violations occurring during the 180-day periods before the effective date of section 609.375, subdivision 2b. With regard to the last count, the court framed the issue, "as a prerequisite to prosecution . . . from criminal nonsupport . . ., does Minn. Stat., § 609.375, subd. 2b (2002) require that the state attempt to obtain a contempt order for failure to pay support during the same time period specified in the criminal complaint?"

The court agreed with the state that subdivision 2b did not expressly require the prosecution to obtain a court order for contempt during the same 180-day period of continuing nonsupport violations but "we conclude that, read in context, the subdivision reasonably could require this consistency and therefore is ambiguous."

The court noted the relationship of section 609.375 with the civil contempt proceedings of chapter 518, the marriage dissolution chapter, and concluded that the provision, "could reasonably be interpreted as requiring that the contempt-order attempt embrace the same time period of nonpayment of child support as the criminal complaint." The court also felt that since the felony nonsupport provision may be violated with continuing violations over a specific time

period, 180 days, and that the civil contempt provisions are time specific, subdivision 2b could reasonably be interpreted as having a time-specific requirement. Finally, the court examined legislative history to conclude that compliance with child-support orders takes precedence over prosecution.

The court held, ". . . Minn. Stat., § 609.375, subd. 2b, requires the state, as a prerequisite to prosecution, to attempt to obtain a contempt order for failure to pay child support during the time period specified in the complaint." Nelson's conviction on the fifth count was reversed.

Minnesota Statutes, sec. 611.17, subd. 1, para. (c)
Indigent Defendant's Right to Counsel

State v. Tennin
Minnesota Supreme Court
February 12, 2004

Tennin was charged with prostitution; was found to be indigent and eligible for public defender assistance; paid the $50 co-payment for this assistance as required by Minnesota Statutes, section 611.17, subdivision 1, paragraph (c), as amended in 2003; received public defender assistance; and challenged the constitutionality of the statute as violating her right to counsel.

The court found that the 2003 amendment to the public defender assistance co-payment provision "(1) . . . created a co-payment obligation upon appointment of the public defender rather than at disposition of the case; (2) deleted the express language establishing a judicial waiver of the co-payment; and (3) increased the amount of the co-payment." The court also noted that the amendment provided that "Collection of the co-payment may be made through the . . . Revenue Recapture Act."

The court analyzed the U. S. Supreme Court's decision in an Oregon case, *Fuller v. Oregon*, 417 U.S. 40 (1974), which stated that "The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the cost of these services does not impair the defendant's right to counsel." *Fuller*, 417 U.S. at 53. However, the court framed the issue as ". . . does Minn. Stat., § 611.17, subd. 1(c) . . . exempt persons who remain indigent or for whom repayment of the co-payment would work a manifest hardship?" It stated that two components of the federal court's analysis of the Oregon co-payment statute were "relevant to our analysis: (1) the Oregon statute's express language that a court could not order a defendant to pay legal expenses unless the defendant is or will be able to pay them, or if hardship would result if repayment was ordered; and (2) the Oregon statute's provision for a defendant to petition the court at any time for remission of the payment costs, which the court may grant if payment 'will impose manifest hardship on the defendant or his immediate family.'" The court stated that the Oregon statute was applicable to those indigent defendants who later became able to pay for the legal representation and, thus, those persons were not denied their right to counsel. In further comparing the co-payment statutes, the court concluded that Minnesota's provision did not provide, either expressly or impliedly, for a judicial waiver of the co-payment but that the legislature intended that the co-payment be collected through the Revenue Recapture Act and other means, that insufficient protection existed "against imposing co-payments on defendants who remain indigent and those for whom repayment would cause a manifest hardship, and that the provision was not ambiguous and did not provide room for other, discretionary construction."

The court held, ". . . Minn. Stat., § 611.17, subd. 1(c) (Supp. 2003) is unconstitutional" and " . . . , as amended, violates the right to counsel under the United States and Minnesota Constitutions."

STATE OF MINNESOTA

IN SUPREME COURT

C4-02-2021

Court of Appeals

Meyer, J.
Concurring specially, Anderson, Paul H., J.
Dissenting, Gilbert, J. and Anderson, Russell A., J.

Patricia E. Miklas, as trustee for the
Next-of-Kin of Kathleen Rose Fields
and Daniel Joseph Fields, Deceased,

Appellant,

Filed: July 29, 2004
Office of Appellate Courts

Stephen Travis Parrott, et al.,

Defendants,

Illinois Farmers Insurance Company,

Respondent.

S Y L L A B U S

A claim for uninsured motorist benefits based on wrongful death must be commenced within the six-year contract statute of limitations.

Reversed and remanded.

Heard, considered, and decided by the court en banc.

O P I N I O N

MEYER, Justice.

The issue before this court is whether a claim for uninsured motorist benefits based on wrongful death must be commenced within the three-year wrongful death statute of limitations or the six-year contract statute of limitations. We are asked to construe the meaning of Minn.

Stat. § 65B.43, subd. 18 (2002) requiring an insured in a claim for uninsured motorist benefits to establish that she is "legally entitled to recover damages" for the harm caused by the tortfeasor. We conclude that the six-year contract statute of limitations applies generally to uninsured motorist claims and that in a claim based on wrongful death, an insured need not comply with the three-year wrongful death statute of limitations in order to recover uninsured motorist benefits.

The relevant facts are not in dispute. On May 29, 1997, Kathleen Rose Fields and Daniel Joseph Fields were killed in a car accident and neither the owner nor the driver was insured. Kathleen and Daniel Fields were insured under an auto insurance policy issued to their brother by Illinois Farmers Insurance Company with uninsured motorist benefits of $30,000/$60,000.[1]

On January 25, 1999, Kathleen and Daniel Fields's mother Patricia Miklas served the uninsured owner, the uninsured driver, and Illinois Farmers with a complaint alleging alternative claims for wrongful death and uninsured motorist benefits. The complaint asserted that Miklas had been appointed trustee for Kathleen and Daniel Fields on September 29, 1997.[2] Miklas had not, in fact, been appointed as trustee for either Kathleen or Daniel Fields.

In May of 2001, Illinois Farmers and Miklas negotiated a policy limits settlement on the claim for Kathleen Fields's death. Miklas petitioned the district court to approve the settlement and a hearing was held on January 17, 2002, at which time it was discovered that Miklas had not been appointed trustee for either Kathleen or Daniel Fields. The court appointed Miklas as trustee, approved the settlement, and later issued a written order to that effect.

Illinois Farmers did not attend the hearing because it believed the hearing to be a routine approval of a wrongful death settlement. Upon learning that it had settled the wrongful death claim before Miklas had been appointed trustee, Illinois Farmers moved to vacate the settlement and dismiss the remaining claims. Illinois Farmers argued that the three-year statute of limitations for a wrongful death action applied, and that the failure to appoint a trustee within three years left the court without jurisdiction to appoint Miklas as the trustee.[3] The district court did not vacate the settlement in the Kathleen Fields matter, citing the policy favoring settlement of claims without litigation, but it did dismiss the remainder of Miklas's claims with prejudice. Illinois Farmers and Miklas each appealed the rulings adverse to them.

The court of appeals determined that the district court abused its discretion in approving the Kathleen Fields settlement because a trustee had not been appointed for Fields's heirs and next-of-kin within three years of the date of Fields's death and, therefore, the claim was a nullity. *Miklas v. Parrott*, 663 N.W.2d 583, 587 (Minn. App. 2003). The court of appeals affirmed the dismissal of Miklas's remaining claims. *Id.* at 588. Miklas petitioned this court for review.

As an initial matter we must clarify whether the tort or contract statute of limitations applies generally to uninsured motorist claims. At oral argument, neither party asserted that the six-year tort not the six-year contract statute of limitations applies. This court has yet to clearly enunciate whether the contract or tort limitation period applies to uninsured motorist claims. However, we have applied the contract statute of limitations to underinsured motorist claims. *See Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11, 13 (Minn. 1994), *overruled in*

part by Oanes v. Allstate Ins. Co., 617 N.W.2d 401, 406 (Minn. 2000); *O'Neill v. Illinois Farmers Ins. Co.*, 381 N.W.2d 439, 440 (Minn. 1986), *overruled in part by Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000).[4] We see no reason to apply a different rule to uninsured motorist claims.[5] Therefore, we hold that the contract statute of limitations applies generally to uninsured motorist claims.

The central issue in this case is whether the statutory definition of uninsured motorist coverage that limits coverage to those "legally entitled to recover damages" should be read to mean that in wrongful death cases the trustee must comply with the three-year statute of limitations for bringing a wrongful death action under Minn. Stat. § 573.02, subd. 3 (2002). Illinois Farmers contends that once the three-year wrongful death limitation period expires, the insured no longer has a cause of action against the tortfeasor and thus the insured is no longer "legally entitled to recover damages" for the damages inflicted by the tortfeasor. Miklas asserts that in order to be "legally entitled to recover damages" a plaintiff need only establish fault and damages on the part of the tortfeasor, and that the wrongful death limitation period is inapplicable.

Neither the legislature nor this court has defined the meaning of the phrase "legally entitled to recover damages." *See Milwaukee Mut. Ins. Co. v. Currier*, 310 Minn. 81, 86-87, 245 N.W.2d 248, 251 (1976) (noting that the term "legally entitled to recover damages" is ambiguous). The phrase "legally entitled to recover damages" is ambiguous because it can be interpreted in at least two different manners. One interpretation of the phrase is that an insured must be able to proceed with the underlying tort action in order to be "legally entitled to recover damages." In other words, if the statute of limitations has run on the underlying tort action, the uninsured motorist claim is barred. *See, e.g., Brown v. Lumbermens Mut. Cas. Co.*, 204 S.E.2d 829, 832 (N.C. 1974). However, the "majority of courts dealing with the situation in which the statute of limitations for bringing an action against the uninsured motorist has run have held that the 'legally entitled to recover' requirement means simply that the insured must establish fault and damages." 2 Irvin E. Schermer & William J. Schermer, *Auto Liability Ins. 3d* § 37:1[4] (1995 & Supp. 2003); *see also Sahloff v. W. Cas. & Sur. Co.*, 171 N.W.2d 914, 917 (Wis. 1969)(asserting that the phrase "legally entitled to recover" "was only used to keep the fault principle as a basis for recovery against the insurer"); 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Coverage* § 7.6 (2d ed. 2001) (noting that "legally entitled to recover" is at best an ambiguous articulation of the notion that an insured's right to recover from an insurer should be limited by the tort statute of limitations).

In interpreting this ambiguous phrase, we must bear in mind that the no-fault act is remedial in nature. *Dahle v. Aetna Cas. & Sur. Ins. Co.*, 352 N.W.2d 397, 401 (Minn. 1984). "[R]emedial statutes must be liberally construed for the purpose of accomplishing their objects." *State v. Indus. Tool & Die Works*, 220 Minn. 591, 604, 21 N.W.2d 31, 38 (1945). One of the objects of Minnesota's no-fault insurance law is to "relieve the severe economic distress of uncompensated victims of automobile accidents." Minn. Stat. § 65B.42(1) (2002); *see also Dairyland Ins. Co. v. Starkey*, 535 N.W.2d 363, 365 (Minn. 1995). Therefore, we must liberally construe "legally entitled to recover damages" to the extent necessary to ensure that the severe economic distress of uncompensated accident victims is alleviated.

Illinois Farmers argues that because uninsured motorist coverage is intended to give an insured the same remedy that would have been available if the tortfeasor had been insured, this court should hold that in order to be legally entitled to recover damages, Miklas must comply with the wrongful death limitation period. We do not interpret "legally entitled to recover damages" so narrowly. Blind application of the rule that an insurer steps into the shoes of the tortfeasor "disregards the very real distinctions between the insured/insurer relationship and the plaintiff/tortfeasor relationship. Most noticeably, no contract exists between a plaintiff and his or her tortfeasor compelling payment of damages." *Safeco Ins. Co. v. Barcom*, 773 P.2d 56, 59 (Wash. 1989). In other words, uninsured motorist claims are claims based on contract with the insured's insurance company. *Beaudry*, 518 N.W.2d at 13.

An uninsured motorist lawsuit is a contract cause of action. Yet tort law is relevant in that the plaintiff must demonstrate fault and damages in order to claim benefits. *McIntosh v. State Farm Mut. Auto. Ins. Co.*, 488 N.W.2d 476, 479 (Minn. 1992). But in *McIntosh* this court did not state that uninsured motorist claims must satisfy all aspects of tort law. Instead, we simply held that whether an injury is caused by a negligent or intentional act is determined under principles of tort law and the perspective of the tortfeasor. *Id.*

The dissent suggests that we treat this as a "case-within-a-case" and require Miklas to show that she has a viable underlying claim much like we require a legal malpractice plaintiff to demonstrate that she would have been successful on her underlying claim. Our jurisprudence does not support this approach.[6] In order to prevail on an uninsured motorist claim an insured need not prove he or she can actually recover from the insured. Indeed, in the case of a hit-and-run accident an insured need not prove the identity of the tortfeasor, that he or she has located the tortfeasor, or that he or she is able to serve the tortfeasor with a summons and complaint in order to be "legally entitled to recover damages." *See* Minn. Stat. § 65B.43, subd. 18 (2002) (extending uninsured motorist coverage to those "who are legally entitled to recover damages for bodily injury from owners or operators of * * * hit-and-run motor vehicles"); *Halseth v. State Farm Mut. Auto. Ins. Co.*, 268 N.W.2d 730, 733 (Minn. 1978) (defining hit-and-run as an accident causing damages where the driver flees the scene).

In the final analysis, our decision is driven by the remedial purpose of Minnesota's no-fault insurance statutes and the fact that the legislature did not clearly state that for uninsured motorist coverage, an insured is legally entitled to recover on a wrongful death claim only if the three-year wrongful death statute could still be satisfied. We hold that "legally entitled to recover damages" under Minn. Stat. § 65B.43, subd. 18, does not require an insured, who has a wrongful death claim, to comply with the three-year wrongful death limitation period. "Legally entitled to recover damages" is read to only mean that an insured must establish fault and damages to be entitled to uninsured motorist benefits. Therefore, the district court had the authority to appoint Miklas as trustee for her deceased children with regard to the uninsured motorist claims, the settlement between Miklas, as trustee, and Illinois Farmers is enforceable, and the court erred in dismissing Miklas's remaining claims.

Reversed and remanded.

SPECIAL CONCURRENCE

ANDERSON, Paul H., Justice (concurring specially).

I agree with the result reached by the majority; however, I concur specially.

DISSENT

GILBERT, Justice (dissenting).

I respectfully dissent. The majority, to reach its conclusion that compliance with the 3-year wrongful death limitation period for the appointment of a trustee is not required to be "legally entitled to recover damages" under Minn. Stat. § 65B.43, subd. 18 (2002), cites to commentary and a case from another jurisdiction that are not about wrongful death—*Sahloff v. W. Cas. & Sur. Co.*, 171 N.W.2d 914, 917 (Wis. 1969); 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Coverage* § 7.7 (2d ed. 2001) (noting that the "particular considerations presented by wrongful death actions are discussed in § 7.8"). In fact, according to Widiss, numerous courts have reasoned that when a state's wrongful death statute establishes a period of limitation, claims against the uninsured motorist underwriter should be subject to the limitation because the claimants were not "legally entitled to recover damages" once the period allowed by the wrongful death statute had passed. 1 Widiss, *Uninsured and Underinsured Motorist Coverage* § 7.8 (2d ed. 2001). The majority also, in reaching its conclusion, cites to cases and commentary that discuss the meaning of the phrase "legally entitled to recover" as it is used in insurance policies rather than a statute—*Milwaukee Mut. Ins. Co. v. Currier*, 310 Minn. 81, 86-87, 245 N.W.2d 248, 250-51 (1976); *Safeco Ins. Co. v. Barcom*, 773 P.2d 56, 58-59 (Wash. 1989); 2 Irvin E. Schermer & William J. Schermer, *Auto Liability Ins. 3d* § 37:1[4] (1995 & Supp. 2003). In so doing, the majority reaches a conclusion that misconstrues the plain meaning of uninsured motorist coverage as defined by Minn. Stat. § 65B.43, subd. 18.

> "Uninsured motorist coverage" means coverage for the protection of persons injured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles.

Minn. Stat. § 65B.43, subd. 18. Although appellant may have 6 years to bring a claim under the uninsured motorist statute, she still has the burden of proving a viable, underlying claim to show she is "legally entitled to recover damages." *Cf. Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 409 (Minn. 1994) (discussing the "case-within-a-case" principle in legal malpractice cases). This she cannot do because a trustee was not appointed within the 3-year time limit of Minn. Stat. § 573.02 (2002). The filing of a wrongful death action without the appointment of a trustee during the statutory filing period is a nullity and the 3-year time limit of Minn. Stat. § 573.02 is an absolute condition precedent to bringing a wrongful death action. *Ortiz v. Gavenda*, 590 N.W.2d 119, 122-23 (Minn. 1999). Further, "[a] cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02." Minn. Stat. § 573.01 (2002). Because a trustee was not appointed within the 3-year

time limit of Minn. Stat. § 573.02, appellant cannot show a viable underlying claim of wrongful death.

The most apposite case on the meaning of the statutory phrase "legally entitled to recover damages" as it applies to the limitation period for a wrongful death action is, I believe, *Bocek v. Inter-Insurance Exch. of Chicago Motor Club*, 369 N.E.2d 1093 (Ind. Ct. App. 1977). In *Bocek*, it was held that, under a statute requiring an uninsured motorist to be "legally entitled to recover damages," plaintiff's legal right to recover for wrongful death was contingent upon filing suit within the limited period for bringing a wrongful death action.[7] *Id.* at 1097-98. Similarly, in cases interpreting the phrase "legally entitled to recover" in an insurance policy, courts in other jurisdictions have held that the right to recover for wrongful death is dependent upon compliance with the limitation period for bringing a wrongful death action. *See Sykes v. Fireman's Fund Ins. Co.*, 269 F. Supp. 229, 230-31 (S.D. Fla. 1967); *Country Mut. Ins. Co. v. Nat'l Bank of Decatur*, 248 N.E.2d 299, 303-04 (Ill. App. Ct. 1969); *Crenshaw v. Great Cent. Ins. Co.*, 527 S.W.2d 1, 4-5 (Mo. Ct. App. 1975); *Brown v. Lumbermens Mutual Casualty Co.*, 204 S.E.2d 829, 834 (N.C. 1974).

Regardless of whether the contract or tort statute of limitations applies to uninsured motorist claims, an uninsured motorist must still be "legally entitled to recover damages." Minn. Stat. § 65B.43, subd. 18. The purpose behind uninsured motorist coverage is to afford the same protection to a person injured by an uninsured motorist as she would have enjoyed if the offending motorist had himself carried liability insurance. *Bocek,* 369 N.E.2d at 1097. Thus, the limitation of being "legally entitled to recover damages" legitimately and reasonably limits a potential cause of action to that which would be recoverable against an offending motorist had that motorist maintained liability coverage. *Id.* Any hardship caused by such a result is no greater than it would be for any person failing to bring a wrongful death action pursuant to the statute. *Id.* at 1098; *cf. Ortiz*, 590 N.W.2d at 125 (Anderson, Paul H., dissenting) (discussing the hardship of the effect of failure to appoint a trustee pursuant to the wrongful death statute).[8] Therefore, I would affirm the court of appeals and hold that appellant is not legally entitled to recover damages because she does not have a viable underlying claim for wrongful death in this case.

ANDERSON, Russell A., Justice (dissenting).

I join in the dissent of Justice Gilbert.

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[1] The insurance policy is not contained in the record.

[2] In an uninsured motorist action where the plaintiff is deceased, the action may only be brought by an individual who has been appointed as a trustee or is the personal representative of the estate. *See* Minn. Stat. § 573.01 (2002).

[3] In a wrongful death action if a trustee is not appointed within three years the cause of action is a "legal nullity." *Regie De L'Assurance Auto. Du Quebec v. Jensen*, 399 N.W.2d 85, 91-92 (Minn. 1987).

[4] The Minnesota Court of Appeals has applied the contract statute of limitations to uninsured motorist claims. *Spira v. Am. Standard Ins. Co.*, 361 N.W.2d 454, 456 (Minn. App.), *rev. denied* (Minn. Mar. 29, 1985).

[5] Other jurisdictions' "[a]ppellate court decisions almost uniformly hold that * * * a claim for uninsured motorist insurance benefits is a contractual right and, therefore, the contract statute of limitations applies." 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Coverage* § 7.7 (2d ed. 2001). The Iowa Supreme Court aptly described the policies behind applying the contract statute of limitations to uninsured motorist claims. *See Lemrick v. Grinnell Mut. Reinsurance Co.*, 263 N.W.2d 714 (Iowa 1978). The Iowa court stated:

> [T]he insured has bought and paid for a contract by an insurer to pay him if he has the misfortune to be injured by a culpable uninsured motorist or hit-and-run driver. If the insured and insurer cannot agree and the insured is compelled to sue the insurer under the uninsured motorist clause, we think in reality the action is bottomed on the policy. To be sure, the circumstances of the uninsured motorist's culpability and of the insured's damages are propositions which the insured must prove in order to recover from the insurer, but these are really conditions of the insurer's contract.

Id. at 717.

[6] Unlike some jurisdictions, we have never required that a plaintiff first establish liability in a tort action against the insured in order to be able to recover uninsured motorist benefits. *See Lawson v. Porter*, 180 S.E.2d 643, 644 (S.C. 1971); *Glover v. Tenn. Farmers Mut. Ins. Co.*, 468 S.W.2d 727, 729-30 (Tenn. 1971). Thus, while we agree with the dissent that in a *wrongful death action* a plaintiff cannot utilize the relation back doctrine to appoint a trustee after the wrongful death limitation period expires, we find no compelling reason to extend that rule to this case. *See Ortiz v. Gavenda*, 590 N.W.2d 119, 123 (Minn. 1999).

[7] In *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789, 793 (1974), the Texas Supreme Court held that a plaintiff's uninsured motorist claim based on wrongful death was not extinguished by the running of the 2-year limitation period for wrongful death actions even though a statute required persons claiming uninsured motorist coverage to be "legally entitled to recover damages." However, *Franco* relied in large part on the fact that the time limit for filing a statutory cause of action for wrongful death under Texas law was merely "procedural" rather than substantive, which stands in stark contrast to our interpretation of the time limits for filing a wrongful death claim under Minnesota law in *Ortiz* and *Regie De L'Assurance Auto. Du Quebec v. Jensen*, 399 N.W.2d 85, 91-92 (Minn. 1987).

[8] I am sympathetic to appellant's argument. I joined the dissent of Justice Paul H. Anderson in *Ortiz*, which discusses the fact that the court ignored the remedial purpose behind the Wrongful Death Act and elevated form over equity in that case. Having decided as we did in *Ortiz*, however, we cannot ignore that a 3-year limitation for appointment of a trustee is a condition precedent before one is "legally entitled to recover damages" in a wrongful death action.

STATE OF MINNESOTA

IN SUPREME COURT

C9-01-1985

Court of Appeals

Gilbert, J.
Dissenting, Meyer, J.
and Blatz, C. J., Hanson, J.

State of Minnesota,

Respondent,

vs.

Filed: July 31, 2003
Office of Appellate Courts

Joel Robert Henning,

Appellant.

SYLLABUS

Minnesota Statutes § 168.0422 (2002), which authorizes stops of motorists based solely on the presence of special series registration plates, is unconstitutional under the Fourth Amendment of the United States Constitution and Article I, Section 10 of the Minnesota Constitution.

The presence of special series registration plates issued pursuant to Minn. Stat. § 168.041, subd. 6 (2002) or Minn. Stat. § 169A.60, subd. 13 (2002), does not amount to reasonable articulable suspicion justifying a stop of a motorist.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

GILBERT, Justice.

This case involves a challenge to an investigative stop made pursuant to Minn. Stat. § 168.0422 (2002). Appellant Joel Robert Henning was charged in Olmsted County with driving after revocation, Minn. Stat. § 171.24, subd. 2 (2002), no driver's license in possession, Minn.

Stat. § 171.08 (2002), and no current proof of insurance, Minn. Stat. § 169.791 (2) (2002).[1] Appellant moved to dismiss the charges for the following reasons: 1) there was no reasonable articulable suspicion to justify the stop of the vehicle, and 2) Minn. Stat. § 168.0422 is unconstitutional. An omnibus hearing was held in Olmsted County District Court; the arresting officer was the only witness to testify. The court issued an omnibus order concluding: 1) Minn. Stat. § 168.0422 is unconstitutional; 2) the fact that the vehicle carried a WZ series plate provided reasonable and articulable suspicion of criminal activity justifying the stop.

Appellant, pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), agreed to stipulate to the facts contained within the police reports and his certified driving record. A bench trial was held on May 11, 2001, in Olmsted County District Court. In an order and memorandum, the court incorporated the ruling from the earlier omnibus hearing concluding that Minn. Stat. § 168.0422 is unconstitutional and the fact that defendant's vehicle carried special WZ series plates provided a reasonable and articulable suspicion of criminal activity justifying a stop. The court found appellant guilty of driving after revocation, Minn. Stat. § 171.24, subd. 2, and no driver's license in possession, Minn. Stat. § 171.08. Appellant appealed to the Minnesota Court of Appeals. The court of appeals held that by applying for and displaying special series plates issued pursuant to Minn. Stat. § 168.041, subd. 6, a party implicitly consents to a vehicle stop based solely on the display of those plates and concluded Minn. Stat. § 168.0422 is constitutional under both the federal and state constitutions. *State v. Henning*, 644 N.W.2d 500 (Minn. App. 2002). We reverse.

On July 12, 2000, at 7:30 p.m., an Olmsted County deputy sheriff, while on patrol in Rochester, Minnesota, noticed a vehicle with special series registration plates with the first two letters WZ. The deputy followed the vehicle, but did not observe any inappropriate driving, recognize the driver, discern any other traffic or other violations, nor did he run a vehicle registration check. The deputy stopped the vehicle being driven by appellant without reasonable suspicion that appellant was involved in any criminal activity. The vehicle was registered to appellant's father. The regularly issued registration plates on that vehicle had been impounded April 2, 2000, on account of appellant's prior DUI conviction. The deputy testified that the only reason appellant was stopped was because his vehicle had special series registration plates issued when the previous plates were impounded because the operator of the vehicle was driving under the influence.

According to the deputy, appellant initially told the deputy that he knew he could be stopped based on the registration plates he had on the vehicle. However, appellant went on to tell the deputy that he had no reason to pull him over. Appellant expressed his belief that to pull him over the deputy needed a reason in addition to the registration plates. There were no indicators that appellant had been consuming alcohol. Appellant did not have a valid driver's license in his possession at the time of the stop because his driver's license had been revoked. Appellant was cited for driving after revocation, Minn. Stat. § 171.24, subd. 2, no driver's license in possession, Minn. Stat. § 171.08 and no current proof of insurance, Minn. Stat. § 169.791 (2).

An omnibus hearing was held and the court issued an order concluding that Minn. Stat. § 168.0422 is unconstitutional, but that the presence of the special series plates provided the

deputy with reasonable articulable suspicion to justify the stop of appellant's vehicle. The parties stipulated to the police reports and appellant's prior record for the purposes of a bench trial. The court convicted appellant of driving after revocation, Minn. Stat. § 171.24, subd. 2 (2002) and no driver's license in possession, Minn. Stat. § 171.08 (2002). It adopted the conclusions from the earlier omnibus hearing that Minn. Stat. § 168.0422 is unconstitutional, but the special series plates provided reasonable articulable suspicion of criminal activity to justify the stop. Appellant was ordered to pay a fine of $300 plus a $35 surcharge and a $5 library fee, with sentence stayed pending appeal. On appeal, the court of appeals held that by applying for and receiving special series plates, a party implicitly consents to police stops for the purpose of determining whether the driver has a valid license, based solely on those registration plates, and that Minn. Stat. § 168.0422 did not violate the state or federal constitutions. *Henning*, 644 N.W.2d at 502-04.

I.

Appellant argues that Minn. Stat. § 168.0422 is an unconstitutional attempt to override the Minnesota Court of Appeals ruling in *State v. Greyeagle*, 541 N.W.2d 326 (Minn. App. 1995); violates the Fourth Amendment of the United States Constitution and its counterpart, Article I, Section 10 of the Minnesota Constitution; unconstitutionally interferes with and chills protected activities; and cannot form the sole basis for the stop of a motor vehicle.

We review the constitutionality of a statute de novo. *State v. Grossman,* 636 N.W.2d 545, 548 (Minn. 2001). "Statutes are presumed constitutional." *Id.* The party challenging the statute must show, beyond a reasonable doubt, that the statute violates the constitution. *Id.*

Minnesota Statutes § 168.0422 provides:

> A peace officer who observes the operation of a motor vehicle within this state bearing special series registration plates issued under section 168.041, subdivision 6, or 169A.60, subdivision 13, may stop the vehicle for the purpose of determining whether the driver is operating the vehicle lawfully under a valid driver's license.

Special plates may be issued under Minn. Stat. § 168.041, subd. 6, in the following circumstances:

> if a member of the violator's household has a valid driver's license, the violator or owner has a limited license issued under section 171.30, or the owner is not the violator and the owner has a valid or limited license or a member of the owner's household has a valid driver's license.[2]

Similar conditions are provided by Minn. Stat. § 169A.60, subd. 13:

> (1)the violator has a qualified licensed driver whom the violator must identify;

(2)the violator or registered owner has a limited license issued under section 171.30;
(3)the registered owner is not the violator and the registered owner has a valid or limited driver's license;
(4)a member of the registered owner's household has a valid driver's license.

The statute at issue here, Minn. Stat. § 168.0422, appears to have been passed in response to the court of appeals' decision in *Greyeagle*. In *Greyeagle,* the court of appeals held that police may not make suspicionless stops of drivers based solely on special series registration plates, where the statute creating the special plates does not provide that the plates are issued under that condition. *Greyeagle,* 541 N.W.2d at 328, 330. The court of appeals also held that where the state produces no evidence that the policy of making suspicionless stops is more effective than the traditional system of stops based on particular suspicion, the routine stops of special series registered vehicles is unconstitutional. *Id.* at 329. Minnesota Statutes § 168.0422 was subsequently passed by the legislature in order to authorize the stops prohibited by the court of appeals ruling in *Greyeagle*. The primary issue is whether the statute is prohibited by the Fourth Amendment or its counterpart, Article I, Section 10 of the Minnesota Constitution. If the statute violates the Fourth Amendment or Article I, Section 10 of the Minnesota Constitution, it cannot stand.

In *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979), the United States Supreme Court held that absent reasonable articulable suspicion, stopping an automobile driver to check whether he is properly licensed is prohibited by the Fourth Amendment. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions * * * .'" *Id.* (citations omitted). "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654.

Generally, an officer stopping a vehicle on the open road in order to check the driver's license is a "seizure" under the Fourth Amendment. *Prouse,* 440 U.S. at 653. An officer must have reasonable articulable suspicion of wrongdoing in order to justify such a stop. *Id.* at 663.

The state argues that by applying for and receiving the special series plates, appellant was aware that his use of that vehicle carried with it a condition giving the police the statutory authority to stop the vehicles bearing those plates without reasonable articulable suspicion. The state argues appellant "destroyed" any reasonable expectation of privacy he may have had which would allow him to object to the search. We disagree.

Here, appellant had a subjective expectation of privacy. He expressed his opinion that the officer needed to have a reason to stop him separate from the mere presence of the special series registration plates. It is not clear from the record that appellant was put on notice that these plates were accepted on the condition that law enforcement may stop the vehicle at any time to check the validity of the driver's license. We decline to imply consent under these facts.

The special series registration plates are only issued upon a showing that someone will be legally driving the vehicle bearing those plates. This person may be the violator, who may be issued a limited license to drive under certain circumstances, such as attending work or school. Minn. Stat. § 171.30. However, the special series plates are also issued where someone other than the violator, either a member of the violator's household or someone else identified to the commissioner of public safety, will be lawfully driving the vehicle. These qualified, licensed drivers of the specially registered vehicles are also subject to the possibility of numerous stops made each and every day, pursuant to Minn. Stat. § 168.0422, solely on account of driving a motor vehicle bearing special series registration plates. Thus, Minn. Stat. § 168.0422 subjects a number of licensed motorists, who were not party to the original revocation of the registration plates or the subsequent reissuing of the special series plates, to the possibility of being stopped by every law enforcement officer they encounter.

We look to the totality of the circumstances to determine whether a stop under these facts was reasonable. *United States v. Knights*, 534 U.S. 112 (2001). The degree of the intrusion must be weighed against the promotion of legitimate government interests. *Id.* at 119.

Minnesota Statutes § 168.0422 seeks to dispense with the individualized suspicion requirement. In *Ascher v. Comm'r of Public Safety*, we, exercising our independent authority to interpret the Minnesota Constitution, held that using roadblocks to stop all vehicles at sobriety checkpoints violates "Minn. Const. art. I, § 10, which we have long held generally requires the police to have an objective individualized articulable suspicion of criminal wrongdoing before subjecting a driver to an investigative stop." 519 N.W.2d 183, 187 (Minn. 1994). In *Ascher,* we "engaged in a judicial determination of the reasonableness of the use of a temporary roadblock to stop a large number of drivers in the hope of discovering evidence of alcohol-impaired driving by some of them." *Id.* at 187. We concluded:

> Based primarily on the state's failure to meet its burden of -articulating a persuasive reason for dispensing with the individualized suspicion requirement in this context, we conclude that the constitutional balance must be struck in favor of protecting the traveling public from even the "minimally intrusive" seizures which occur at a sobriety checkpoint.

Id. at 187.

Our reasoning in *Ascher* applies to stops under Minn. Stat. § 168.0422. Although a smaller number of drivers are potentially affected, those drivers may be stopped daily on numerous occasions without reasonable articulable suspicion of any criminal activity, solely because the vehicle carries the special series registration plates. The state has not met its "burden of articulating a persuasive reason" for dispensing with the general requirement of individualized suspicion in this context. *Ascher*, 519 N.W.2d at 186. In *Prouse,* the Supreme Court pointed out that where individualized suspicion is not required to make a stop, other safeguards are relied upon to assure that a driver's reasonable expectation of privacy may not be invaded at the discretion of a patrolling officer. 440 U.S. at 654-55. Minnesota Statutes § 168.0422 seeks to eliminate the constitutional safeguard requiring an officer to have reasonable

articulable suspicion of criminal activity before stopping a motorist, but provides no substitute to protect licensed motorists driving in vehicles with special series plates from repeated stops at the unchecked discretion of law enforcement officers. As we noted in *Ascher*, the police should not be allowed to define the reasonableness of their own conduct. *Ascher,* 519 N.W.2d at 186. Neither is the legislature empowered to redefine the constitutional parameters of police conduct. Therefore, based on *Ascher* and *Prouse,* we conclude Minn. Stat. § 168.0422 is unconstitutional under the Fourth Amendment and Article I, Section 10 of the Minnesota Constitution.

II

The district court held Minn. Stat. § 168.0422 unconstitutional, but concluded the stop .was lawful because there existed "a reasonable and articulable suspicion of criminal activity justifying the stop." We agree that Minn. Stat. § 168.0422 is unconstitutional. To effectuate a stop of a vehicle an officer must have a reasonable articulable suspicion that the motorist is violating the law. *Prouse*, 440 U.S. at 663. However, the mere presence of the special series plates does not amount to "reasonable articulable suspicion."

We do not believe the presence of special series registration plates issued pursuant to Minn. Stat. § 168.041, subd. 6 or Minn. Stat. § 169A.60, subd. 13, amounts to reasonable articulable suspicion nor do the circumstances surrounding the issuance of the plates render a suspicionless stop of a driver in a vehicle with these plates "reasonable." The U.S. Supreme Court has articulated that reasonable suspicion must be examined by the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981). An analysis of the totality of the circumstances "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* at 418.

Special series registration plates are issued, upon the satisfaction of conditions set forth by statute, in order to enable continued legal use of a motor vehicle by licensed drivers. Minn. Stat. § 168.041, subd. 6; Minn. Stat. § 169A.60, subd. 13. The driver of the vehicle is not necessarily the one whose actions led to the original impoundment and subsequent issuing of special series plates. Because the special series plates are only issued when it is demonstrated that the vehicle may lawfully be driven, we hold that the mere presence of special series plates does not amount to reasonable articulable suspicion of criminal activity and, in fact, the special plates demonstrate that the vehicle may be lawfully driven. Nor is it reasonable to automatically infer that there is a substantial possibility that the driver of the vehicle does not possess a valid driver's license. While the special series plates may be a factor for law enforcement to consider and would provide a basis for closer scrutiny of these vehicles, the special series plates may not provide the sole justification for a stop.

The dissent approves "this type of (suspicionless) stop" and deems it "reasonable because [of the] substantial state interest in safeguarding our roads from drivers who repeatedly drive while impaired." However, the dissent ignores the showing we required in *Ascher. Ascher,* 519 N.W.2d at 186. We have never before simply allowed the ends to justify the means when the means void our citizens' constitutional protections. The dissent's rationale would be a dramatic departure that demotes constitutional protections to a position inferior to that of traffic safeguards. The state has not met its burden of showing that it is impracticable for police to

develop individualized suspicion and that a departure from the individualized suspicion requirement will significantly help police achieve a higher rate of arrest than would using more conventional means of apprehending alcohol impaired drivers. *Ascher*, 519 N.W.2d at 186. Therefore, the balance must be struck in favor of protecting the traveling public from even the "minimally intrusive" seizure present here. *Id.* at 187.

We recognize that the practice of impounding standard license plates may further the state's interest in protecting the public from repeat drunken drivers. The state has an obvious and substantial interest in safeguarding our roads from such drivers. However, the subsequent issuance of special plates to allow the vehicle to again be driven does not necessarily further the state's interest in protecting the public, but may enable or facilitate the impaired driver's use of the same vehicle. Furthermore, the dissent fails to explain why these plates should be used to annul constitutional protections. Contrary to what the dissent surmises, these special plates do nothing to "ensur[e] that repeat offenders do not harm the motoring public by driving during their period of revocation." Rather, these special plates may actually provide a further opportunity for repeat drunken drivers to drive again by making available a properly licensed vehicle.[3]

Having concluded that Minn. Stat. §168.0422 is unconstitutional under the Fourth Amendment and Article I, Section 10 of the Minnesota Constitution, we need not address appellant's other arguments. We reverse the court of appeals and hereby vacate appellant's convictions for driving after revocation, Minn. Stat. § 171.24, subd. 2, and no driver's license in possession, Minn. Stat. § 171.08, as the product of an unlawful seizure. We limit the retroactive application of this ruling to cases pending on the date of this decision in which the constitutionality of this statute has been properly raised in a timely fashion.

Reversed.

DISSENT

MEYER, Justice (dissenting).

I respectfully disagree with the majority's conclusion that Minn. Stat. § 168.0422 (2002) violates the Minnesota and federal constitutions. Officer Maitland's stop of Joel Henning, limited as it was to inquiring about the validity of his driver's license, was a reasonable seizure and therefore not prohibited by either the state or federal constitution. This type of stop, authorized by statute, is reasonable because the substantial state interest in safeguarding our roads from drivers who repeatedly drive while impaired, combined with the focused nature of the practice, outweigh the limited intrusion on individual liberty. Aside from whether the balancing test weighs in favor of the seizure's reasonableness, the statute should be upheld because the owner of the vehicle gave consent to a suspicionless stop when he applied for the special plates.

The state has devised a system for impounding license plates as part of its overall scheme of keeping the traveling public safe on the roads. The legislature has passed laws making driving under the influence of drugs or alcohol a crime. Minn. Stat. ch. 169A (2002). Violating these statutes once is a gross misdemeanor, and repeat offenders can be sent to jail for months. Minn.

Stat. § 169A.275 (2002). The state will revoke an individual's license to drive and impound that individual's license plates during the period of the revocation. Minn. Stat. §§ 169A.54-.60 (2002). Taking away the license plates is a particularly important step in this procedure, because it ensures that individuals who are repeat offenders of our driving laws will not be able to illicitly drive their vehicles unnoticed.

The record establishes that Henning had driven while impaired twice within 5 years. Because of those violations, the state impounded his license plates and revoked his driver's license as required by statute. Minn. Stat. §§ 169A.54-.60.[4] Then, in order to obtain plates denoted by the prefix WZ, Henning's father requested these special-issue plates and demonstrated to the court that he owned the vehicle and had a valid license to drive.[5]

The Fourth Amendment of the United States Constitution, as well as Article I, Section 10 of the Minnesota Constitution, are implicated in this case because "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the constitution], even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse,* 440 U.S. 648, 653 (1979). What both constitutions prohibit is "not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U.S. 206, 222 (1960); *see also* U.S. Const. amend. IV; Minn. Const. art. I, § 10; *State v. Olson*, 271 Minn. 50, 57, 135 N.W.2d 181, 186 (1965). After it has been established that a police practice amounts to a search or seizure, the analysis of what searches and seizures are unreasonable, and therefore unconstitutional, involves balancing competing interests. *See Prouse,* 440 U.S. at 654; *State v. Larsen,* 650 N.W.2d 144, 148 (Minn. 2002); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 185-86 (Minn. 1994). The balancing test involves three factors: the gravity of the public concern served by the seizure; the degree to which the seizure advances the public interests; and the severity of the interference with individual liberty. *Ascher*, 519 N.W.2d at 185 (citing *Brown v. Texas,* 443 U.S. 47, 50-51 (1979)). The question presented in this case is whether it is reasonable for a peace officer to stop a driver of a WZ vehicle and inquire about his or her driver's license without any additional particularized suspicion.

The first factor to weigh in the balance is the gravity of the public concern served by the seizure. The state has a substantial interest in keeping our roads safe. *See Prouse*, 440 U.S. at 658. As part of its efforts to keep roads safe, the state must grapple with the problem of people who drive under the influence. We have recognized on multiple occasions the seriousness of this problem. *See, e.g., Ascher,* 519 N.W.2d at 185 (citing the magnitude of the problem with drunk driving and the strong state interest in eradicating it); *Heddan v. Dirkswager,* 336 N.W.2d 54, 62-63 (Minn. 1983) (discussing the relationship of drunk driving to tragedy on the highways). Despite the best efforts of legislators and law enforcement, impaired drivers continue to present a very real danger, causing a disproportionate number of traffic deaths each year.[6] These accidents exact a tragic cost on the families of the individuals involved and are a drain on the financial resources of the state.[7]

Even more specifically, the practice of impounding standard plates and issuing special plates is intended to further the state interest in protecting the public from individuals who *repeatedly* drive under the influence or without a driver's license. The National Highway Traffic Safety Administration (NHTSA) reports that approximately one-third of all drivers arrested or

convicted of driving while impaired each year are repeat offenders. National Highway Traffic Safety Administration, *Vehicle & License Plate Sanctions, at* www.nhtsa.gov/people/outreach/safesobr/19qp/factsheets/vehicle.html(last visited June 30, 2003). In addition, repeat offenders are "overrepresented in fatal crashes and have a greater relative risk of fatal crash involvement." *Id.*[8] In addition, many second- and third-time convicted DWI offenders are involved in traffic offenses or crashes during their suspension. *Id.* I conclude that repeat offenders of our laws against driving while impaired pose a serious threat to the safety of other travelers, and the seizure authorized by this statute addresses that threat.

The second factor in the balancing test concerns the efficacy of the stops at issue. The court was presented with no statistics as to how frequently peace officers find legal drivers at the wheel when they stop cars with special-issue plates of this variety. However, a study of Minnesota's plate impoundment system found "a significant decrease in recidivism for violators who had their plates impounded versus violators who did not. Violators whose license plates were impounded by the arresting officer showed a 50 percent decrease in recidivism over a 2-year period (when compared with DWI violators who did not experience impoundment)." *Id.* The decrease in recidivism suggests that the impoundment scheme is furthering the state's interest in protecting the public from the unsafe driving habits of repeat offenders. As our WZ plates are a key aspect of ensuring that repeat offenders do not harm the motoring public by driving during their period of revocation, and this statute is narrowly tailored to the population of repeat offenders, it reasonably advances the public interest.

I turn now to the third factor, the "nature and quality" of the intrusion on liberty entailed by the seizure. *See Terry v. Ohio*, 392 U.S. 1, 24 (1968). In this case, we face a situation in which a narrow class of people—individuals driving with WZ plates—can be stopped by an officer for the purpose of ensuring that they are operating the vehicle within the scope allowed them by our state licensing agency. Although potentially aggravating, intimidating, and embarrassing, the purpose of the stop is limited and the resulting detention is brief, just long enough for the officer to ensure the driver has a valid license. [9]

Having considered the gravity of the public concern presented by repeat offenders of our drunk driving laws, the focused nature of this statute as part of the state's enforcement scheme, and the extent of the intrusion involved when an officer asks to see the operator's license to drive, I conclude this practice is a reasonable seizure and therefore the statute does not violate either the state or federal constitution. I emphasize here that the scope of the seizure authorized by statute is limited: it authorizes the stop of a vehicle in order to determine the validity of the driver's license. Anything beyond that limited scope, justified by the state's need to protect the public from individuals who repeatedly drive under the influence, could be unreasonable. *See Terry*, 392 U.S. at 29 (noting that "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation" and that frisks justified by the protection of police officers and bystanders must be confined to an intrusion designed to discover hidden instruments that could be used in an assault); *see also State v. Fort,* 660 N.W.2d 415, 418 (Minn. 2003) ("the scope and duration of a traffic stop investigation must be limited to the justification for the stop").

The majority attempts to analogize this case to the unconstitutional police practices at issue in *Prouse* and *Ascher*. Those cases are distinguishable in part because the intrusion affected many more people than does the intrusion authorized by Minn. Stat. § 168.0422. In *Prouse*,the police practice at issue was the arbitrary stop of any car on the road. 440 U.S. at 650. And in *Ascher*, the practice at issue was temporary roadblocks used for sobriety tests, which detained all vehicles at a particular intersection. 519 N.W.2d at 184. In both of these cases the practices could potentially impact large populations, limiting the efficacy of the stop.

An additional difference between the instant case and *Ascher* is that *Ascher* did not involve a police action authorized by statute. The sobriety checks at issue in *Ascher* were an attempt by the police to use innovative tools to decrease drunk driving, but there was no statute prescribing the roadblocks. Because the court was faced with the constitutionality of a police practice, not a statute, the court was free to place the burden of proof on the state. *Ascher,* 519 N.W.2d at 187. In this case a statute is at issue, which shifts the burden of proof. Statutes are presumed constitutional, and the court traditionally uses its power to declare a statute unconstitutional "only when absolutely necessary." *State v. Larsen,* 650 N.W.2d 144, 147 (Minn. 2002). The party challenging the constitutionality of the statute bears the heavy burden of establishing its invalidity. *Heidbreder v. Carton,* 645 N.W.2d 355, 372 (Minn. 2002). The mere "possibility" that lawful drivers may be repeatedly stopped should not suffice to meet the appellant's heavy burden of establishing the statute's invalidity. Nothing in the record before us convinces me it is "absolutely necessary" to strike down this statute.

Even if we were to conclude that the state's interest in regulating repeat DWI offenders does not outweigh the intrusion on those drivers' liberty, I would nevertheless conclude that the statute is constitutional because the owner of the vehicle gave consent to a suspicionless stop by applying for the special plates. That consent eliminated Henning's reasonable expectation of privacy, at least insofar as it included an expectation to be free from an investigative stop to confirm he was a licensed driver. *See State v. Perkins*, 588 N.W.2d 491, 493 (Minn. 1999) ("But even a reasonable expectation of privacy may be waived if a defendant's conduct, objectively viewed in light of the totality of the circumstances, 'mandates the conclusion that any expectation of privacy was unreasonable'") (quoting *State v. Tungland*, 281 N.W.2d 646, 650 (Minn. 1979)) (internal ellipsis omitted).

The majority opinion refuses to imply consent to a suspicionless stop because (1) Henning stated his view that the officer needed a separate reason to stop him, and (2) there was no evidence that Henning was put on notice that the special plates were accepted on the condition that law enforcement could stop the vehicle at any time. But the existence of a reasonable expectation of privacy, as a prerequisite to an unlawful search and seizure, depends not merely on the party's subjective expectations, but also on his or her objective expectations. *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003) ("First, we must determine whether B.R.K. exhibited an actual subjective expectation of privacy in the home and, second, whether that expectation is reasonable."). Henning did admit to the officer that he was on notice of the conditions under which the special plates were issued (in fact, he debated with the officer about the appropriate interpretation of those conditions). Henning is charged with notice of the law, and the law expresses those conditions. *See State v. Calmes*, 632 N.W.2d 641, 648 (Minn. 2001).[10] Because consent is implied, neither the violator nor the person who applied for

special plates has a reasonable expectation of privacy in the vehicle. The violator cannot rely upon any theoretical expectation of privacy that might be possessed by someone other than the violator or the applicant.

I would hold that Minn. Stat. § 168.0422 is constitutional, because it authorizes only reasonable seizures of individuals who have continually abused their driving privileges and, alternatively, it authorizes a stop of an individual who has revoked his or her reasonable expectation of privacy in the vehicle. Therefore, I would affirm the court of appeals.

BLATZ, Chief Justice (dissenting).

I join in the dissent of Justice Meyer.

HANSON, Justice (dissenting).

I join in the dissent of Justice Meyer.

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[1] The no proof of insurance charge was later dropped when proof of insurance coverage was provided to the court.

[2] Limited licenses are issued pursuant to Minn. Stat. § 171.30 when a person's license has been suspended or revoked but the person needs a license to attend school, work, or treatment or to accomplish the tasks required as a homemaker.

[3] The dissent relies upon numerous studies, statistics and anecdotal conclusions, which are not part of the record, in order to justify an unconstitutional intrusion. There obviously are important policy considerations involved with addressing the problem of repeat drunken drivers. Other options are available to the legislature that could directly address the problem of repeat drunken drivers without trampling on the constitutional rights of our citizens, including simply declining to issue the special plates or subjecting the vehicle driven to forfeiture.

[4] Joel Henning's plates were impounded under Minn. Stat. § 168.042 (1998), which is now repealed, but carried the same substantive provisions as sections 169A.54-.60.

[5] Other circumstances for issuance include when the violator himself has a limited license to perform essential tasks. *See* Minn. Stat. §§ 168.041, subd. 6; 169A.60, subd. 13; 171.30 (2002).

[6] In 2001, there were 226 alcohol-related traffic fatalities in Minnesota, which constituted 40% of all traffic deaths in that year. Mothers Against Drunk Driving, *State-by-State Traffic Fatalities – 2001, at* http://www.madd.org/stats/0,1056,4809,00.html (last visited June 30, 2003).

[7] It is estimated that the average alcohol-related fatality costs the State of Minnesota $3.5 million. Public Services Research Institute, *Impaired Driving in Minnesota, at* www.nhtsa.gov/people/injury/alcohol/MN.htm (last visited June 30, 2003). Using the number of traffic deaths reported in note 3, alcohol-related fatalities cost Minnesota an estimated $791 million in the year 2001.

[8] Interestingly, the NHTSA includes among its recommendations for strengthening states' license plate sanctions that states allowing special-issue plates "incorporate a provision that permits officers to stop the vehicle for the sole purpose of checking whether the driver is operating the vehicle while their license is under suspension." National Highway Traffic Safety Administration, *Vehicle & License Plate Sanctions, at* www.nhtsa.gov/people/outreach/safesobr/19qp/factsheets/vehicle.html (last visited June 30, 2003). Minnesota is one of three states that issue special license plates as part of its efforts to monitor repeat offenders. *Id.*

[9] The majority describes the statute as subjecting legitimate motorists "to the possibility of being stopped by every law enforcement officer they encounter." The facts of this case do not establish that the actual government intrusion is unnecessarily invasive; there is no indication that other members of Henning's family were harassed while driving. In this case, Henning was the individual whose license had been revoked after he was caught driving under the influence of alcohol or drugs twice within 5 years. And Henning was the individual behind the wheel when Maitland stopped the car after noticing the special plates. Regardless, I would defer that concern for another day and only decide the constitutionality of Minn. Stat. § 168.0422 as applied to the facts before us. *See, e.g., Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (finding predatory offender registration statute constitutional as applied to appellant); *State v. Chambers*, 589 N.W.2d 466, 480 (Minn. 1999) (finding life sentence without possibility of release, as applied to appellant, constitutional); *Wheeler v. City of Wayzata*, 533 N.W.2d 405, 407 (Minn. 1995) (finding Wayzata's zoning ordinance "not constitutionally invalid as applied here"). As applied to these facts, issues concerning the statute's breadth do not take on constitutional significance. The majority also expresses concern that the statute might authorize a suspicionless stop of a qualified driver who was not a party to the original revocation. I would also defer that concern to another day because the facts before us involve a driver whose violation caused the original revocation.

[10] It is not clear whether the majority is of the view that the legislature could never condition the issuance of special plates on the applicant's consent to suspicionless searches or only that the legislature did not do so with sufficient clarity here. I do not read the majority opinion as foreclosing further efforts by the legislature to make the applicant's consent more explicit.

STATE OF MINNESOTA

IN COURT OF APPEALS

C0-02-668

In re: Estate of

Jean Gullberg,

a/k/a Jean Weiland Gullberg,

Deceased.

Filed October 29, 2002

Reversed and remanded

Klaphake, Judge

Minge, Judge, concurring specially

Dakota County District Court

File No. P8016555

James C. Backstrom, Dakota County Attorney, Margaret M. Horsch, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for appellant Dakota County)

Mike Hatch, Attorney General, Suzette C. Schommer, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101 (for intervenor Department of Human Services)

Randy F. Boggio, 9995 Lyndale Avenue South, Bloomington, MN 55420 (for respondent)

Considered and decided by Toussaint, Chief Judge, Klaphake, Judge, and Minge, Judge.

S Y L L A B U S

1. When a Medicaid recipient conveys his or her interest in the homestead to a spouse, who survives the recipient, the county retains the right to make a claim against the surviving spouse's estate, but only to the extent of the recipient's interest in the homestead at the time of death.

2. Minnesota's estate recovery statute, Minn. Stat. § 256B.15 (2000), is preempted by federal law, 42 U.S.C. § 1396p (1994), only to the extent that the Minnesota statute permits recovery beyond the value of a recipient's interest in an asset at the time of death.

OPINION

KLAPHAKE, Judge

Intervenor appellant Minnesota Department of Human Services (the state) and appellant Dakota County (the county) challenge a district court decision denying the county's claim against respondent, the Estate of Jean Gullberg, for reimbursement of medical assistance benefits paid on behalf of Jean Gullberg's husband, Walter Gullberg, who predeceased her. The district court denied the county's petition for allowance of the claim, holding that Minnesota's estate recovery statute, Minn. Stat. § 256B.15, subd. 2 (2000), is preempted by 42 U.S.C. § 1396p(b)(4)(B) (2000).

On appeal, this court has granted the state's motion to intervene and the county's subsequent motion to join in the state's brief. Because Minnesota's estate recovery statute is preempted only to the extent that it conflicts with federal law, we reverse and remand to determine the nature and extent of Walter Gullberg's interest in the homestead at the time of his death.

FACTS

Walter and Jean Gullberg were married when they purchased their homestead property in 1983. The warranty deed listed them as joint tenants. On October 30, 1992, Walter Gullberg conveyed his interest in the homestead by quit claim deed to Jean Gullberg, who was still his wife. Less than one month later, Walter Gullberg applied for medical assistance. On the application for medical assistance, the homestead was valued at between $57,300 and $59,000. Between December 1, 1992 and his death on February 13, 1994, at the age of 70, Walter Gullberg received $40,081.31 in medical assistance benefits.

Jean Gullberg died more than six years later, on September 11, 2000, having never received medical assistance benefits. The only asset listed in her estate inventory was the homestead, which was valued at $119,900.

On March 15, 2001, the county filed a claim in the amount of $40,081.31 against the estate under Minnesota's estate recovery statute, Minn. Stat. § 256B.15, subd. 2 (2000). The Gullbergs' daughter, who had been appointed personal representative of the estate, disallowed the claim. The county thereafter filed a petition with the district court seeking allowance of the claim. On May 31, 2001, while the county's petition was pending, the personal representative sold the homestead and placed the proceeds in the estate account.

In denying the county's claim against the estate, the district court concluded:

> The State may not seek reimbursement of Medical Assistance benefits from the assets of the estate of the surviving spouse of a Medical

> Assistance recipient where those assets were conveyed to the recipient's surviving spouse prior to the recipient's death.

The court reasoned that because federal law limits the definition of "estate" to property and assets in which the recipient had legal title at the time of death, federal law preempts Minnesota's estate recovery statute, which defines "estate" to include any property that was jointly owned at any time during the marriage.

ISSUE

Did the district court err in concluding that Minnesota's estate recovery statute is preempted by federal law, thus disallowing the county's claim in its entirety?

ANALYSIS

The issue of "[w]hether federal law preempts state law is generally an issue of statutory construction," which is reviewed de novo. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002) (citing *Pikop v. Burlington N.R.R. Co.*, 390 N.W.2d 743, 748 (Minn. 1986)). To the extent that the preemption doctrine finds its roots in the supremacy clause, it implicates constitutional concerns, burdens, and standards. *See* U.S. Const. art. VI; *Martin*, 642 N.W.2d at 17 (finding of preemption implicates obligation to interpret statute to avoid constitutional defects).

Federal law will preempt state law in three distinct situations: explicit preemption, implicit preemption, or conflict preemption. *Martin*, 642 N.W.2d at 10-11. Because Congress "specifically permits state action regarding Medicaid" and "requires that a participating state's Medicaid plan conform to federal requirements," this case does not involve explicit or implicit preemption. *See id.* at 11 ("there is no explicit or implicit federal preemption of the [Medicaid] field"). Rather, this case presents a "conflict preemption" situation, in which preemption will arise only "when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal scheme." *Id.* (citations omitted).

Since 1993, federal law has required states to recover the costs of certain medical assistance provided to individuals over the age of 55 from the "individual's estate," but only after the "death of the individual's surviving spouse." 42 U.S.C. § 1396p(b) (2000). Federal law defines the term "estate" to include all assets within the individual's estate under state probate law. 42 U.S.C. § 1396p(b)(4)(A) (2000). At the "option" of a state, an individual's "estate" may also include

> any other real and personal property and any other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4)(B) (2000). Thus, under federal law, a state may choose to enact legislation that allows recovery of claims against a surviving spouse's estate if the estate contains property or assets in which the Medicaid recipient had some legal title or interest at the time of his or her death. *See, e.g., In re Estate of Jobe*, 590 N.W.2d 162, 165-66 (Minn. App. 1999), *review denied* (Minn. May 26, 1999); *In re Estate of Wirtz*, 607 N.W.2d 882, 886 (N.D. 2000).

In Minnesota, the estate recovery statute allows claims against the estate of a surviving spouse but limits those claims "to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn. Stat. § 256B.15, subd. 2 (2000). In *Jobe*, 590 N.W.2d at 165-66, this court allowed a claim against a surviving spouse's estate where the only asset in that estate consisted of the homestead, which was held by the couple in joint tenancy and became the property of the surviving spouse on the death of the recipient. In so doing, we concluded that there was no preemption because compliance with federal and state law was possible. *Id.* at 166.

This case presents a slightly different situation. Here, the recipient spouse conveyed the homestead, which was marital property and held in joint tenancy, to the surviving spouse shortly before he applied for and began to receive medical assistance benefits. While the county's claim against the estate is clearly allowed by Minnesota's estate recovery statute, the issue is whether allowance of the claim in its entirety complies with federal law.

Again, federal law permits a state to define a Medicaid recipient's estate to include

> other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor * * * of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4)(B).[1]

At the time of his death in early 1994, Walter Gullberg did not hold legal title to the homestead, having conveyed it in late 1992 to his wife, Jean Gullberg. Nevertheless, he continued to have some legal "interest" in the homestead because he and Jean Gullberg were still married at the time of his death. *See Searles v. Searles*, 420 N.W.2d 581, 583 (Minn. 1988) ("the law recognizes that spouses have a common ownership interest in property acquired during coverture, regardless of who holds title"); Minn. Stat. § 524.2-402(a), (c) (2000) (homestead descends to surviving spouse free from any testamentary disposition to which surviving spouse has not consented, but subject to claim filed under 256B.15 for medical assistance benefits). Moreover, the homestead was conveyed to Jean Gullberg through some "other arrangement." *See Bonta v. Burke*, 120 Cal. Rptr.2d 72, 76 (Cal. App. 2002) (recipient, who conveyed homestead to her daughters but retained life estate and right to revoke the remainder, held significant interest in property until her death); *Wirtz*, 607 N.W.2d at 885 (North Dakota Supreme Court recognizes that "other arrangement" language has been interpreted by courts to include community property and homestead interests). We therefore conclude that at the time of

his death, Walter Gullberg continued to have some legal interest in the homestead, albeit contingent on any number of factors.[2]

Nonetheless, to the extent that Minnesota's estate recovery statute allows recovery "to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage," we conclude that it goes beyond what is allowed by federal law, which allows recovery only "to the extent of" the individual's legal interest at the time of death. This apparent conflict, however, does not render the state law preempted in its entirety. *See Martin*, 642 N.W.2d at 16. "Preemption of state laws is generally disfavored," and courts will find state laws "preempted only to the extent that they are in conflict with federal law." *Id.* at 11 (citations omitted). Such a "partial" preemption fulfills our obligation to construe statutes to avoid constitutional defects. *Id.* at 18. Thus, we must construe Minn. Stat. § 256B.15, subd. 2 so as to allow it to operate in harmony with the federal law. *See id.*

We therefore conclude that Minn. Stat. § 256B.15, subd. 2 allows claims against a surviving spouse's estate only to the extent of the value of the recipient's interest in marital or jointly owned property at the time of the recipient's death. This construction allows some tracing of assets back through the marriage, but restricts recovery to the value of the recipient's interest in those assets at the time of the recipient's death. *Cf. Wirtz*, 607 N.W.2d at 886 (holding that 42 U.S.C. § 1396p(b) "contemplates only that assets in which the deceased recipient once held an interest will be traced" and that "recovery from a surviving spouse's separately-owned assets * * * or recovery from the surviving spouse's entire estate, including assets not traceable from the recipient, is not allowed").

Typically, the homestead is the only significant asset subject to estate recovery provisions. *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 284-85 (4th Cir. 2001) (because potential Medicaid beneficiaries are required to "spend down" their income and assets before they become eligible for benefits and because the homestead is one of the few assets which is exempt from these spend down provisions, the homestead is typically the only significant asset subject to estate recovery provisions). Thus, allowing a claim like this serves to fulfill the purposes of the Medicaid Act by protecting the surviving spouse's right to enjoy and use assets during his or her lifetime, while enabling the county to recoup a portion of its expenditures and to prevent "capable individuals from using Medicaid as artificially inexpensive long-term care insurance." Jon M. Zieger, *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*, 5 Elder L.J. 359, 374-76 (Fall 1997) (noting that 1993 changes in federal law were aimed "both at reducing manipulation [of eligibility provisions] and at giving the state a second chance at the sheltered wealth after the recipient's death" and predicting that because estate recovery "may prove unsettling to members of the middle class," many will "seek out long-term care insurance * * * before the need for it arises and when the product is still financially within reach").

DECISION

The district court's disallowance of the county's claim is reversed and the matter is remanded to determine and reevaluate Walter Gullberg's interest in the homestead at the time of his death. The county's claim is limited to recovering only to the extent of that interest.

Reversed and remanded.

MINGE, Judge (concurring specially)

This decision results in partial preemption of the Minnesota law. In addition, the decision limits the long-term ability and flexibility of the state of Minnesota to collect reimbursement for Medical Assistance from those able to pay. Finally, it creates opportunity for estate planning creativity and abuse that would frustrate such collections of Medical Assistance reimbursement in the future.

As the majority opinion in this case recognizes, we should avoid finding federal preemption unless it is clearly required. Section 1396p(b)(4) of title 42 of the federal code was amended in 1993 to both set a higher minimum standard for state efforts to collect reimbursement for Medicaid (in Minnesota the Medicaid program is known as Medical Assistance) and to give the states flexibility to accomplish this. Pub. L. No. 103-66, § 13612(c) (1993). The language in the federal law is admittedly not a model of clarity. To the extent this decision limits the efforts of the state of Minnesota to deal with the unfortunate, but persistent, efforts of some to enhance their final estate by sheltering and divesting assets in order to qualify for Medical Assistance, this decision takes us down the wrong road. That road and federal preemption can be avoided by construing words "estate," "interest," and "other arrangement" in 42 U.S.C. § 1396p(b)(4) (2000) to include any estate, interest, or arrangement that the state by law establishes for purposes of recovery of Medical Assistance (Medicaid) benefits. By this approach, we minimize the endless scheming. The all-together human temptation to take advantage of a generous government program is controversial, brings discredit to estate planning, and breeds cynicism in the larger community. Since I do not agree that the federal law should be read to preempt Minnesota law and preclude an expansive state interpretation of "estate," "interest," or "arrangement," I do not join in the opinion of the court. However, at oral argument the respondent stated that if the state of Minnesota could reach the limited interest attributed to Walter Gullberg as allowed by the majority, the state would be fully reimbursed for its claim. Therefore, I concur in the result.

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[1] "[A]t the time of death" must be construed to mean a point in time immediately before death. Any other reading of this phrase would render the estate recovery statute meaningless because upon death, property immediately passes to beneficiaries. *Cf.* Minn. Stat. § 645.16 (2000) ("Every law shall be construed, if possible, to give effect to all its provisions.").

[2] The special concurrence notes that at oral arguments, the estate suggested that if recovery is allowed in this case, then the county would be "fully reimbursed for its claim." This statement was not made in the context of our decision here. The value of Walter Gullberg's interest in the homestead at the time of his death is a matter for the district court to determine on remand.

STATE OF MINNESOTA

IN SUPREME COURT

A03-483

Court of Appeals

Page, J.

State of Minnesota,

Respondent,

vs.

Filed: July 15, 2004
Office of Appellate Courts

Francisco Garcia,

Appellant.

SYLLABUS

Minnesota Statutes § 260B.130, subdivision 5 (2002), violates the equal protection guarantees of the Minnesota Constitution by denying jail credit to extended jurisdiction juveniles for time served in juvenile facility custody.

Reversed and remanded.

Heard, considered, and decided by the court en banc.

OPINION

PAGE, Justice.

The issue before this court is whether a juvenile convicted of first-degree aggravated robbery, and designated an extended jurisdiction juvenile (EJJ), is entitled to jail credit for time served at the Minnesota Correctional Facility at Red Wing (MCF-Red Wing). The sentencing court found that a juvenile designated as an EJJ was not entitled to jail credit. The court of appeals affirmed. For the reasons set forth below, we reverse and remand.

The relevant facts are simple and straightforward. On June 10, 1999, 14-year-old Francisco Garcia along with two other minors discussed robbing a pizza delivery person. They aborted their first robbery attempt because the delivery person was too physically fit. Garcia and

one of the other minors then called a second pizza place and robbed that delivery person using a baseball bat and fireplace poker. The robbery netted Garcia and his friend approximately $100 in cash and checks, in addition to the pizza.

On June 14, 1999, a delinquency petition charging Garcia with one count of first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subd. 1 (2002), and one count of attempted simple robbery, in violation of Minn. Stat. §§ 609.17, subd. 1, and 609.24 (2002), was filed. After negotiating a plea calling for Garcia to plead guilty to aggravated robbery, designation of Garcia as an EJJ, and dismissal of the attempted simple robbery charge, Garcia was adjudicated an EJJ and sentenced as an adult to 58 months in prison on September 1, 1999.[1]

Execution of the adult sentence was stayed and Garcia was placed on juvenile probation until his 21st birthday. As a condition of the juvenile disposition, Garcia was required to complete a residential treatment program at the Northwestern Minnesota Juvenile Center in Bemidji. At the sentencing hearing, the court noted that Garcia would be entitled to 83 days of credit against the adult sentence for time spent in custody between his arrest and sentencing if the adult sentence were ever executed.

Garcia was released from the juvenile center on August 14, 2000, and on September 12 Garcia was arrested on new felony charges and for violating the terms of his probation. On October 13, 2000, the court found Garcia in violation of his probation and ordered him to complete a residential juvenile corrections program at MCF-Red Wing. He completed that program in September 2001 and was released to a foster home. In March of 2002, Garcia absconded from the foster home. He was arrested again on September 7 and charged with seven new felonies and violating his probation.

On March 5, 2003, a hearing was held to resolve the probation violation. Garcia admitted the probation violation, and the court vacated the stay of execution and imposed the 58-month adult sentence.[2] Garcia sought 407 days of jail credit for the time he spent at MCF-Red Wing, in addition to the credit for the 83 days that he had spent in jail awaiting initial disposition of the EJJ matter. The court granted Garcia jail credit for time served in the county jail after his September 7, 2002, arrest. The court declined to give Garcia credit for the time spent at MCF-Red Wing or the time spent awaiting disposition of the EJJ matter in 1999. Garcia appealed the denial of jail credit only for the time spent at MCF-Red Wing. The court of appeals affirmed, holding that Minn. Stat. § 260B.130, subd. 5 (2002), as amended in 2000, precluded the district court from granting Garcia credit for time served at MCF-Red Wing. *State v. Garcia*, 670 N.W.2d 297, 300 (Minn. App. 2003).

In this appeal, Garcia makes four arguments challenging the denial of jail credit. The first is a two-part argument in which he contends that Minn. Stat. § 260B.130, subd. 5, is not applicable because MCF-Red Wing is not a juvenile facility and because subdivision 5 only applies to time spent in custody "prior to a summary hearing." He next argues that applying section 260B.130, subdivision 5, as amended, to the facts of his case results in a violation of the federal and Minnesota constitutional prohibitions against ex post facto laws. Garcia's third argument is that, as amended, subdivision 5 violates the separation of powers doctrine. Finally,

Garcia argues that the denial of jail credit to EJJ offenders for time served in a juvenile facility violates the equal protection guarantees of the United States and Minnesota Constitutions.

Before considering Garcia's arguments, it is necessary to review the relevant law concerning jail credit. A defendant bears the burden of establishing that he/she is entitled to jail credit. *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985). At the time of Garcia's offense in 1999, Minn. Stat. § 260B.130, subd. 5, which sets out the procedural requirements for executing an adult sentence after a probation violation by an EJJ, did not address the issue of credit for time previously served in a juvenile facility except to the extent that it provided that "the court shall treat the offender as an adult and order any of the adult sanctions authorized by section 609.14, subdivision."[3] Minnesota Rule of Criminal Procedure 27.03, subdivision 4(B), provides that when a court imposes a sentence "time spent in custody in connection with the offense or behavioral incident for which a sentence is imposed * * * shall be automatically deducted from the sentence and the term of imprisonment including time spent in custody as a condition of probation from a prior stay of imposition or execution of sentence." Minnesota Sentencing Guidelines III.C.3 provides that all time served in custody "for the offense or behavioral incident for which the person is sentenced * * * shall be deducted * * * from the sentence imposed." Additionally, until it was amended in 2003, Minn. R. Juv. P. 18.06, subd. 1(d), provided for jail credit in cases involving juvenile certification to adult court. According to the comments to the juvenile delinquency rules, this provision was removed from the rules in 2003 because jail credit is awarded at the time of sentencing in adult court and is governed by the rules of criminal procedure. Minn. R. Juv. Delinq. P. 18, cmt. In sum, at the time of Garcia's conviction, the adult rules of criminal procedure governed jail credit for EJJs because section 260B.130, subdivision 5, provided that an EJJ whose probation was revoked be treated as an adult. In 2000, after Garcia was adjudicated an EJJ, but before he was ordered to serve time at MCF-Red Wing, Minn. Stat. § 260B.130, subd. 5, was amended to preclude EJJs from receiving jail credit "for time served in juvenile facility custody prior to a summary hearing." *See also* Act of March 7, 2000, ch. 255 § 1, 2000 Minn. Laws 25.

We consider Garcia's equal protection argument first because it is dispositive. The crux of the argument is that Minn. Stat. § 260B.130, subd. 5, as amended, violates the equal protection clauses of the federal and state constitutions because there is no rational basis for denying jail credit for time served in juvenile facilities to juveniles designated as EJJs while granting such credit to juveniles certified as adults.[4] The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, "No state shall * * * deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1. Article I, Section 2, of the Minnesota Constitution provides, "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." "Both clauses have been analyzed under the same principles and begin with the mandate that all similarly situated individuals shall be treated alike, but only 'invidious discrimination' is deemed constitutionally offensive." *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000). This court reviews an equal protection challenge to a statute under a rational basis standard unless the challenge involves a suspect classification or a fundamental right. *Id.* Neither party contends that this case involves a suspect classification or a fundamental right.[5]

We have developed two formulations for the rational basis test. *Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002). The first formulation is the standard articulated by the federal courts. Under this formulation, "it must be determined whether the challenged classification has a legitimate purpose and whether it was reasonable to believe that use of the challenged classification would promote that purpose." *Id.* The second formulation, also known as the Minnesota rational basis test, requires that:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (citations omitted). The key distinction between the federal and Minnesota tests is that under the Minnesota test "we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires. Instead, we have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals." *Id.* at 889. In this case, we will apply the Minnesota rational basis test.

We first must consider the state's argument that juveniles and adults are not similarly situated for equal protection purposes. The state's argument is flawed because on these facts the relevant comparison is not between adults and juveniles. The relevant comparison is between juveniles designated as EJJs who violate probation and have an adult sentence executed, and juveniles certified as adults who are initially placed on probation and then violate that probation and have their sentence executed. This case is distinguishable from *State v. Mitchell*, 577 N.W.2d 481, 493 (Minn. 1998), in which we held that a 15-year-old charged with first-degree murder who was certified as an adult was not similarly situated to a 15-year-old who committed a murder and remained in the juvenile system. We held that they were not similarly situated because, when certifying a 15-year-old to adult court, a trial court considers numerous factors, including the offender's amenability to treatment, culpability, the seriousness of the offense, and other circumstances of the offense. *Id.* at 493. Here, when the stay of execution of an EJJ's adult sentence is revoked, Minn. Stat. § 260B.130, subd. 5, requires that the court treat the EJJ as an adult, thereby placing the EJJ in precisely the same position as the juvenile who was certified as an adult in the first instance. Therefore, EJJs who violate probation and subsequently have their adult sentence executed and certified juveniles who receive a probationary disposition, violate probation, and have their adult sentence executed, are similarly situated for purposes of equal protection.

We next consider whether, on the facts presented, there is a rational basis for denying jail credit to juveniles designated as EJJs while granting jail credit to juveniles certified as adults. *See Russell*,477 N.W.2d at 888. The state contends that the denial of jail credit is rationally related to the legitimate government purpose of ensuring that EJJs do not reoffend. The state posits that giving jail credit to EJJs would erode the legitimate government purpose of ensuring

that EJJs receive proper treatment. In other words, the state argues that it is rational to hold the "stick" of a larger adult prison sentence over an EJJ's head but not a certified juvenile's head because EJJs are more amenable to treatment. Garcia argues that there is no rational basis for granting jail credit to "more dangerous" certified juveniles but not to "less dangerous" EJJs who have their adult prison sentences executed.

In order to determine whether there is a rational basis for denying jail credit to EJJs, it is helpful to understand the goals of the EJJ designation as articulated by the Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System that recommended the creation of the EJJ scheme. The EJJ designation was conceived to provide "a more graduated juvenile justice system based on age and offense with a new transitional component between the juvenile and adult systems." Minn. Sup. Ct. Advisory Task Force on the Juv. Justice Sys.,Final Report 32 (Jan. 1994) (hereinafter Task Force Report); *see also* Kathryn A. Santelmann & Kari L. Lillesand, *Extended Jurisdiction Juveniles in Minnesota: A Prosecutor's Perspective*, 25 Wm. Mitchell L. Rev. 1303, 1311 (1999). The intent of the EJJ designation is to give juveniles "one last chance at success in the juvenile system, with the threat of adult sanctions as an incentive not to reoffend." Task Force Reportat 33. An initial juvenile disposition reinforced by the possibility of adult sanctions gives juveniles "a certainty of punishment combined with an opportunity to be successful in the juvenile system." *Id.* at 34. Thus, unlike certified juveniles, EJJs are given one last chance at rehabilitation in the juvenile system before being subjected to adult sanctions.

The state's argument that the denial of jail credit is necessary to serve as a "stick" for EJJs in order to ensure compliance with the terms of the juvenile disposition, but it is not necessary for certified juveniles because they are not afforded one last chance in the juvenile system, does not withstand scrutiny. Not only did the advisory task force recognize that the threat of adult sanctions is necessary to ensure that EJJs do not reoffend, it also recommended that EJJs placed in secure juvenile facilities "receive credit for that time if there is ever a commitment to prison for a probation violation." *Id.*at 8. Thus, from the outset, it was not contemplated that denial of jail credit was a legitimate "incentive" to promote successful rehabilitation within the juvenile system.

Furthermore, the state's reasoning falls short because, when juveniles who are certified as adults are placed on probation as opposed to having their prison sentence executed, one would want them to have the same incentive to successfully complete their probationary programs as similarly situated EJJs. Put another way, it is not rational, under these circumstances, to punish juveniles designated as EJJs more severely than juveniles certified as adults who engage in the same conduct.[6] Disguising the more severe punishment as an "incentive" not to reoffend may be clever, but it does not make the classification reasonable.[7] The facts of this case poignantly illustrate that point. It is difficult to envision how Garcia is not entitled to jail credit for the time he served at MCF-Red Wing for the aggravated robbery offense, but would be entitled to credit on the later second-degree assault conviction if he had been placed on probation.[8]

The distinctions that separate juveniles designated as EJJs from juveniles certified as adults with respect to entitlement to jail credit are manifestly arbitrary and fanciful and not genuine and substantial, and there is no evident connection between the distinctive needs peculiar to EJJs as compared to certified juveniles and the prescribed remedy. *See Russell*, 477

N.W.2d at 888. We therefore hold that section 260B.135, subdivision 5, fails to satisfy the Minnesota rational basis test because there is no "reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals."[9] *See id* at 889.

Consequently, Garcia is entitled to receive jail credit for the time he served at MCF-Red Wing. Additionally, because *Asfaha v. State*, 665 N.W.2d 523, 528 (Minn. 2003), was decided while this case was pending, Garcia is entitled to receive jail credit for the time he served at residential treatment facilities if the conditions that were imposed at those facilities were the functional equivalent of those at a jail or workhouse. We remand this case to the district court to determine the amount of jail credit Garcia is entitled to receive for time served at MCF-Red Wing and whether the conditions at the Northern Minnesota Juvenile Center were the functional equivalent of those at a jail or workhouse and, if so, the amount of jail credit he is entitled to receive for time served there.

Reversed and remanded.

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[1] When sentencing an EJJ, a court must impose both a juvenile disposition and "an adult criminal sentence, the execution of which [is] stayed on the condition that the offender not violate the provisions of the disposition order and not commit a new offense." Minn. Stat. § 260B.130, subd. 4 (2002).

[2] With regard to the felony charges, Garcia was certified as an adult and ultimately pleaded guilty to second-degree assault. The court sentenced Garcia to 21 months in prison consecutive to the 58-month sentence.

[3] Section 260B.130, subdivision 5, also provides that, "Upon revocation, the offender's extended juvenile jurisdiction status is terminated and juvenile court jurisdiction is terminated. The ongoing jurisdiction for any adult sanction, other than commitment to the commissioner of corrections, is with the adult court."

[4] In *Asfaha v. State*, 665 N.W.2d 523, 528 (Minn. 2003), we held that a certified juvenile was entitled to jail credit for time served in a treatment facility when the "level of confinement and limitations imposed are the functional equivalent of those imposed at a jail, workhouse, or regional correctional facility." We also noted that the record supported the district court's finding that the restrictions imposed at the treatment facility were the "functional equivalent of those imposed at the juvenile correctional facility in Red Wing" and therefore credit should be granted. *Id.*

[5] It is worth noting that the Montana Supreme Court utilized a strict scrutiny standard when it held that the state's Extended Jurisdiction Prosecution Act (EJPA) violated equal protection by not granting custody credit to EJPA juveniles whose probation was revoked and granting such credit to certified juveniles. *In re S.L.M*, 951 P.2d 1365, 1371-76 (Mont. 1997). The Montana court employed a strict scrutiny standard because the statute affected physical liberty, which is a fundamental right under the Montana Constitution. *Id.* at 1371-72. The

issue of whether the deprivation of liberty involves a fundamental right, not having been raised by the parties, need not be resolved in this case.

[6] The facts of this case, when compared with *Asfaha*, cannot be distinguished in terms of one receiving jail credit and the other not. *See* 665 N.W.2d at 524. Asfaha was certified as an adult, placed on probation, and had his probation revoked and his sentence executed and was entitled to jail credit for time spent in a residential treatment facility, which we determined in essence was the functional equivalent of being placed at MCF-Red Wing. *Id.*

[7] As Judge Crippen noted in a concurrence/dissent in the almost identical case of *State v. Serena*, 673 N.W.2d 182, 190 (Minn. App. 2003), *rev. granted* (Minn. Feb. 17, 2004), "'[t]ough love' may be attractive in private contexts, but it does not represent an acceptable basis for public laws that impose greater punishment for less dangerous juveniles than for more dangerous juvenile offenders who * * * have been certified for adult-court prosecution." *Id.* He further stated that, "If there is rationality in big threats to less dangerous children, one is led to find rationality in laws providing punitive, severe consequences for failure to immediately discontinue a pattern of minor or even petty misconduct." *Id.*

[8] Similarly, it is not difficult to imagine a scenario in which two juveniles commit a crime together. One of the juveniles has a more severe record and is more culpable for the crime and is certified as an adult, while the other juvenile is designated an EJJ. They both receive the same stayed adult sentence and serve time in custody as a condition of probation. Upon their release, they commit another crime together and have their probation revoked and the adult sentences executed. The less dangerous EJJ would not get credit for the time served in custody, but the more dangerous certified juvenile would receive credit and serve a shorter sentence for the identical crime and probation violation.

[9] Because we base our decision on equal protection grounds, we need not reach Garcia's ex post facto argument. We vacate the holding of the court of appeals that the application of Minn. Stat. § 260B.130, subd. 5, as amended, to Garcia did not violate the United States and Minnesota Constitutions' prohibition on ex post facto laws. *See Garcia*, 670 N.W.2d at 300.

STATE OF MINNESOTA

IN SUPREME COURT

A03-1108

Tax Court

Meyer, J.
Took no part, Page, J.

James S. Harris, III,

Respondent,

vs.

Filed: May 27, 2004
Office of Appellate Courts

County of Hennepin,

Relator.

SYLLABUS

Property tax relief under Minnesota's equalization relief statute, Minn. Stat. § 278.05, subd. 4 (2002), is calculated using the property's actual market value, not its limited market value.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

MEYER, Justice.

This case presents the question of whether property tax relief under Minnesota's equalization relief statute should be calculated based on a property's actual market value or its limited market value. The Minnesota Tax Court concluded that equalization relief is based on a property's limited market value. We reverse.

The legislature has provided various mechanisms to alleviate the property tax burdens on certain classes of property. One form of relief is designed to alleviate the impact of unequal

assessment among similarly situated, comparable properties, otherwise known as equalization relief. Under Minn. Stat. § 278.05, subd. 4 (2002), even where a property has not been valued in excess of its actual market value, the property owner can obtain relief if the property is valued unequally in comparison with other property in the taxing district.[1]

Another kind of property tax relief is designed to alleviate the impact of rapidly increasing market values. Under Minn. Stat. § 273.11, subd. 1a (2000), known as the limited market value statute, a cap is placed on the rate at which a taxpayer's property tax assessment can increase from one year to the next.[2]

James S. Harris, III, taxpayer-respondent, owns a residence in the town of Minnetrista with an estimated market value in 2001 of $4,788,000.[3] The parties agree that Harris is entitled to equalization relief under Minn. Stat. § 278.05, subd. 4.[4] The parties also agree that Harris is entitled to limited market value relief under Minn. Stat. § 273.11, subd. 1a.

The issue presented requires this court to determine in what order the two types of property tax relief are to be applied. Harris claims that he should be allowed to take his equalization reduction from the limited market value of his property in the amount of $4,479,900.[5] This interpretation of the law would yield an assessed value of $4,229,100. Hennepin County (the county) and the Department of Revenue disagree, arguing that Harris's equalization reduction should first be taken from the actual market value of his property and that the limited market value relief should then be applied. This interpretation of the law would yield an assessed value of $4,529,400. The county contends that the limited market value would cap the assessed value.

The dispute between Harris and the county was submitted to the tax court on stipulated facts. The court granted summary judgment for Harris, concluding that applying equalization to the limited market value of property was the only way to give effect to both the equalization relief statute and the limited market value statute. The county appealed to this court, alleging that the tax court erred by granting Harris an equalization reduction from limited market value rather than actual market value.

This is a case of first impression. We have not previously determined the proper interplay between the limited market value and equalization relief statutes. We review this summary judgment ruling on stipulated facts to determine whether the tax court erred in its application of the law. *Brookfield Trade Center, Inc. v. County of Ramsey*, 609 N.W.2d 868, 873-74 (Minn. 2000). Statutory construction is an issue of law that we review de novo. *Astleford Equip. Co. v. Navistar Int'l Transp. Corp.*, 632 N.W.2d 182, 188 (2001). The object of statutory interpretation "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2002). Courts must give effect to the plain meaning of statutory text when it is clear and unambiguous. *Green Giant Co. v. Comm'r of Revenue*, 534 N.W.2d 710, 712 (Minn. 1995). "A statute is ambiguous if it is reasonably susceptible to more than one interpretation." *Current Tech. Concepts, Inc. v. Irie Enter., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

The equalization relief statute, Minn. Stat. § 278.05, subd. 4, provides that in the trial of an equalization case, "sales ratio studies" published by the Department of Revenue "shall be admissible in evidence as a public record." "Sales ratio studies" are then referenced in Minn.

Stat. § 127A.48 (2002 & Supp. 2003), wherein the methodology for conducting the studies by the Department of Revenue is set forth in some detail. Reference to "sales ratio studies" is also found in Minn. Stat. § 273.11, subd. 1a, as follows:

> For purposes of the assessment/sales ratio study conducted under section 127A.48, and the computation of state aids paid under chapters 122A, 123A, 123B, 124D, 125A, 126C, 127A, and 477A, market values and net tax capacities determined under this subdivision and subdivision 16, shall be used.

Harris argues that the plain language of section 273.11, subdivision 1a, states that limited market values are to be used in an equalization proceeding. Harris reads the phrase "and the computation of state aids" as a conjunction, indicating the legislature's intent to employ limited market values in both assessment/sales ratio studies *and* state aid calculations. We believe that an equally plausible interpretation of the statute is that the legislature intended limited market values to be used "[f]or purposes of the assessment/sales ratio study" *as it relates to* the computation of state aids. *See id.* This interpretation acknowledges that there is more than one purpose for the study and that limited market values should only be used for one of those purposes, the calculation of state aids. Furthermore, the maxim *expressio unius est exclusio alterius*, the expression of one thing indicates the exclusion of another, supports the proposition that the absence of section 278.05 equalization proceedings in the list of enumerated chapters in section 273.11 indicates that the legislature did not intend for limited market values calculated under section 273.11 to apply to equalization relief. Minnesota Statutes § 273.11, subdivision 1a, does not clearly and unambiguously lead us to conclude that limited market values are the basis for equalization proceedings.

We look to other sections of the law and our canons of statutory construction to determine the intent of the legislature. We may examine, among other considerations, the "occasion and necessity for the law" and "the circumstances under which it was enacted." Minn. Stat. § 645.16 (2002). We may also look to the state of the law before a statute was enacted. *Id.* In doing so, we will attempt to read statutes in a way that gives effect to all their provisions. *Id.* Statutes should be read as a whole with other statutes that address the same subject. *See State v. Chambers*, 589 N.W.2d 466, 480 (Minn. 1999).

It is helpful to examine equalization relief as it existed before the passage of Minn. Stat. § 278.05 in order to understand the occasion and necessity for the passage of the statute. Property tax assessors in Minnesota have historically "assess[ed] property systematically and uniformly at a percentage of its true value." *Renneke v. County of Brown*, 255 Minn. 244, 248, 97 N.W.2d 377, 380 (1959). Therefore, we have recognized that "discrimination in the imposition of the tax burden" violates the uniformity clause of the Minnesota Constitution and the Equal Protection Clause of the federal constitution. *Hamm v. State*, 255 Minn. 64, 70, 95 N.W.2d 649, 654-55 (1959). To remedy this unequal assessment, the courts of this state allowed taxpayers to receive relief if they could demonstrate that their property was assessed at a higher rate than other similarly situated properties. *See* Minn. Stat. § 271.01 (2002); *Renneke*, 255 Minn. at 248, 97 N.W.2d at 380. Sustaining such a claim necessarily requires that a taxpayer compare the assessed value of his property with that of property in the same class. *United Nat'l Corp. v.*

County of Hennepin, 299 N.W.2d, 73, 76 (Minn. 1980); *Renneke*, 255 Minn. at 248, 97 N.W.2d at 380.

In 1980, the legislature enacted Minn. Stat. § 278.05, subd. 4, to simplify the procedure for taxpayers to make out claims for equalization relief. *See* Act of Apr. 3, 1980, ch. 443, § 3, 1980 Minn. Laws 270, 272. Section 278.05, subdivision 4, states that the Department of Revenue's assessment/sales ratio study shall be "prima facie evidence of the level of assessment" in a given taxing district. The legislature incorporated the assessment/sales ratio study conducted under Minn. Stat. § 127A.48 (2002 & Supp. 2003),[6] which was originally used to determine levels of state aids for local school districts, to provide a yardstick by which to measure claims for equalization relief. *See* Minn. Stat. § 278.05, subd. 4; *see also* Minn. Dep't of Revenue, 2003 Sales Ratio Study Criteria 2. Accordingly, Minn. Stat. § 278.05, subd. 4, announced the methodology for making out claims for equalization relief, but did not alter the essential nature of the taxpayer's remedy for unequal assessment.

In light of the purposes for statutory equalization and its constitutional underpinnings, we conclude that the legislature intended for equalization relief to be based on actual market value rather than limited market value. Since *Hamm* and *Renneke*, Minnesota courts have recognized a constitutional right for taxpayers to be assessed at a percentage of fair market value that is similar to other taxpayers in the same taxing district. *See Ploetz v. County of Hennepin*, 301 Minn. 410, 413-14, 223 N.W.2d 761, 763-64 (1974); *Dulton Realty, Inc. v. State*, 270 Minn. 1, 15, 132 N.W.2d 394, 404 (1964). The remedy necessarily required the aggrieved taxpayer to compute the ratio of the assessed value of his or her property to its actual value and compare similar ratios of other properties in his or her taxing district. *See United Nat'l*,299 N.W.2d at 76. In enacting Minn. Stat. § 278.05, subd. 4, the legislature allowed the admission of sales ratio studies as evidence of levels of assessment, thereby establishing a uniform method for obtaining equalization relief. Nothing in the text of Minn. Stat. § 278.05, subd. 4, purports to alter the purpose of equalization relief, to ensure that property is assessed at a uniform percentage of fair market value.

Furthermore, applying equalization relief to the fair market value of property is the only way to give effect to both Minn. Stat. § 278.05, subd. 4, and Minn. Stat. § 273.11, subd. 1a. Direct equalization is intended to guarantee that localities assess property at a uniform percentage of its true value.[7] *See Renneke*, 255 Minn. at 248, 97 N.W.2d at 380. However, two properties with identical market values may have appreciated at different rates due to the age of the property or other market conditions. As a result, these two equally-valuable properties would have different limited market values. Therefore, taking equalization reductions from limited market value, which may vary for two identically-valued properties, would not serve the purpose of equalization, which is to bring assessed property values within a uniform percentage of actual market value. Rather, such a rule would provide a windfall for taxpayers who qualify for both forms of relief by creating a situation in which taxpayers who suffer from unequal assessment would actually pay less in taxes than if their property had been assessed fairly in the first instance.

The purpose of Minn. Stat. § 273.11, to cap annual increases in assessed property value, is better served by first applying equalization relief to fair market value. If a taxpayer receives an equalization reduction based on actual market value under Minn. Stat. § 278.05, subd. 4, and

that equalized value falls below the property's limited market value, there is no need to adjust the equalized value further. The equalization relief alone will bring the taxable value under the cap mandated by Minn. Stat. § 273.11, subd. 1a. If, however, the equalized value of property exceeds limited market value, Minn. Stat. § 273.11, subd. 1a, would hold the assessed value to the limited market value.

We therefore hold that, when a taxpayer qualifies for both equalization relief under Minn. Stat. § 278.05, subd. 4, and limited market value relief under Minn. Stat. § 273.11, subd. 1a, the taxpayer's equalization reduction must first be applied to the property's actual market value before its limited market value is determined.

Reversed.

PAGE, J., took no part in the consideration or decision of this case.

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[1] The practice of assessing some properties in a taxing district at higher percentages of actual market value relative to other properties in that taxing district is referred to as "unequal assessment." *Weyerhaeuser Co. v. County of Ramsey*, 461 N.W.2d 922, 924 (Minn. 1990).

[2] The only tax year at issue in this case is the year 2001; therefore, we refer to the 2000 statute.

[3] The estimated market value is the value established by the assessor before any adjustments are made to the value of the property. *See* Minn. Stat. § 127A.48, subd. 5 (2002). This value reflects the assessor's estimation of the property's actual market value, the price at which it would sell on the open market. *See* Minnesota Tax Court, *Presenting Property Tax Appeals to the Minnesota Tax Court, available at* http://www.taxcourt.state.mn.us/ProSePPY.htm (last modified Sept. 24, 2003).

[4] Pursuant to Minn. Stat. § 278.04 (2002), the Department of Revenue conducted a nine-month "assessment/sales ratio study" to determine whether property in various taxing districts would qualify for equalization relief. According to a formula set forth in section 278.05, Harris was entitled to reduce the taxable value of his property by 5.6 percent.

[5] The parties stipulated before the tax court that the limited market value provisions of Minn. Stat. § 273.11, subd. 1a, applied to the subject property and pursuant to the statute the assessor established a limited market value of $4,479,900 for the property.

[6] Minnesota Statutes § 127A.48, subdivision 1 (Supp. 2003), located in the education code, instructs the Department of Revenue to prepare an assessment/sales ratio study to "determine an aggregate equalized net tax capacity for the various classes of taxable property in each [school] district." The statute requires the department to complete the

study using a "methodology consistent with the most recent Standard on Assessment Ratio Studies published by the assessment standards committee of the International Association of Assessing Officers" ("IAAO Standards"). Minn. Stat. § 127A.48, subd. 2 (2002). The statute further states that the Commissioner of Revenue "shall supplement this general methodology with specific procedures necessary for execution of the study in accordance with other Minnesota laws impacting the assessment/sales ratio study." *Id.*

The IAAO Standards refer to both "direct" and "indirect" equalization. IAAO Standards § 2.3.2 (1999). The IAAO makes clear, however, that constrained market values, such as limited market values in Minnesota, are appropriate only for indirect equalization, which estimates the aggregate tax base in various school districts or localities and, therefore, must account for statutory constraints on those tax bases. IAAO Standards §§ 2.3.2.2; 6.5.7. Similarly, the Department of Revenue refers to two distinct types of sales ratio studies that mirror the IAAO distinctions. The first, intended for use in equalization, matches sale prices against the assessors' *estimated market values*, while the second, intended for calculation of state aids, compares sales with assessors' *taxable market values*. Minn. Dep't of Revenue, 2003 Sales Ratio Study Criteria 1. The IAAO standards and the Department of Revenue's practice therefore support a reading of section 278.05, subdivision 4, under which limited market value is used only for the computation of state aids.

[7] This contrasts with indirect equalization, which seeks to equalize the differences in tax capacities between different taxing districts. Because indirect equalization requires a determination of a taxing district's aggregate tax capacity, it is appropriate to consider that capacity as it is affected by limited market value and other constraints on taxable value.

STATE OF MINNESOTA

IN SUPREME COURT

CX-01-2207

Court of Appeals

Meyer, J.
Concurring in part and dissenting in part,
Hanson, J., and Blatz, C.J.
Took no part, Gilbert, J.

George Janssen, et al.,

Respondents,

vs.

Filed: May 22, 2003
Office of Appellate Courts

Best & Flanagan, et al.,

Defendants,

and

Minneapolis Police Relief Association, petitioner,

Appellant.

S Y L L A B U S

1. The boards of nonprofit corporations may receive the protection of the business judgment rule.

2. Minnesota Statutes § 317A.241 (2002) does not prohibit nonprofit corporations from appointing independent committees with the authority to decide whether the corporation should join a member's derivative suit.

3. Because the investigation conducted by appellant's litigation committee lacked independence and good faith, the conclusion of that committee does not deserve deference from the court as a business decision.

4. When the committee authorized with making a business decision for the corporation lacks independence and good faith, a member's derivative suit proceeds on its merits.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

MEYER, Justice.

We are called on to decide certain questions of first impression regarding the law of nonprofit corporations in Minnesota. The principal issue concerns how a nonprofit board may respond to a member's demand to commence legal action on behalf of the association. We also consider the degree of deference that a district court may give to a nonprofit board's decision to reject a member's demand to commence legal action.

The board of directors of the Minneapolis Police Relief Association (MPRA) made an improvident investment in a company known as Technimar and lost approximately fifteen million dollars. Certain members of MPRA (Janssen, et al., whom we will refer to collectively as "Janssen") brought a derivative suit on behalf of MPRA against Best & Flanagan alleging attorney malpractice with respect to the Technimar investment. MPRA appointed special counsel to review the merits of the derivative suit. Special counsel concluded that proceeding with the derivative suit would not be in the best interests of MPRA and MPRA moved to dismiss the suit. The district court treated special counsel as a special litigation committee, applied the business judgment rule to the committee's decision not to proceed with the derivative action, and dismissed Janssen's suit. The court of appeals reversed, concluding that the legislature had not granted nonprofit corporations authority to appoint special litigation committees, and the district court was precluded from deferring to the decision of MPRA's special counsel. MPRA petitioned for review, seeking a reversal of the court of appeals' decision.

MPRA is a Minnesota nonprofit corporation that administers a pension plan for Minneapolis police officers hired before June 15, 1980. Minn. Stat. § 423B.01-.04 (2002).

MPRA was formed under and is subject to Minn. Stat. ch. 317A (2002), the Minnesota Nonprofit Corporation Act, and is governed by a board of nine directors. *See* Minn. Stat. § 423B.05, subd. 1 (2002).

In 1996 and 1997, MPRA lost approximately fifteen million dollars that it had invested with David Welliver in a company called Technimar. The circumstances surrounding this loss were the subject of several investigations and at least two prior lawsuits. The most important aspect of this history for the instant case is that two law firms, Jones, Day, Reavis and Pogue (Jones Day) and Dorsey & Whitney, LLP (Dorsey Whitney), had already conducted investigations surrounding some of the issues.

Janssen alleges in this action that MPRA's former attorneys, Best & Flanagan, committed malpractice in representing MPRA during and after the Welliver investments were made in 1996 and 1997. Janssen alleges, among other claims, that Best & Flanagan attorneys served as general counsel to MPRA and were negligent in failing to conduct a "due diligence" inquiry into the

Welliver investment. In bringing this derivative suit, Janssen did not have an attorney-client relationship with Best & Flanagan, so their suit depended upon MPRA joining them as a plaintiff.

In response to this lawsuit, MPRA appointed attorney Robert A. Murnane (Murnane) as special counsel to investigate Janssen's claims and determine whether MPRA should join the derivative suit. The MPRA board issued a resolution in June of 2000 instructing Murnane to conduct an independent review and evaluate the derivative lawsuit to determine on behalf of MPRA's board of directors whether or not MPRA should join in legal action against Best & Flanagan. The resolution specifically instructed Murnane to "not reinvestigate, verify or otherwise attempt to prove or disprove the factual findings, determinations, events or circumstances" described in the prior investigative reports of Jones Day and Dorsey Whitney and a set of discovery materials in a related lawsuit. Murnane was specifically instructed to "accept as correct" the factual findings of these reports and discovery materials. Murnane was not limited, however, by the conclusions of the previous reports.

Murnane reviewed "thousands of pages of reports, documents and deposition transcripts" over a few months in investigating the merits of a malpractice action against Best & Flanagan. However, the record does not indicate that he conducted any of his own investigation, nor did he personally speak to the Janssen claimants or their counsel. Murnane submitted his report to the MPRA board on September 26, 2000, concluding that "the totality of the materials reviewed does not support a finding that Best & Flanagan committed legal malpractice in its handling of the MPRA affairs," and that "to spend money in the pursuit of a legal malpractice claim against Best & Flanagan would not be prudent use of the MPRA funds." Following submission of Murnane's report, the MPRA board brought a motion to dismiss the instant lawsuit under the principle of law that the court should defer to the business judgment of Murnane, MPRA's special litigation committee.

In considering MPRA's motion to dismiss, the district court described the appropriate role that special litigation committees play in acting on behalf of for-profit corporations. The court determined that a nonprofit corporation is also authorized to utilize the special litigation committee procedure. The court treated Murnane as a special litigation committee and applied the business judgment rule to the committee's report. Under the business judgment rule enunciated by the court, it examined only whether the committee conducted its investigation with independence and good faith. The court concluded that "[Murnane's] investigation cannot survive even this limited review." The court could not find that Murnane was independent because "he was told by the board of directors what to believe." The court could not find good faith because there was no indication from Murnane that he sought or received input from the plaintiffs and the court was left to assume that such input was not sought because the board's instructions limited the scope of the investigation. Finally, the court could not clearly discern whether Murnane was offering legal advice or, in fact, rendering a business judgment decision.

Rather than deny MPRA's motion to dismiss the Janssen lawsuit, the district court postponed a decision on the motion to allow MPRA an opportunity to remedy the deficiencies in MPRA's delegation of authority to its special litigation committee. The court instructed MPRA that if it sought deference for its committee's litigation decision, the court would not grant such

deference unless and "until adequate evidence of independence and good faith is submitted by the MPRA, and until it is clear that Murnane has rendered a business judgment."

Consequently, MPRA issued a second resolution in December of 2000 to Murnane, declaring that he was to function as a special litigation committee, not being limited in any way as to how to conduct his investigation or what material he may consider: "[s]pecial counsel shall have complete independence and may undertake whatever good faith investigation he chooses." The resolution asked Murnane to exercise his "business judgment" regarding whether it was in the best interest of MPRA to join in the derivative suit. Murnane conducted an investigation that included meeting with certain of the named plaintiffs in the action and the involved attorneys at Best & Flanagan. Murnane submitted a second report and in that report concluded it would be a "poor business judgment" for MPRA to join in litigation against Best & Flanagan. MPRA renewed its motion to dismiss. The district court reviewed Murnane's second report and concluded that MPRA's special litigation committee (Murnane) had conducted an investigation that was independent and conducted in good faith. The court deferred to the committee's business judgment and granted MPRA's motion to dismiss the complaint against Best & Flanagan.

Janssen appealed and the court of appeals reversed. It concluded that a nonprofit corporation lacks the statutory authority to appoint a special litigation committee to evaluate derivative claims. Additionally, the court concluded that even if a nonprofit corporation has the authority to appoint a special litigation committee, in this case the special litigation committee failed to meet the threshold test of the business judgment rule. The court reversed and remanded for trial. This appeal followed.

I.

We concern ourselves with two questions: (1) whether the Minnesota Nonprofit Corporations Act prohibits a nonprofit corporation's board of directors from establishing an independent committee with authority to make decisions about derivative lawsuits; and (2) whether Murnane, as special counsel, displayed sufficient independence and good faith to be entitled to the deference of the business judgment rule. We exercise de novo review of the primary issues in this case, as they involve statutory interpretation and novel questions of law. *State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000). We also note that other states have recently held that they will review de novo a decision of a district court to dismiss a derivative suit. *See Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000); *In Re PSE & G S'holder Litig.*, 801 A.2d 295, 313 (N.J. 2002).

A. The Business Judgment Rule and Derivative Lawsuits

To resolve this case we must strike a balance between two competing interests in the judicial review of corporate decisions. *See PSE & G*, 801 A.2d at 306. On one hand, courts recognize the authority of corporate directors and want corporations to control their own destiny. *Stoner v. Walsh*, 772 F. Supp. 790, 796 (S.D.N.Y. 1991). On the other hand, courts provide a critical mechanism to hold directors accountable for their decisions by allowing shareholder derivative suits. *See Barrett v. Southern Conn. Gas Co.*, 374 A.2d 1051, 1055

(Conn. 1977) (remarking that "'[i]f the duties of care and loyalty which directors owe to their corporations could be enforced only in suits by the corporation, many wrongs done by directors would never be remedied'" (citation omitted)); *Brown v. Tenney*, 532 N.E.2d 230, 232 (Ill. 1988) (stating that "[t]he derivative suit is a device to protect shareholders against abuses by the corporation, its officers and directors, and is a vehicle to ensure corporate accountability"). Because shareholder-derivative litigation is not an everyday occurrence in Minnesota's courts, we address these issues for the first time.

Courts have attempted to balance these two competing concerns by establishing a "business judgment rule" that grants a degree of deference to the decisions of corporate directors. The business judgment rule was developed by state and federal courts to protect boards of directors against shareholder claims that the board made unprofitable business decisions. "The business judgment rule is a presumption protecting conduct by directors that can be attributed to any rational business purpose." Dennis J. Block, et al., *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* 18 (5th ed. 1998). The business judgment rule means that as long as the disinterested director(s) made an informed business decision, in good faith, without an abuse of discretion, he or she will not be liable for corporate losses resulting from his or her decision. *Id.* at 39. Two major reasons buttress the decision to grant a degree of deference to corporate boards. First, protecting directors' reasonable risks is considered positive for the economy overall, as those risks allow businesses to attract risk-averse managers, adapt to changing markets, and capitalize on emerging trends.[1] Second, courts are ill-equipped to judge the wisdom of business ventures and have been reticent to replace a well-meaning decision by a corporate board with their own. *See, e.g.*, *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979).

Where the shareholders of a corporation believe the board has acted improperly, corporate law recognizes the shareholders' ability to bring a derivative lawsuit. Derivative suits allow shareholders to bring suit against wrongdoers on behalf of the corporation, and force liable parties to compensate the corporation for injuries so caused. *Tenney*, 532 N.E.2d at 233. A derivative action actually belongs to the corporation, but the shareholders are permitted to bring the action where the corporation has failed to take action for itself. *See id.* Because of the business judgment rule, however, not all shareholders' derivative suits proceed on their merits. While derivative suits may benefit a corporation, any benefit must be weighed against the possibility that disgruntled shareholders will bring nuisance lawsuits with little merit and that even legitimate suits may not be worth pursuing when the likelihood of victory is compared with the time, money, and hostility necessary to win. The substantive decision about whether to pursue the claims advanced in a shareholder's derivative action involves "the weighing and balancing of legal, ethical, commercial, promotional, public relations, fiscal and other factors familiar to the resolution of many if not most corporate problems." *Auerbach,* 393 N.E.2d at 1002. The careful balancing of those factors is best done by the board of directors, which is familiar with the appropriate weight to attribute to each factor given the company's product and history. Thus, courts apply the business judgment rule when evaluating the decision by a board of directors whether to join or quash a derivative suit belonging to the corporation. *Block, supra,* at 1702-03.

Having established the principles by which we apply the business judgment rule to a for-profit corporate board's decision whether to join a derivative lawsuit, we consider whether to grant similar deference to nonprofit boards of directors. The parties in this case have presumed the business judgment rule will apply to MPRA. Other states have applied the business judgment rule to decisions of nonprofit corporations, explicitly or implicitly. The highest courts of Alabama, Hawaii, and South Dakota have done so, as have intermediate appellate courts of Colorado, New York, Ohio, South Carolina, Tennessee, and Wisconsin.[2] We find no case denying a nonprofit organization the protection of the business judgment rule.

In addition to finding support in other jurisdictions for giving judicial deference to nonprofit corporate decisions, the primary rationales for applying the business judgment rule in the for-profit context apply in the nonprofit context as well. Organizations are autonomous agents that should control their own destiny. *See Auerbach,* 393 N.E.2d at 1000-01. Directors of nonprofits may take fewer risks than would be optimal if they were overly concerned about liability for well-meaning decisions. *See* Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis,* 71 Cornell L. Rev. 261, 270 (1986). Additionally, courts are not well-equipped to scrutinize the decisions of a corporation; judges should not be caught in the middle of fighting factions of nonprofits any more than they should be thrust between dissatisfied shareholders and profit-seeking boards. *See id.* at 273. Therefore, we conclude that the boards of nonprofit corporations may receive the protection of the business judgment rule.

B. Special Litigation Committees

We turn now to consider whether a nonprofit board of directors that is not sufficiently independent to decide whether to join a member's derivative lawsuit may establish a special litigation committee with authority to make the decision.[3] Janssen claims a nonprofit may not appoint a special litigation committee because the Minnesota Nonprofit Corporation Act (Nonprofit Act) provides no such authority. Minn. Stat. § 317A.241 (2002). MPRA argues that the Nonprofit Act permitted them to appoint Murnane as its special litigation committee, and the district court agreed. The court of appeals concluded that the statute prohibited nonprofits from appointing special litigation committees. We agree with the district court.

Special litigation committees are made up of disinterested board members or individuals appointed by the board who are charged with informing themselves fully on the issues underlying the derivative suit and deciding whether pursuit of litigation is in the best interests of the corporation. *See, e.g., Houle v. Low,* 556 N.E.2d 51, 53 (Mass. 1990); *Drilling v. Berman,* 589 N.W.2d 503, 505-07 (Minn. App. 1999); *PSE & G,* 801 A.2d at 303. The key element is that the board delegates to a committee of disinterested persons the board's power to control the litigation. Block, *supra,* at 1689. A mere advisory role of the special litigation committee fails to bestow a sufficient legitimacy to warrant deference to the committee's decision by the court. If the board properly delegates its authority to act to the special litigation committee, the court will extend deference to the committee's decision under the business judgment rule. *See Drilling,* 589 N.W.2d at 510; *Skoglund v. Brady*, 541 N.W.2d 17, 22 (Minn. App. 1995); *Black v. NuAire, Inc.,* 426 N.W.2d 203, 211 (Minn. App. 1988).

C. Minnesota Nonprofit Corporations Act

We look to the Nonprofit Act to determine whether MPRA had statutory authority to appoint its special litigation committee. The relevant part of the statute reads:

> A resolution approved by the affirmative vote of a majority of the board may establish committees having the authority of the board in the management of the business of the corporation to the extent provided in the resolution. Committees are subject at all times to the direction and control of the board.

Minn. Stat. § 317A.241, subd. 1 (2002).

The first inquiry in statutory interpretation is whether the law is ambiguous. *See* Minn. Stat. § 645.16 (2002). If the words are clear and unambiguous, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit." *Id.* MPRA argues the statute unambiguously allows nonprofit boards to create independent committees. It maintains that the statute does not limit the types of committees that nonprofits can create in any way, thereby making litigation committees acceptable. In addition, MPRA posits that the phrase "subject at all times to the direction and control of the board" does not strip the committees of the independence necessary for the protection of the business judgment rule. Instead, it argues that "subject * * * to" simply indicates a "possibility of control," not a necessity of constant control.

Janssen also argues that the statute is unambiguous but urges a contrary meaning: a committee that must be "subject to" the "control" of the board cannot be sufficiently independent from the board to deserve the protection of the business judgment rule. Janssen also points to subdivision 5 of the statute, noting that a director cannot fulfill his or her standard of conduct by delegating authority to the board, as an indication that nonprofit directors have to retain control over all board committees.

The language in subdivision 1 indicating that committees must be subject to the board's control and direction could reasonably be interpreted to mean either that the board must control every move of the committees, or simply that the board has a duty to oversee the work of the committees. The former interpretation would make true independence impossible, while the latter interpretation is flexible enough to allow for independent committees. As both parties' interpretations are plausible, we conclude the statute is not clear and free from all ambiguity.

If the words of a statute are not explicit, we interpret the statute's meaning by considering the intent of the legislature in drafting the law. Minn. Stat. § 645.16 (2002). There are three overarching considerations we consider in discerning legislative intent in this case: the context of the 1989 revision of the Nonprofit Act, contemporaneous legislative history, and consequences of a particular interpretation. *Id.* We will address each of these in turn. In addition, we presume that the legislature did not intend an absurd result or to violate the Constitution, and that it intended the entire statute to have effect and favor the public interest. Minn. Stat. § 645.17 (2002).

The 1989 revision of the Nonprofit Act was carried out eight years after the legislature enacted a wholesale revision of the Minnesota Business Corporation Act (Business Act), Minn. Stat. ch. 302A (2002), in 1981. *See* Minnesota Business Corporation Act of 1981, ch. 270, §§ 1-125, 1981 Minn. Laws 1141-1222. Shortly after the revised Business Act was adopted, the Minnesota State Bar Association organized a group to study the counterpart statute for nonprofits, and found it was outdated and unworkable, with many ambiguities. Hearing on H.F. 1203, H. Subcomm. Civil Law, 76th Minn. Leg., April 24, 1989 (audio tape) (comments of Kathleen Pontius). The act had not been revised since 1951, when the archetypal nonprofit in legislators' minds was a social club like the Jaycees or Rotary. Hearing on H.F. 1203, H. Subcomm. Civil Law, 76th Minn. Leg., April 24, 1989 (audio tape) (comments of Patrick Plunkett, president of Ramsey County Bar Ass'n). This original conception made the statute a poor fit for the growing number and variety of nonprofit organizations, and for the lawyers who served them. *Id.* A legislative committee drafted a new statute governing nonprofits, with three major sources: the Business Act, the ABA's Revised Model Nonprofit Act, and Minnesota's old nonprofit act. Hearing on H.F. 1203, H. Subcomm. Civil Law, 76th Minn. Leg., April 24, 1989 (audio tape) (comments of Rep. Thomas Pugh, bill's sponsor).

Minnesota Statutes § 317.241 was passed in the context of a wholesale revision of the Nonprofit Act. The legislature did not pass the statute to specifically address the committee structure of nonprofits or their ability to control derivative suits. We conclude that the legislature's purpose in revising the Minnesota Nonprofit Corporations Act in 1989 had nothing to do with special litigation committees, and sheds little light on our inquiry.

We next examine the contemporaneous legislative history to determine legislative intent. In reaching its decision that the legislature did not intend to empower nonprofit boards to create special litigation committees, the court of appeals emphasized the difference between the Business Act and the Nonprofit Act on this subject. The Business Act specifically says a board of directors may establish special litigation committees of one or more directors "to consider legal rights or remedies of the corporation and whether those rights and remedies should be pursued. Committees *other than special litigation committees* * * * are subject at all times to the direction and control of the board." Minn. Stat. § 302A.241, subd. 1 (2002) (emphasis added). The court of appeals was concerned that not only does the Nonprofit Act lack a specific provision for special litigation committees, it also does not exempt any committees from board control.

The comparison between the Business Act and the Nonprofit Act does not illuminate as much legislative intent as the court of appeals derived, however. The Nonprofit Act was passed eight years after the Business Act, making any attempt to infer meaning from a comparison between the two less convincing. A careful review of the available legislative history produced no discernible indication why the special litigation committee language was dropped. The absence of the special litigation language in the nonprofit statute could mean several things, including that the drafters did not think derivative suits were an issue for nonprofits and therefore did not address litigation committees in the Nonprofit Act.

Given that little legislative intent concerning section 317A.241 can be inferred from either the purpose of the 1989 revision of the Nonprofit Act or the comparison with the Business

Act, we are left with one remaining consideration in discerning legislative intent under Minn. Stat. § 645.16: the consequences of a particular interpretation. On this point it becomes clear that the district court reached the correct result. The district court noted that if nonprofit corporate boards are unable to establish independent committees whose informed business judgments merit deference from the courts, the judiciary would be forced to review the merits of every lawsuit brought by a member of a nonprofit corporation. Reviewing all derivative suits for nonprofit corporations would intrude on the authority of nonprofit boards, significantly tax our court system's limited resources, and require judges to step significantly beyond their expertise. The district court concluded that "[s]uch a procedure—totally removing from the board of directors any control over litigation brought on behalf of the organization the board is supposed to govern—is clearly untenable." We agree. We see no reason to assume that the courts are better equipped to make business judgments about the merits of a lawsuit brought by a member of a nonprofit corporation than is a properly functioning board of directors whose duty it is to govern and promote the nonprofit corporation's best interests.

There are no characteristics of nonprofits that justify treating nonprofit and for-profit corporations differently in terms of their ability to delegate board authority to independent committees to review the merits of derivative suits. There are nonprofits, like MPRA, that function very much like for-profit corporations and would benefit from the ability to weed out nuisance suits. In addition to pension funds, these nonprofits may include hospitals, schools, and homeowners associations.[4] We are not alone in reaching this conclusion; two other states have used the business judgment rule when reviewing decisions by nonprofit litigation committees: *Finley v. Superior Court*, 96 Cal. Rptr.2d 128, 132 (Cal. Ct. App. 2000); *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1343 (Ohio Ct. App. 1990).

Refusing nonprofit corporations the ability to create special litigation committees is counter to our common law tradition as well. While statutes govern certain aspects of corporate life, including the initial incorporation, corporate litigation has been largely a creature of the common law. Derivative suits developed during the nineteenth century as an equitable means of protecting corporations and minority shareholders from fraudulent directors. Block, *supra*, at 1380. The first judicial opinions to apply the business judgment rule to the decision of a special litigation committee did not rely on statutory authority, but rather relied upon case law to determine whether a committee could terminate a shareholder lawsuit. Block, *supra*, at 1690-93.

A nonprofit corporation's power to appoint a special litigation committee, in the absence of a statutory prohibition, may also spring from the existence of corporate "incidental" powers to carry out corporate purposes. *Aiple v. Twin City Barge & Towing Co.*, 274 Minn. 38, 45, 143 N.W.2d 374, 378 (1966) (identifying corporate powers as being limited to "those actions expressly authorized by statute and such as are incidental thereto and necessary to carry them into effect"). It is now universally accepted in corporate jurisprudence that corporations have the ability to exercise incidental or necessary powers:

> Formerly, corporations were viewed as possessing only such powers as were specifically granted to them by the state. This grant of powers was

> found in the certificate of incorporation * * * or in the special statute granting a charter to the corporation.
>
> * * * *
>
> Today, in all the states, a corporation is deemed to possess all the powers of a natural person except those powers which are specifically forbidden to such corporations by the law. The old concept of a corporation as a bundle of only a few, specifically granted powers, has been replaced by the concept of a corporation as an artificial person, lacking only those powers which the law specifically denies to it.

Howard L. Oleck, *Non-Profit Corporations, Organizations, & Associations* § 168 (6th ed. 1994); *see also* 13 William Meade Fletcher, et al., *Fletcher's Cyclopedia of the Law of Private Corporations* § 5963 (perm. ed., rev. vol. 1984).

The untenable consequence of concluding the Nonprofit Act prohibits litigation committees, in combination with the common law tradition favoring corporate control of derivative actions, leads us to conclude that nonprofit corporations have the power to create committees that are sufficiently independent to merit judicial deference. We hold the Minnesota Nonprofit Corporations Act does not prohibit corporations from appointing independent committees with the authority to decide whether the corporation should join a member's derivative suit.

II.

Having determined that nonprofit corporations have the power to create special litigation committees, the question remains whether Murnane deserved the deference of the business judgment rule. The court of appeals concluded that Murnane, as a special litigation committee, failed to meet the threshold test of independence and good faith, and ordered the lawsuit to proceed. We agree and affirm.

All the state variations upon the business judgment rule as applied to committees reviewing litigation have two common elements. At a minimum, the board must establish that the committee acted in good faith and was sufficiently independent from the board of directors to dispassionately review the derivative lawsuit. *See, e.g., Grimes v. Donald,* 673 A.2d 1207, 1219 (Del. 1996); *Houle*, 556 N.E.2d at 59; *PSE & G*, 801 A.2d at 312; *Auerbach*, 393 N.E.2d at 1000. A key factor in evaluating independence is whether the board delegates to a committee of disinterested persons the board's power to control the litigation. Block, *supra,* at 1689. A mere advisory role of the special litigation committee fails to bestow a sufficient legitimacy to warrant deference to the committee's decision by a court. Thus, we consider whether Murnane conducted his investigation with sufficient independence and good faith to deserve the deference of the business judgment rule. If not, the committee does not receive the court's deference and the derivative suit proceeds.

In reviewing Murnane's first report, we conclude that the board failed to establish the independence and good faith of Murnane's investigation.[5] We agree with the district court's determination that Murnane lacked independence because the MPRA's initial resolution restricted his factual investigation. Murnane was told to rely on facts developed by law firms that had been hired to represent MPRA in lawsuits about other legal issues. Additionally, Murnane's independence is suspect because his conduct suggests that he saw his role in conformance with his title: special counsel. Murnane did not talk to Janssen or their attorneys in investigating the suit and gave a conclusion that sounds like legal advice. That behavior belies MPRA's attempt to portray Murnane as a special litigation committee; instead MPRA hired Murnane to serve as its special counsel and he acted more like a legal advisor than a neutral decision maker.

In addition, we conclude that Murnane did not engage in a good faith attempt to deduce the best interest of MPRA with respect to the litigation against Best & Flanagan. Murnane never interviewed Janssen or their attorneys, a fundamental task in reaching an informed decision about the merits of their complaints. Murnane also gave no indication that he had undertaken the careful consideration of all the germane benefits and detriments to MPRA that is indicative of a good faith business decision. Murnane opined that "the totality of the materials reviewed does not support a finding that Best & Flanagan committed legal malpractice in its handling of the MPRA affairs," and that "to spend money in the pursuit of a legal malpractice claim against Best & Flanagan would not be prudent use of the MPRA funds." The language of his conclusion hints that his decision was that of a special counsel evaluating the likelihood of a legal victory. But a much more comprehensive weighing and balancing of factors is expected in situations like this, taking into consideration how joining or quashing the lawsuit could affect MPRA's economic health, relations between the board of directors and members, MPRA's public relations, and other factors common to reasoned business decisions. *See Auerbach,* 393 N.E.2d at 1002. We conclude that Murnane's initial investigation of the derivative action instituted by Janssen against Best & Flanagan lacked the independence and good faith necessary to merit deference from this court.

Implicitly acknowledging the failures in its first resolution and investigation, the MPRA board urges us to consider the second resolution and improved investigation.[6] We decline to do so. Generally, when the committee authorized with making a business decision for the corporation is found to lack the independence needed to grant summary judgment, or where the independence is uncertain, the derivative suit proceeds on its merits. *See, e.g., Hasan v. CleveTrust Realty Investors*, 729 F.2d 372, 380 (6th Cir. 1984); *Will v. Engebretson & Co., Inc.*, 213 Cal. App. 3d 1033, 1043-45 (1989); *Lewis v. Fuqua*, 502 A.2d 962, 972 (Del. Ch. 1985); *Davidowitz v. Edelman*, 153 Misc. 2d 853, 858 (N.Y. Sup. Ct. 1992). *See also Houle*, 556 N.E.2d at 58-60 (reversing summary judgment in favor of defendant board of directors and remanding for an evidentiary hearing before a judge regarding a committee member's independence, and noting that "[u]nless the defendant sustains its burden of proof as to both of those questions, the case should proceed to trial."). The *Auerbach* court was blunt in its assessment of the consequences when proof of an investigation shows that the investigation is too restricted in scope or so shallow in execution as to constitute a pretext; such proof "would raise questions of good faith * * * which would *never* be shielded by that doctrine." *Auerbach,* 393 N.E.2d at 1003 (emphasis added).

The practice of allowing derivative suits to proceed to trial if a corporate board's initial attempt at a business decision fails the minimal requirements for judicial deference is supported by the principles underlying the application of the business judgment doctrine. We strike a balance between allowing corporations to control their own destiny and permitting meritorious suits by shareholders and members by limiting a board of directors to one opportunity to exercise its business judgment. *See, e.g., Kaplan v. Wyatt*, 484 A.2d 501, 508 (Del. Ch. 1984) (explaining that if the court determines the litigation committee failed the minimal review of the business judgment rule,the "court shall deny the motion for such reason and need go no farther, the result being that the shareholder plaintiff may resume immediate control of the litigation"). If the courts allow corporate boards to continually improve their investigation to bolster their business decision, the rights of shareholders and members will be effectively nullified. We conclude that the district court erred in deferring MPRA's motion to dismiss and permitting the board to remedy defects in its first grant of authority to Murnane. We further conclude that Murnane failed to conduct his initial investigation with sufficient independence and good faith to deserve the deference of the business judgment rule and, therefore, hold that the district court erred when it granted MPRA's motion to dismiss the suit against Best & Flanagan.

Affirmed.

GILBERT, J., took no part in the consideration or decision of this case.

CONCURRENCE & DISSENT

HANSON, Justice (concurring in part, dissenting in part).

Although I concur with the decisions that boards of nonprofit corporations are protected by the business judgment rule, that nonprofit corporations may avail themselves of that rule by appointing a special litigation committee to decide whether the corporation should join a members' derivative suit, and that Murnane may be viewed as a special litigation committee, I respectfully dissent on the decision to limit our review to Murnane's first report. The district court did not base its dismissal order on Murnane's first report because it concluded that procedural deficiencies precluded deference to Murnane's recommendations. The district court granted MPRA's motion to dismiss specifically on the basis of Murnane's second report, concluding that it was entitled to deference because it reflected an independent investigation that was conducted in good faith.

I find no authority to support the majority opinion's development of a "one strike you're out" rule for conducting an investigation of claims made in a derivative action. The cases cited by the majority stand only for the proposition that the derivative action proceeds to trial when a motion to dismiss, based on the recommendation of a special litigation committee, is denied. They do not address the question of whether such denial is with prejudice to later renewal or, more specifically applicable here, whether the district court has discretion to defer ruling on the motion to dismiss to allow further investigation. Drawing on the analogy to summary judgment motions generally, the federal decisions are unanimous in holding that the denial of a motion for summary judgment does not become the "law of the case" so as to preclude the later grant of a renewed motion. *See, e.g., Paulson v. Greyhound Lines, Inc.*, 628 F. Supp. 888, 891 (Minn.

1986), and cases cited in 10A Charles Alan Wright, Arthur R. Miller, & Mary Kaye Kane, *Federal Practice and Procedure* § 2718 n.6 (1998). This rule has been recognized by the Minnesota Court of Appeals in *Invest Cast, Inc. v. City of Blaine*, 471 N.W.2d 368, 370 (Minn. App. 1991); *Brantner v. Fruehauf Corp.*, 1991 WL 10225 (Minn. App.). Even more to the point are those cases which hold that it is within the trial court's discretion to deny a motion for summary judgment without prejudice to it being renewed at a later time. *See* Wright, Miller and Kane § 2718 n.5; 2 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 56.11 (1998).

For these reasons, I would not limit review to Murnane's first report. Under these facts, where the deficiencies of the first report resulted from structural impediments imposed by the corporation upon the scope of the special litigation committee's investigation, I would conclude that the district court has discretion to defer (or to deny without prejudice) a motion to dismiss to allow the corporation an opportunity to remove those structural impediments.

Moreover, I would conclude that MPRA did remove the structural impediments to Murnane's investigation and that Murnane's second report did reflect sufficient independence and good faith to warrant dismissal.

In reaching this conclusion, I am persuaded that the deficiencies in Murnane's first report were not the product of any wrongdoing by Murnane, but instead were the necessary result of the structural impediments imposed by MPRA. That conclusion is confirmed by the majority opinion's review of Murnane's first report, which concludes that "Murnane lacked independence because the MPRA's initial resolution restricted his factual investigation." The resolution of the MPRA board, authorizing Murnane's continuing investigation after his first report, was appropriately broad:

> Special Counsel is not required to assume as correct any portion of the previous reports prepared on behalf of the Board of Directors. Special Counsel is encouraged to solicit facts, argument and other input from the parties to the litigation in such manner and form as Special Counsel deems appropriate. Special Counsel is not limited in any way as to how to conduct his investigation or what material he may consider. Special Counsel shall have complete independence and may undertake whatever good faith investigation he chooses.

The fault in Murnane's first report was cured by his further investigation and second report. Murnane interviewed Janssen and their attorneys, reviewed documents they provided and analyzed the arguments they presented. Murnane considered all of the germane benefits and detriments to MPRA of participating in the litigation.

There may be situations where an initial investigation by a special litigation committee is so tainted that an expanded investigation, at least by the same committee, could not cure the deficiencies in the required independence and good faith. For example, if there was evidence that Murnane had developed some bias or was committed to reach the same recommendation no matter what facts or arguments were brought to his attention, the second report would stand no better than the first. However, I see no evidence that this was the case.

Finally, I cannot agree with the majority opinion's view that Murnane's legal evaluation of the likely outcome of the derivative action somehow discredited the independence or good faith of his investigation. Although Murnane, as a special litigation committee, was expected to exercise the "business judgment" of a board of directors, that business judgment must be applied to the merits of the derivative action. The best interests of MPRA depend upon an objective assessment of whether the likely outcome of the derivative action justifies the expenditure of time, effort and collegiality. In such a cost-benefit analysis, the potential benefit depends directly upon the likelihood of a favorable outcome in the litigation—the less likely a favorable outcome, the less benefit.

Murnane's report concludes that there would be no benefit to participating in the derivative action—"the association would be unsuccessful in prosecuting a cause of action against Best & Flanagan, Brian Rice and Charles Berquist"—but that the cost would be significant, despite the willingness of Janssen's counsel to proceed on a contingent fee basis—"the ongoing viability of the association and a harmonious relationship between its board of directors and legal counsel" would be adversely affected. This is precisely the type of business judgment that a special litigation committee is expected to make and, when made in good faith by a committee that is independent of the corporation's board, it is entitled to deference by the court. Accordingly, I would reverse the court of appeals and conclude that the district court did not err when it dismissed the derivative action based on Murnane's second report and recommendation.

BLATZ, Chief Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Hanson.

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[1] For a thorough discussion of the rationale behind judicial deference to business decisions, *see* Peter V. Letsou, *Implications of Shareholder Diversification on Corporate Law and Organization: The Case of the Business Judgment Rule*, 77 Chi.-Kent L. Rev. 179, 181-82 (2001); Eric W. Orts, *The Complexity and Legitimacy of Corporate Law*, 50 Wash. & Lee L. Rev. 1565, 1588 (1993); Ralph K. Winter, *On 'Protecting the Ordinary Investor,'* 63 Wash. L. Rev. 881, 895 (1988); Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis,* 71 Cornell L. Rev. 261, 270-71 (1986).

[2] *See Fairhope Single Tax Corp. v. Rezner*, 527 So.2d 1232, 1236 (Ala. 1987); *Chun v. Bd. of Trustees of the Employees Ret. Sys. in the State of Hawaii*, 952 P.2d 1215, 1226-27 (Haw. 1998); *Mahan v. Avera St. Luke's*, 621 N.W.2d 150, 154 (S.D. 2001); *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (Colo. App. 1974); *Scheuer Family Foundation Inc. v. 61 Associates*, 582 N.Y.S.2d 662, 663 (A.D. 1992); *Solomon v. Edgewater Yacht Club, Inc.*, 519 N.E.2d 429, 431 (Ohio Mun. 1987); *Dockside Ass'n, Inc. v. Detyens*, 352 S.E.2d 714, 716 (S.C. Ct. App. 1987); *Burke v. Tennessee Walking Horse Breeders & Exhibitors Ass'n*, 1997 WL 277999, *9 (Tenn. Ct. App. 1997); *John v. John*, 450 N.W.2d 795, 801-02 (Wis. Ct. App. 1990).

[3] Both Janssen and MPRA accepted the premise that the full MPRA board was not independent enough to merit judicial deference as a decision maker, and made no arguments about deferring to the decision of the board of directors to accept Murnane's report. Thus, we are focusing on whether Murnane's decision is entitled to deference.

[4] *See* Peter Frumkin & Alice Andre-Clark, *Nonprofit Compensation and the Market*, 21 U. Haw. L. Rev. 425, 427 (1999) (describing a lawsuit by a trustee of an educational organization against another trustee); *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1341 (Ohio Ct. App. 1990) (involving a derivative suit on behalf of a nonprofit hospital); *Dockside Ass'n*, 352 S.E.2d at 714 (involving a suit against a property association).

[5] We do not adopt a particular version of the business judgment rule for use with Minnesota nonprofit organizations today. Because we hold that Murnane's investigation failed the most minimal version of a business judgment rule, requiring that a litigation committee act in good faith, with independence, we need not reach the question of whether a more exacting standard of judicial review may be appropriate for nonprofit corporations than in the case of for-profit corporations. The members of nonprofits are not akin to diversified shareholders – any risk sustained by them cannot necessarily be spread among their other investments. Nor can they necessarily protect themselves by taking their assets elsewhere.

[6] We note that the district court could have deferred the motion in order to simply supplement the record. However, there is a marked difference between allowing a corporation to supply documents that better indicate the process it employed in reaching its business decision, and allowing the corporation to reconstitute its litigation committee and revamp its investigation. The former is permitted by a judge's authority to continue a summary judgment motion to more fully develop the record; the latter is not supported by the principles underlying the application of the business judgment doctrine.

STATE OF MINNESOTA

IN SUPREME COURT

C4-01-1487

St. Louis County

Meyer, J.
Concurring in part and dissenting in part, Gilbert, J.
Concurring in part and dissenting in part, Anderson, Russell A., and Hanson, JJ.

State of Minnesota,

Respondent,

vs.

Filed: August 21, 2003
Office of Appellate Courts

Darryl Andre Harris,

Appellant.

SYLLABUS

A legislative grant of authority to the chief judge of a judicial district to assign any district court matter, including a felony jury trial, to a judicial officer violates Article VI, Section 1 of the Minnesota Constitution.

Plain error analysis is inappropriate in a case involving a fundamental question of judicial authority.

Appellant, whose first-degree murder trial was assigned to a judicial officer and who has challenged the jurisdiction of the judicial officer on direct appeal, is entitled to a new trial before a district court judge.

Reversed and remanded.

Heard, considered, and decided by the court en banc.

OPINION

MEYER, Justice.

A St. Louis County jury convicted appellant Darryl Andre Harris of first-degree felony murder and attempted first-degree murder. A judicial officer presided, without objection, over most of the pretrial proceedings, as well as all aspects of the trial, including sentencing. On appeal, Harris argues that his convictions must be reversed and a new trial ordered because the judicial officer did not have jurisdiction to hear and try cases of first-degree murder. We reverse the convictions, holding that the assignment of a felony-level trial to a judicial officer pursuant to Minn. Stat. § 487.08, subd. 5 (2002), is unconstitutional. Harris is entitled to a new trial.

On February 22, 2000, Harris, John Horton, and Lucas Johnson went to the apartment of David Voegeli and Licolle Behan for a drug transaction. At the apartment were Voegeli, Behan, David Greenwood, and Efftimia Mylonas. According to witnesses, Harris entered the apartment, pulled out a gun, and declared that it was a robbery. He instructed everyone to drop to the floor and empty their pockets. A struggle over the gun ensued and at least two shots were fired, one paralyzing Voegeli and the other fatally wounding Greenwood. According to Harris, Voegeli, Greenwood, Horton, and Johnson attacked Harris after he walked into the apartment, and Harris shot Voegeli and Greenwood in self-defense.

A grand jury indicted Harris for first-degree felony murder, second-degree intentional murder, second-degree unintentional murder, attempted first-degree felony murder, attempted second-degree intentional murder, and first-degree assault. The case was assigned to a judicial officer rather than a district court judge. Neither party objected to the assignment, and the judicial officer presided over most of the pretrial proceedings, as well as the entire trial. The jury found Harris guilty on all charges. The judicial officer sentenced Harris to life in prison for first-degree murder and to a consecutive term of 180 months for attempted first-degree murder.

On appeal, Harris contends that he is entitled to a new trial before a judge of the district court because the judicial officer lacked jurisdiction to hear and try the case. The state contends that Harris waived any objection to assignment of his case to a judicial officer and, in any event, it was not plain error for the chief judge of the district to assign the judicial officer to hear and try the case. Because the issue of a judicial officer's authority to preside over a felony trial involves purely legal questions, we review the issue de novo. *See State v. Wolf,* 605 N.W.2d 381, 386 (Minn. 2000). Before considering a judicial officer's proper jurisdiction, we review the background of the judicial officer position within Minnesota's court system.

A. A History of Judicial Officers in Minnesota

In 1971, the legislature abolished most municipal courts in favor of county courts and authorized the appointment of judicial officers by county courts. Act of June 7, 1971, ch. 951, 1971 Minn. Laws 1985, 1985-2011 (codified at Minn. Stat. §§ 487.01-487.41 (1971)); *see generally* Marlene Johnson & John M. Stuart, *Minnesota's Judicial Officers: A Short History of an Endangered Species*, Bench & Bar of Minn., Dec. 1979, at 23, 27-28 (explaining the work of judicial officers and how the position was created). Minnesota Statutes § 487.08 (1971) provided:

> When the judicial business of a county court requires, the county court may appoint one or more part time judicial officers who shall be learned in

> the law and whose salary shall be fixed by the county court, with the approval of the county board or boards of the counties of the district, and paid by the county. They shall serve at the pleasure of the county court. They shall hear and try such matters as shall be assigned to them by the county court judge.

The judicial officer's work was seen as a continuation of the services provided by the municipal court, and the positions were created both to handle excess work load and provide short-term employment for probate and municipal judges who did not become county court judges. Johnson & Stuart, *supra*, at 27-28.

Under the 1971 legislation, a county court judge's jurisdiction was limited to probate matters, juvenile matters, family court proceedings, civil cases where the amount in controversy did not exceed $5,000, quiet title and mortgage foreclosures, forcible entry and unlawful detainer actions, ordinance violations, minor criminal offenses, and preliminary hearings for any criminal matter occurring in the county.[1] Act of June 7, 1971, ch. 951, §§ 14-19, 1971 Minn. Laws 1985, 1992-94. Because county courts did not have jurisdiction over felony matters, a judicial officer appointed under Minn. Stat. § 487.08 could not preside over a felony matter. *See id.*

In 1977, the legislature abolished the office of judicial officer. Act of June 2, 1977, ch. 432, § 25, 1977 Minn. Laws 1147, 1161. Before the effective date of abolition, however, the 1978 legislature amended the statute to grandfather in existing personnel, authorizing persons holding the office of judicial officer on January 1, 1978, in certain counties to "continue to serve at the pleasure of the chief judge of the district under the terms and conditions of their appointments." Act of April 5, 1978, ch. 750, § 3, 1978 Minn. Laws 907, 908-09 (codified at Minn. Stat. § 487.08 (1978)). The 1978 act also brought judicial officers under the controlling authority of the chief judge of the judicial district by providing that their salaries would be fixed by the chief judge, that they would be subject to the administrative authority and assignment powers of the chief judge, and that they would hear and try such matters as the chief judge may assign. Minn. Stat. § 487.08, subd. 5 (1978).[2] The 1978 act would have gradually phased out judicial officers through retirement, resignation, or termination of the assignment, but did allow for the appointment of temporary judicial officers for terms to expire no later than July 31, 1981. Act of April 5, 1978, ch. 750, § 6, 1978 Minn. Laws 907, 910.

As part of the same act, the legislature mandated that the supreme court, or an agency designated by it, review and study, among other things, whether the offices of judicial officer and referee should be retained or abolished; and if it was recommended that these offices should be retained, whether the powers and duties should be modified. *Id.*, § 8, 1978 Minn. Laws at 910. On October 1, 1980, the Minnesota Supreme Court Judicial Planning Committee submitted its report to the legislature. Minn. Supreme Court Judicial Planning Comm., Report on the Use of Para-Judicial Personnel in the Minnesota Courts (Oct. 1, 1980) (hereinafter "Committee Report").

The committee recommended that "[n]o vacancy in the office of judicial officer should be filled, nor new office created." *Id.* at 13. The committee noted that following the transfer of

assignment powers to the chief judge of the district court in 1978, district court cases were being assigned to judicial officers. *Id.* at 12-13. The committee stated:

> Statutory authority for judicial officers to hear, try, and issue final orders on any matter assigned, together with current assignment practices in the various districts, leads to the conclusion that judicial officers are utilized as functional equivalents of judges.

Id. at 12. In recommending the elimination of the judicial officer position, the committee was concerned that "judicial officers are not judges yet they are engaged in judging." *Id.* The committee further explained:

> The Minnesota Constitution and fundamental organization of the judiciary contemplate courts staffed with duly elected judges, accountable to the public. * * * Simply stated, the argument is that "people have a right to a judge."

Id. The committee acknowledged that the judicial officer position provided additional judicial personnel to meet rising caseloads, but advised that "[c]aseload requirements should be accommodated not by counties appointing judicial officers, but by the Legislature creating judgeships." *Id.* at 13. The committee also noted that elimination of the judicial officer position would be consistent with recent legislation intended to consolidate, unify, and standardize the court system throughout the state. *Id.* Accordingly, the committee recommended that the office of judicial officer be abolished when all "grandfathered" positions were vacated or terminated. *Id.*

Notwithstanding the committee's recommendations, the legislature did not entirely eliminate the position of judicial officer nor did it modify the duties and powers of judicial officers. Following the Committee Report, the 1981 legislature updated the grandfather provision, providing that persons holding the office of judicial officer on January 1, 1981, in certain counties "may continue to serve at the pleasure of the chief judge of the district under the terms and conditions of their appointment." Act of June 6, 1981, 1st Spec. Sess., ch. 4 art. 3, § 5, 1981 Minn. Laws 2479, 2526 (codified at Minn. Stat. § 487.08, subd. 2 (1982)). Although the same act prescribed the duties and powers of referees, *see id.* at § 4 (codified at Minn. Stat. § 484.70, subd. 7 (1982)), the legislature did not further address the duties and powers of judicial officers.

The 1982 legislature preserved judicial officer positions in St. Louis, Steele, and Carlton counties, granting authority to the chief judge in those districts to fill any vacancies arising in the office of judicial officer so long as the position existed on January 1, 1981. Act of March 23, 1982, ch. 608, § 2, 1982 Minn. Laws 1457, 1457 (codified at Minn. Stat. § 487.08, subd. 2 (1982)). As of May 1992, the only judicial officer position that remained filled in Minnesota was in St. Louis County. Minn. R. Crim. P. 4 cmt.

B. The Judicial Officer's Jurisdiction

With this background, we come to our first question. Did the legislature intend to grant authority in the chief judge of a judicial district to assign any district court matter to a judicial officer? The purpose of statutory interpretation is to determine the intent of the legislature. Minn. Stat. § 645.16 (2002); *State v. Larivee*, 656 N.W.2d 226, 229 (Minn. 2003).

Harris contends that the judicial officer never had jurisdiction to hear and try his case because the legislature never intended to expand the judicial officer's jurisdiction from minor criminal cases heard by the county courts to felony level cases under the jurisdiction of the district courts. Harris asserts that a judicial officer is limited to hearing and trying county court matters under the plain meaning of Minn. Stat. § 487.08 (2002), which states that judicial officers – until their positions are abolished – are to "continue to serve at the pleasure of the chief judge of the district under the terms and conditions of their appointment." Harris argues that permitting judicial officers to serve "under the terms and conditions of their appointment" refers to their original appointment in county court, and they are permitted to serve so long as they are assigned county court cases. *See* Minn. Stat. § 487.08, subd. 2 (2002). Alternatively, "terms and conditions" could merely refer to administrative matters such as compensation and benefits and not concern a judicial officer's jurisdiction.

We conclude that the "terms and conditions" language likely refers to administrative matters and does not express legislative intent about jurisdiction. If the legislature had intended to limit the jurisdiction of judicial officers, it could have included language to that effect. Indeed, the section on referees, enacted as part of the same act, also states that persons holding the office of referee in certain districts "may continue to serve at the pleasure of the chief judge of the district under the terms and conditions of their appointment," yet contains explicit restrictions on the authority of referees to hear certain contested trials. Act of April 5, 1978, ch. 750, § 2, 1978 Minn. Laws 907, 908 (codified at Minn. Stat. § 484.70, subd. 1 (2002)). Because referees were allowed to continue to serve "under the terms and conditions of their appointment" with limitations on their authority being expressly stated, we conclude that the legislature did not intend "terms and conditions" to define a referee's jurisdictional limits. *In re Butler*, 552 N.W.2d 226, 231 (Minn. 1996) ("where words of a law are not explicit, the intent of the legislature may be ascertained by considering other laws upon the same or similar subjects"). Similarly, we conclude that the legislature did not intend "terms and conditions" to define a judicial officer's jurisdictional limits.

Furthermore, Minn. Stat. § 487.08, subd. 5 (2002), subjects judicial officers to the authority of the chief judge of the judicial district:

> All judicial officers are subject to the administrative authority and assignment power of the chief judge of the district as provided in section 484.69, subdivision 3. They shall be learned in the law, and shall hear and try matters as assigned to them by the chief judge.

Under section 484.69, the chief judge of each district has the administrative authority to assign any judge any matter in any court of the judicial district. Minn. Stat. § 484.69, subd. 3 (2002). The state contends that the chief judge's authority to assign matters to judicial officers is without

limitation; if the legislature had intended to limit judicial officers to the kinds of cases they formerly heard in county court, the legislature would have said so explicitly. We agree. By the end of 1980, the legislature was made aware of the general jurisdiction of the district courts and that judicial officers were being utilized as the functional equivalent of judges. *See* Committee Report, *supra*, at 12. Had the legislature intended to modify the duties and powers of judicial officers, it would have done so explicitly, as it did for referees. *See* Act of June 6, 1981, 1st Spec. Sess., ch. 4 art. 3, § 4, 1981 Minn. Laws 2479, 2526; *see Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995) (declining to read into statute restrictions that the legislature did not include). We therefore conclude the legislature intended to permit the chief judge of the district court to assign any district court or county court matter to a judicial officer under Minn. Stat. §§ 487.08 and 484.69.

C. Constitutional Limits on Jurisdiction

We arrive at our next question. Does granting authority to the chief judge of a district to assign any district court matter to a judicial officer, including a felony jury trial, violate the Minnesota Constitution? In construing articles of the constitution, we have stated:

> "The rules governing the courts in construing articles of the State Constitution are well settled. The primary purpose of the courts is to ascertain and give effect to the intention of the Legislature and people in adopting the article in question. If the language used is unambiguous, it must be taken as it reads, and in that case there is no room for construction. The entire article is to be construed as a whole, and receive a practical, common sense construction."

Rice v. Connolly, 488 N.W.2d 241, 247 (Minn. 1992) (quoting *State ex rel. Chase v. Babcock*, 175 Minn. 103, 107, 220 N.W. 408, 410 (1928)). We provide a brief history of the development of the judicial power of the state to provide context for our analysis.

The Minnesota Constitution vests judicial power of the state in the various courts. The original Minnesota Constitution of 1857 provided:

> The judicial power of the state shall be vested in a supreme court, district courts, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote.

Minn. Const. of 1857, art. VI, § 1. Accordingly, the original language permitted the legislature to establish additional courts so long as they were inferior to the supreme court. In 1956, article VI, section 1, was amended to provide:

> The judicial power of the state is hereby vested in a supreme court, a district court, a probate court, and such other courts, minor judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish.

Minn. Const. of 1857, art. VI, § 1 (1956). This amendment changed the definition of an inferior court. Before the amendment, a court was inferior so long as its jurisdiction was inferior to the *supreme court*; after the change, a court or judicial officer was inferior if their jurisdiction was inferior to the *district court*. After further amendment, Minn. Const. art. VI, § 1, currently provides:

> The judicial power of the state is vested in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish.

The district court has "original jurisdiction in all civil and criminal cases." Minn. Const. art. VI, § 3. This felony first-degree murder case falls within the district court's original jurisdiction. *See* Minn. Stat. § 484.01, subd. 1 (2002); Minn. R. Crim. P. 26.01, subd. 1(1)(a); *State v. Sailor*, 257 N.W.2d 349, 351 (Minn. 1977). Granting judicial officers the power to hear and try *all* civil and criminal cases may improperly infringe on the district court's original jurisdiction. "The legislature's delegation of an area of the district court's original jurisdiction calls for this court's close scrutiny." *Holmberg v. Holmberg*, 588 N.W.2d 720, 724 (Minn. 1999) (holding that the legislature infringed on the original jurisdiction of the district courts when it empowered administrative law judges to decide child support matters).

Harris maintains that allowing a judicial officer to hear and try a first-degree murder case puts the officer "on the same footing" as a district court judge, in violation of the constitution's clear mandate that judicial officers have jurisdiction inferior to the district court. We have a common understanding of courts of inferior jurisdiction, and dictionary definitions are instructive and supportive of our understanding. Webster's defines an inferior court as "a court having limited and specified rather than general jurisdiction." *Webster's Third New International Dictionary* 1158 (1993). An inferior court is also termed "lower court." *Id.* at 1341. Conciliation court is an example of a contemporary court of inferior jurisdiction. *See* Minn. Stat. § 491A.01 (2002) (addressing establishment, powers, and jurisdiction of conciliation court division of district court). County and municipal courts also are familiar to us as historical examples of such inferior courts. *See* Minn. Stat. ch. 487 (2002) (addressing county courts); Minn. Stat. ch. 488A (2002) (addressing municipal courts for Hennepin and Ramsey Counties).

If an inferior court is one that has limited and specified rather than general jurisdiction, then it naturally follows that for a judicial officer to remain inferior to the district court under article VI, the judicial officer must have limited and specified jurisdiction. In other words, the judicial officer must be a person having limited rather than general jurisdiction.

The state maintains that a judicial officer may be assigned any district court matter, yet remain "inferior" in jurisdiction to the district court because his jurisdiction is granted on a case-by-case basis. According to the state, "The judicial officer receives whatever jurisdiction he has when the chief judge assigns him a case." Since the judicial officer has only "dependent" jurisdiction—jurisdiction that is dependent on assignment by the chief judge—it is by definition inferior to the district court's jurisdiction.

To say that the judicial officer's jurisdiction is inferior because he can only hear cases assigned to him by the chief judge begs the question, however, because Minn. Stat. § 487.08, subd. 5, does not expressly limit the authority of the chief judge to assign matters to the judicial officer, stating only that judicial officers "shall hear and try matters as assigned to them by the chief judge." District court judges are subject to the same assignment authority by the chief judge of the district. Minn. Stat. § 484.69, subd. 3 (stating that "[t]he chief judge may assign any judge of any court within the judicial district to hear any matter in any court of the judicial district"). As we see it, the question is not whether the judicial officer's jurisdiction is *independent of* the district court; the question is whether his jurisdiction is sufficiently limited or specified so that his authority is *inferior to* the district court. We cannot say that this judicial officer did not entirely assume the role of a district court judge.[3]

The record reveals that the judicial officer presided over most of the pretrial proceedings, as well as Harris's entire trial, including jury selection, ruling on evidentiary objections, and instructing the jury. He also sentenced Harris to life in prison. His order of judgment was appealable in the same manner as all other final orders of the district court. In sum, he presided over this entire felony trial and was utilized as the functional equivalent of a district court judge.

The power of the judicial officer to hear and try this felony level case was not limited and specific. Rather, the judicial officer exercised jurisdiction over a complex felony trial in which substantive constitutional issues were generally implicated. If judicial officers are allowed to preside over one of the weightiest matters within the district court's jurisdiction—a first-degree murder trial—then there is no effective limit to the judicial officer's jurisdiction.

Statutes are presumed constitutional, and we will exercise our power to declare a statute unconstitutional "with extreme caution," *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002), and only when there is no reasonable alternative construction available. *See In re Cold Spring Granite Co.*, 271 Minn. 460, 467, 136 N.W.2d 782, 787 (1965). Given the history of judicial officers in Minnesota and the unambiguous language of Article VI, we conclude that there is no reasonable alternative available. Therefore, we hold that the legislative grant of authority to the chief judge of a judicial district to assign any district court matter to a judicial officer pursuant to Minn. Stat. § 487.08, subd. 5, violates Article VI, Section 1 of the Minnesota Constitution, because the grant of authority runs afoul of the constitutional mandate that judicial officers be inferior in jurisdiction to the district court.[4]

D. Harris is Entitled to a New Trial

Next, we must determine whether Harris is entitled to a new trial because the judicial officer lacked authority to preside over his trial. Harris did not raise the issue of the judicial officer's authority until this appeal. The state urges us to apply plain error analysis and uphold the conviction.[5] Harris, on the other hand, maintains that the judgment is void where the court lacks jurisdiction. We decline to adopt either of these analyses.

Ordinarily we limit our review of errors to which the defendant did not object at trial to those constituting plain error affecting substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740-41 (Minn. 1998); Minn. R. Crim. P. 31.02. In a case involving a fundamental question of

judicial authority, however, we believe that plain error analysis is inappropriate. Under similar circumstances, the United States Supreme Court recently concluded that plain error analysis did not apply where the question was whether the participation of a non-Article III judge on an appeals panel invalidated the panel's judgment. *Nguyen v. United States*, __ U.S. ___, 123 S. Ct. 2130, 2137 (2003). The Solicitor General conceded that the panel of the Court of Appeals was improperly constituted, yet urged the court to apply plain error analysis because petitioners had failed to object to the panel's composition before the cases were submitted for decision. *Id.* at 2135. The *Nguyen* court declined to apply plain error analysis because "to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld." *Id.* at 2137. The court explained that the composition of the panel violated a statutory provision that "embodies weighty congressional policy concerning the proper organization of the federal courts" and that "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel." *Id.; cf. N. Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 321 (Minn. 1977) (stating that parties cannot confer subject-matter jurisdiction on a court by consent).

Even more substantial issues are present here, because this case involves the unconstitutional delegation of authority to a judicial officer to preside over a complex felony trial. We cannot discount the constitutional defect in the authority of the judicial officer simply because Harris failed to raise the issue at trial. Accordingly, we conclude that Harris is entitled to a new trial before a district court judge.

Although we look with disfavor upon Harris's delay in raising the issue of the judicial officer's lack of authority until after his conviction, we nonetheless believe that it would be unjust not to consider his claim on direct appeal. We are mindful, however, of the potential consequences of our ruling on other felony trials over which a judicial officer has presided. *Cf.* Restatement (Second) of Judgments § 12 cmt. d (1982) (stating that in the context of collateral attacks on jurisdiction, the interests at stake "are governmental and societal, not those of the parties," and the question is whether the public interest "is sufficiently strong to permit a possibly superfluous vindication of the rule by a litigant who is undeserving of the accompanying benefit that will redound to him"). In deciding whether to give our ruling retroactive effect, public interest considerations are paramount. For example, we have approved the de facto existence of a municipal court to protect the public and to prevent confusion, uncertainty, and disorder, even though the act establishing the court was held unconstitutional. *Marckel Co. v. Zitzow,* 218 Minn. 305, 310, 15 N.W.2d 777, 780 (1944). Similarly, in nullifying the administrative child support process created by the legislature, we gave our ruling prospective application, concluding that retroactive application would be very disruptive without advancing the constitutional principle. *Holmberg*, 588 N.W.2d at 727; *see also State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002) (providing reasons that prospective application of holding is appropriate in a criminal case). Accordingly, because of the reliance by the parties and courts on this judicial officer's authority in other cases, and the potentially disruptive effect of retroactivity on the administration of justice, we limit application of our holding to this case and to pending and future cases.

Reversed and remanded.

CONCURRENCE & DISSENT

GILBERT, Justice (concurring in part, dissenting in part).

I concur with the majority that the legislature intended to permit the chief judge of the district to assign this felony matter to a judicial officer under Minn. Stat. §§ 487.08 and 484.69. I respectfully dissent from the majority opinion as to the constitutional power of a judicial officer to preside over this felony case. Even if the statute under which the judicial officer exercised authority is held unconstitutional, we should follow our long held precedent regarding de facto courts and the defendant should not receive a new trial. Any error must be reviewed for plain error. Here, if there was error, it was harmless and the jury verdict surely cannot be attributed to this alleged error. Furthermore, the objection should have been raised at any of the number of proceedings held by this judicial officer; that was not done and any objection was waived. The appellant received a fair trial and the jury verdict should be affirmed.

The majority incorrectly concludes that Minn. Stat. § 487.08, subd. 5, violates Article VI, § 1 of the Minnesota Constitution, because it runs afoul of the constitutional mandate that a judicial officer's jurisdiction be inferior to that of the district court. I cannot agree with the majority's assertion that where the judicial officer's jurisdiction in any given case is completely dependent on the assignment power of the chief judge of the district, the jurisdiction of the judicial officer is not inferior to that of the district court. Where the judicial officer's jurisdiction is coextensive, but entirely dependent upon the chief judge of the judicial district, the judicial officer's jurisdiction is necessarily inferior. As such, contrary to the holding of the majority, Minn. Stat. § 487.08, subd. 5, does not operate in violation of the Minnesota Constitution.

The majority states, "If judicial officers are allowed to preside over one of the weightiest matters within the district court's jurisdiction – a first-degree murder trial – then there is no effective limit to the judicial officer's jurisdiction." The majority ignores the obvious "effective limit" on the judicial officer's jurisdiction, the fact that the chief judge of the judicial district completely controls the jurisdictional limits of the judicial officer pursuant to Minn. Stat. § 487.08, subd. 5. Minnesota Statutes § 487.08, subd. 5, provides that a judicial officer "shall hear and try matters as assigned to them by the chief judge." Although a chief judge "may assign any judge of any court within the judicial district to hear any matter," Minn. Stat. § 484.69, subd. 3, a district judge is not dependent on that assignment power. Minn. Stat. § 484.01, subd. 1. In contrast to a judicial officer, "district courts shall have original jurisdiction in all civil actions within their respective districts, in all cases of crime committed or triable therein, in all special proceedings not exclusively cognizable by some other court or tribunal." Minn. Stat. § 484.01, subd. 1.

The majority also states, "Granting judicial officers the power to hear and try *all* civil and criminal cases may improperly infringe on the district court's original jurisdiction." Again, the majority has ignored that the legislature provided that the judicial officer can only have jurisdiction over cases the chief judge of the judicial district has assigned to him. The majority, then, must be concerned that the district court will infringe on its own jurisdiction, but declines

to describe how this could result. Such an unfounded and illogical worry cannot support overruling an act of the legislature and nullifying an otherwise fair trial.

The majority's mistaken premise may stem from an improper reliance on *Holmberg v. Holmberg,* 588 N.W.2d 720, 724 (Minn. 1999), which the majority quotes to support its conclusion that the judicial officer's jurisdiction may infringe on the district court's jurisdiction. In *Holmberg,* the legislature had created an administrative hearing process that infringed on the district court's original jurisdiction. We stated that "the administrative child support process raises grave separation of powers concerns." *Id.* at 725. Under the child support adjudication scheme challenged in *Holmberg*, matters previously handled by the judiciary were improperly assigned for hearing by administrative law judges in the executive branch. *Id.* at 722. And it allowed non-attorneys (child support officers) to engage in the practice of law. *Id.* at 722 and 726. Here, there is no evidence of any improper infringement by the executive or legislative branches on the district court's power in any sense of the imagination. Rather, the authority to assign this case was vested with the judiciary. Minn. Stat. § 487.08, subd. 5. The legislature merely allowed the chief judge of the district court to exercise discretion to assign cases to a judicial officer, also a member of the judiciary. Minnesota Statutes § 487.08, subd. 5, does not infringe on the original jurisdiction of the district court and should not be held unconstitutional.

The majority states, "we decline to define the outer limits of a judicial officer's jurisdiction because that is a legislative function." Unfortunately, under the majority's rationale the outer limit of the judicial officer's jurisdiction remains a mystery, regardless of any action taken by the legislature. Nor does the majority address the inconstancy arising from this ruling, which prohibits the judicial officer from presiding over a felony trial, but leaves intact his power to handle important parts of felony cases, including the first appearance, bail setting and conditions, probable cause determinations, taking oaths and testimony, appointing public defenders, handling Rule 8 appearances, establishing release without bail, holding hearings for violation of conditional release and accepting pleas.[6]Thus, the legislature and the chief judge of the district court are left to guess what matters, if any, can be assigned to the judicial officer, so as to assure that his jurisdiction is sufficiently "inferior," such that this court will not overturn the result.

Even if Minn. Stat. § 487.08, subd. 5, is held to be unconstitutional, at a minimum, we should follow the de facto court precedent that has been well-settled law in this state since 1884. This court has held:

> But we may go so far as to lay down this proposition, that where a court or office has been established by an act of the legislature apparently valid, and the court has gone into operation, or the office is filled and exercised under such act, it is to be regarded as a *de facto* court or office. In other words, that the people shall not be made to suffer because misled by the apparent legality of such public institutions.

Burt v. Winona & St. Peter Railroad Co., 31 Minn. 472, 477, 18 N.W. 285, 287-88 (1884).

Sixty years following the decision in *Burt*, establishing the law of de facto courts, we reiterated our adherence to the principle that the acts of a judge acting under authority of an apparently valid statute are final and binding. "The theory that there may be a *de facto* court antecedent to the time the law creating the court is declared *unconstitutional* has become settled policy in this state since the issue first came before the court in *Burt v. Winona & St. P.R. Co.*" *Marckel Co. v. Zitrow*, 218 Minn. 305, 306, 15 N.W.2d 777, 778 (1944) (citation omitted) (second emphasis added). This judicial officer's position has been established by an apparently valid act of the legislature and has operated for a number of years. This case was assigned to this judicial officer by the chief judge of the district and our rules of court have added to his responsibility. As such, "it is to be regarded as a de facto court." *Burt,* 31 Minn. at 477, 18 N.W. at 287. There is nothing to distinguish the legal principle we clearly articulated in *Burt* from the one involved here, "antecedent to the time the law creating the court is declared unconstitutional" the court's actions are final and binding. *Zitrow*, 218 Minn. at 306, 15 N.W.2d at 778.

The majority's decision to overrule the 119-year-old precedent on de facto courts by ignoring it, however, still should not result in overturning the appellant's first-degree murder conviction had the majority also not chosen to abandon our traditional plain error analysis. The majority looks to *Nguyen vs. United States*, __ U.S. __, 123 S. Ct. 2130 (2003), which is distinguishable from this case. *Nguyen* involved appointing a non-Article III judge as a member of a Ninth Circuit appellate panel in violation of a federal statute. *Id.* at 2133-34. In contrast to the congressional limitation, our legislature has left it up to the court to assign appropriate cases to this judicial officer, which our rules of criminal procedure have only further expanded. In fact, our Rules have empowered this judicial officer to perform many of the significant felony-level responsibilities that are carried out by the district court, which we now find to be unconstitutional.[7] If some of the felony-level judicial responsibility assumed by this court official is unconstitutional because his jurisdiction is not inferior to the district court, why would not this same rationale render all of his efforts exercised under our rules unconstitutional? Rather than follow our precedent, the majority creates a new standard to bypass plain error review "in a case involving a fundamental question of judicial authority."

The majority may have bypassed over our traditional plain error analysis in part because even if there was error, it was not plain, nor one that affected substantial rights.[8] A number of factors indicate that if any error occurred in this trial, it was not plain error: the appellant's two defense lawyers did not raise an objection at trial; the state allowed the case to proceed through a lengthy trial; the chief judge of the district assigned this case to this judicial officer; and the court of appeals did not sua sponte raise the issue in the two felony cases presided over by this officer that have been reviewed by that court in the past 3 years. *State v. Bauer*, 642 N.W.2d 760 (Minn. App. 2002); *State v. Barnes*, 618 N.W.2d 805 (Minn. App. 2000).

It is important in this analysis to remember the constitutional requirements of a judge. Although this judicial branch employee was appointed to this position, he meets the constitutional requirements of a judge. The constitutional requirements of our judges are that they be learned in the law, and that they be a resident of the district where they are presiding. Minn. Const. art VI, §§ 4, 5. The judicial officer who tried this case meets the constitutional and statutory requirements: he is learned in the law and a resident of the district and is employed by the judicial branch.

Furthermore, this officer is under the jurisdiction of the Board on Judicial Standards. *See* Rules of Board of Judicial Standards, Definitions (defining judge as "any judge, judicial officer * * * employed in the judicial branch."). He is also governed by the code of judicial conduct. Minn. Code Jud. Conduct. He has for many years exercised the powers of a district court judge in a wide variety of cases with the approval of the court of appeals and this court. This fact is demonstrated by the number of this judge's cases that have been decided by both the court of appeals and this court.[9]

The other constitutional requirements for a felony trial have also been met. This case was venued in the proper county, the trial was held in the appropriate courthouse and was tried to a jury with no objections as to the jury or the jury panel. *See* Minn. Const. art I, § 6. The trial appears to have been in full compliance with the Rules of Criminal Procedure relating to notices, time limits, scheduling, and the actual conduct of the trial.

If there was an error, it surely was not an error that could be classified as a traditional structural error. There was no allegation that this judicial officer was not learned in the law, was incompetent, was biased, or made any procedural errors in handling pretrial issues, voir dire, jury selection or instructions. The judicial officer in this case handled at least 7 separate days of pretrial issues, plus a 9-day jury trial covering 2 weeks, which resulted in the jury rendering a guilty verdict, all without objection. There were also two presumably competent defense lawyers present at all hearings representing the appellant and at no time was there ever any objection or even question about the proceedings being handled by this duly sworn judicial officer. In fact, it appears that the judicial officer handled all of the pretrial and trial proceedings except the initial arraignment, which was handled by a district court judge. Indeed, on appeal, other than the jurisdiction of this judicial officer, there was only one issue raised by appellant's counsel in the midst of many other rulings and proceedings that occurred in the pretrial and trial context. The only other issue raised on appeal relates to whether this judicial officer abused his discretion when he excluded an out-of-court statement by an allegedly critical defense witness who refused to testify because he feared retaliation by the victims' families. Importantly, this issue has been preserved for appeal and has been presented to this court for review based on the full transcript of what transpired at trial. This ruling by the judicial officer is of course subordinate to this court if we decided there was an abuse of discretion. We can review that issue on its full merits.

In terms of best practices, prospectively, a defendant should be informed that he may elect to have a district court judge try his case as opposed to this judicial officer. The record should include an explanation of the differences in appointed or elected positions and case assignments. This explanation should be placed on the record and include a defendant's waiver. However, the absence of this record in the present case does not mean appellant's trial was defective.

Finally, if there was an objection to having this qualified judicial officer hear this case, the objection should have been made known prior to the commencement of the trial. An objection is deemed waived if raised for the first time on appeal. *State v. Glowacki,* 630 N.W.2d 392, 398 (Minn. 2001). There is no support for the assertion that the work of this judicial officer has undermined the trust or confidence of the practitioners and citizens of St. Louis County in

our system of justice. In fact, two defense lawyers sat on their hands through trial knowing well of this issue that was presented only on appeal. Ironically, the article relating to judicial officers authored by John M. Stuart and cited by the majority pointed out this constitutional issue nearly 25 years ago, stating "it may be inappropriate for non-elected officials to exercise identical powers to that of the county court judges." Marlene Johnson & John M. Stuart, *Minnesota's Judicial Officers: A Short History of an Endangered Species*, Bench & Bar of Minn. 23,28 (Dec. 1979).

Stuart is the State Public Defender and the attorney of record for appellant. Stuart was of the opinion in 1979 that there were "very few complaints, if any, about constitutional problems arising from the appointive nature of the office." *Id.* Rather, he pointed out, "a possible problem by the appointive process is that judicial officers are not subject to the assignment power of the chief judges of the districts in which they serve." *Id.* Now, after the possible assignment problem has been corrected by the legislature and appellant is saddled with an unsatisfactory trial result, the appellant and his counsel, who were from the same office throughout this proceeding (at the district court and on appeal), are requesting a second bite at the judicial apple. Contrary to what the majority concludes, the interests of justice require that we affirm this conviction. "[T]he people shall not be made to suffer because misled by the apparent legality of such public institutions." *Burt,* 31 Minn. at 477, 18 N.W. at 288.

CONCURRENCE & DISSENT

ANDERSON, Russell A., Justice (concurring in part, dissenting in part).

I join in part with Justice Gilbert's dissent and conclude that the trial court—a judicial officer—was a de facto court when, under longstanding practice and the color of legislative authority, he presided ably and without objection over the trial of Harris. I would affirm the judgment of the trial court as valid and binding under *Marckel Co. v. Zitzow*, 218 Minn. 305, 15 N.W.2d 777 (1944). When, as in *Marckel*, the order and judgment of a municipal court are valid and binding even when operating under a statute later declared unconstitutional, so also the judgment of a judicial officer is valid and binding when he operates under long-accepted practice and longstanding statutory authority, now declared unconstitutional. *Marckel*, 218 Minn. at 310-11, 15 N.W.2d at 780.

HANSON, Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Russell Anderson.

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[1] In 1973, the legislature authorized county courts to appoint full-time judicial officers. Act of May 24, 1973, ch. 679, § 5, 1973 Minn. Laws 1817, 1823.

[2] The 1978 act provided: "All judicial officers are subject to the administrative authority and assignment power of the chief judge of the district as provided in section 484.69, subdivision

3." Act of April 5, 1978, ch. 750, § 3, 1978 Minn. Laws 907, 909. The referenced section provided in part:

> The chief judge [of each judicial district] may assign any judge of any court within the judicial district to hear any matter in any court of the judicial district. When a judge of a court is assigned to another court he is vested with the powers of a judge of the court to which he is assigned.

Minn. Stat. § 484.69, subd. 3 (1978).

[3] The dissent is not troubled by a judicial officer assuming the role of a district court judge because, in the words of the dissent, "The judicial officer who tried this case meets the constitutional and statutory requirements [of a judge]." This characterization compels us to note that because Judicial Officer Maher was neither elected nor appointed by the Governor, he met neither of the requirements for a judge set forth in Article VI, §§ 7 and 8 of the Minnesota Constitution. In addition, the constitution sets a district court judge's term of office at six years and prevents the legislature from reducing a judge's salary during the term of his or her office. Minn. Const. art. VI, § 5. Judicial Officer Maher's term of office and salary is not constitutionally protected. Therefore, Judicial Officer Maher met none of the requirements and received none of the protections of a district judge.

[4] Our holding is not inconsistent with the assignment of certain non-felony trials and other preliminary matters to a judicial officer. However, we decline to define the outer limits of a judicial officer's jurisdiction because that is a legislative function. *See* Minn. Const., art. VI, § 1.

[5] The dissent would also uphold the conviction by applying the de facto court doctrine, even though neither party has asked us to do so. Because of the unique facts of this case, our de facto court precedent simply is not applicable here. A de facto judge is a "judge operating under color of law but whose authority is procedurally defective." *Black's Law Dictionary* 845 (7th ed. 1999). Typically, we have applied the de facto judge doctrine when there is a technical defect in the judge's statutory authority. For example, we have found a judge to have de facto authority where he signed findings in a case just after his successor had taken the oath of office, *Carli v. Rhener*, 27 Minn. 292, 292-93, 7 N.W. 139, 139 (1880), and we have upheld the de facto authority of a justice of the peace where he filed his bond and oath with the village clerk of the county seat, rather than with the clerk of court, *Canty v. Bockenstedt*, 170 Minn. 383, 389, 212 N.W. 905, 907 (1927). *See also Marckel Co. v. Zitzow*, 218 Minn. 305, 310, 15 N.W.2d 777, 780 (1944) (approving the de facto existence of a municipal court where a two-thirds majority of the senate had not voted for the bill establishing the court as required by the constitution at the time).

We have never applied the de facto doctrine in a case where the defect in the underlying statute "is not merely technical but embodies a strong policy concerning the proper administration of judicial business." *See Glidden Co. v. Zdanok*, 370 U. S. 530, 535-36 (1962) (plurality opinion). Here we are confronted "with a question of judicial authority more fundamental than whether 'some effort has been made to conform with the formal

conditions on which [a judge's] particular powers depend.'" *Nguyen v. United States*, ___ U.S. ___, 123 S. Ct. 2130, 2136 (2003) (recognizing a "difference between an action which could have been taken, if properly pursued, and one which could never have been taken at all") (citation omitted). Accordingly, we decline to apply the de facto judge doctrine in these circumstances. *Cf. id.* at 2135-36 (declining to apply the de facto officer doctrine to uphold the judgment of an improperly constituted panel of the court of appeals).

Contrary to the dissent's assertion, our decision does not overrule this court's precedent on judicial de facto courts and judges. We do not apply the doctrine to the assignment of a felony trial to a officer because such an assignment is an action that could never have been properly pursued.

[6] *See* Minn. R.Crim. P. 4.01; 4.02, subd. 5(1), (2); 4.03, subd. 1; 4.03, subd. 2; 5.01; 5.02, subd. 1(2); 5.03; 5.05; 5.06; 6.02; 6.03; 8.01.

[7] *See* Minn. R. Crim. P. 4.01; 4.02, subd. 5(1), (2); 4.03; 4.03, subd. 2; 5.01; 5.02, subd. 1(2); 5.03; 5.05; 5.06; 6.02; 6.03; 8.01.

[8] The majority quotes a portion of the Restatement (Second) of Judgments § 12 cmt. d, in the concluding paragraph. The majority would be well served by looking to the sentence immediately following the language quoted from comment d. The sentence states, "[t]he public interest is of that strength [requiring reversal of conviction] only if the tribunal's excess of authority was plain or has seriously disturbed the distribution of governmental powers or has infringed a fundamental constitutional protection." Thus, the very section of the Restatement cited by the majority supports undertaking a plain error analysis, which the majority has abandoned. Restatement (Second) of Judgments § 12 cmt. d.

[9] *See, e.g., Bauer,* 642 N.W.2d 760; *State v. Cryette*, 636 N.W.2d 343 (Minn. App. 2001); *Myers v. Hearth Technologies, Inc.*, 621 N.W.2d 787 (Minn. App. 2001); *State v. Barnes*, 618 N.W.2d 805; *Minnesota Teamsters Public & Law Enforcement Employees' Union, Local No. 320 v. County of St. Louis*, 611 N.W.2d 355 (Minn. App. 2000); *St. Louis County v. S.D.S.*, 610 N.W.2d 644 (Minn. App. 2000); *Demolition Landfill Services, LLC v. City of Duluth*, 609 N.W.2d 278 (Minn. App. 2000); *Baker v. State*, 590 N.W.2d 636 (Minn. 1999); *Follmer v. Duluth, Missabe and Iron Range Ry. Co.*, 585 N.W.2d 87 (Minn. App. 1998); *In re Matter of Welfare of C.A.W.*, 579 N.W.2d 494 (Minn. App. 1998); *Nat'l Audubon Soc. v. Minnesota Pollution Control Agency*, 569 N.W.2d 211(Minn. App. 1997); *State v. Brodie*, 532 N.W.2d 557 (Minn. 1995); *State v. Brodie*, 529 N.W.2d 395 (Minn. App. 1995).

STATE OF MINNESOTA

IN COURT OF APPEALS

C0-02-2095

State of Minnesota,

Respondent,

vs.

Archie B. Blooflat,

Appellant.

Filed November 18, 2003

Reversed and remanded

Toussaint, Chief Judge

Benton County District Court

File No. KX00484

Mike Hatch, Attorney General, 1800 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Joseph Sylvan Mayers, 1287 N. 2nd Street, Suite 101, P.O. Box 368, Sauk Rapids, MN 56379 (for respondent)

Jeffrey Stephen Sheridan, 320 Eagandale Office Center, 1380 Corporate Center Curve, Eagan, MN 55121 (for appellant)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Halbrooks, Judge.

SYLLABUS

I. Gross misdemeanor driving after cancellation under Minn. Stat. § 171.24, subd. 5 (Supp. 1999) is not a lesser-included offense of aggravated driving under the influence under Minn. Stat. § 169.129 (Supp. 1999).

II. Minn. Stat. § 609.035, subd. 2(g) (Supp. 1999), which imposes consecutive sentences exceeding one year for gross misdemeanor convictions, is unconstitutional under Article I, Section 6 of the Minnesota Constitution.

OPINION

TOUSSAINT, Chief Judge

On appeal from his convictions of driving after cancellation and aggravated driving under the influence (DWI), appellant-defendant argues that imposing mandatory consecutive sentences for a crime and its lesser-included offense is unconstitutional because it creates sentences of more than one year without the right to a twelve-person jury trial. After reviewing the statutes at issue, we hold that driving after cancellation is not a lesser-included offense of aggravated DWI. But because we hold that the statute mandating consecutive sentences exceeding one year for gross misdemeanors violates Article I, section 6 of the Minnesota Constitution, we reverse and remand.

FACTS

The facts of the present case are not disputed. On April 15, 2000, appellant Archie B. Blooflat was arrested and subsequently charged with five alcohol-related gross misdemeanor driving offenses, including aggravated driving under the influence under Minn. Stat. §§ 169.129, 169.123 (Supp. 1999);[1] driving under the influence under Minn. Stat. § 169.121 (Supp. 1999); and gross misdemeanor driving after cancellation under Minn. Stat. § 171.24, subd. 5 (Supp. 1999). At the time of arrest, Blooflat's driving record indicated that he had already been convicted of similar alcohol-related driving offenses on five previous occasions.

At trial, the district court informed Blooflat that, because of his prior alcohol-related offenses, he faced consecutive sentences if convicted of aggravated DWI and any other gross misdemeanor for which he was charged. The statute empowering the court to impose the sentences at that time read, in relevant part:

> When a court is sentencing an offender for a violation of section . . . 169.129 [aggravated DWI] and a violation of [section 171.24 (driving without a valid license) or section 169.121 (driving while intoxicated)], and the offender has five or more prior impaired driving conditions, five or more prior license revocations, or a combination of the two based on separate instances, within the person's lifetime, the court shall sentence the offender to serve consecutive sentences for the offenses, notwithstanding the fact that the offenses arose out of the same course of conduct.

Minn. Stat. § 609.035, subd. 2(g) (Supp. 1999).

Having been charged with violating Minn. Stat. §§ 169.129, 169.121, and 171.24, and having five previous impaired-driving convictions, Blooflat faced mandatory consecutive

sentences and the possibility of two years incarceration. He therefore moved for a twelve-person jury. The district court denied the motion, noting that the maximum sentence for each count was one year, and that he was not therefore entitled to a twelve-person jury. A six-person jury, presented both with the arresting officer's testimony and with Blooflat's driving record, subsequently found Blooflat guilty on all five counts.

The district court sentenced Blooflat to one year for aggravated DWI, and a consecutive sentence of one year for driving after cancellation. Blooflat now appeals.

ISSUES

I. Does Minn. Stat. § 609.035, subd. 2(g) (Supp. 1999) have an unconstitutional effect by mandating consecutive sentences for two included offenses?

II. Is Minn. Stat. § 609.035, subd. 2(g) (Supp. 1999) unconstitutional because it subjects non-felony defendants to felony-like sentences, while only providing six-person juries?

III. Were errors at trial sufficient to warrant reversal of Blooflat's conviction?

ANALYSIS

The constitutionality of a statute presents a question of law that this court reviews de novo. *State v. Wright*, 588 N.W.2d 166, 168 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999). "In evaluating constitutional challenges, the interpretation of statutes is a question of law." *State v. Manning*, 532 N.W.2d 244, 247 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). A statute will be presumed constitutional unless the party challenging the statute proves beyond a reasonable doubt that the statute is unconstitutional. *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

I.

Blooflat challenges Minn. Stat. § 609.035, subd. 2(g) (Supp. 1999), arguing that by mandating consecutive sentences for included offenses, the legislature has effectively re-created a sentencing scheme that the Minnesota Supreme Court declared unconstitutional in *State v. Baker,* 590 N.W.2d 636 (Minn. 1999). While we disagree with Blooflat's basic interpretation of Minnesota law, we do find *Baker* authoritative.

In *Baker*, the supreme court examined a legislatively-created class of crime known as "enhanced gross misdemeanors," which permitted a court to impose two-year sentences without providing the twelve-member jury required for felonies. 590 N.W.2d at 637. The supreme court struck down the legislation, finding it deprived defendants facing more than one year incarceration – in other words, defendants facing a *felony sentence* – of their constitutional right to a twelve-person jury. *Id.* at 638.

Blooflat argues that section 609.035 has the same unconstitutional effect as an enhanced gross misdemeanor because it simply "piggy-backs" the sentences of sections 171.24 and

169.129, regardless of the fact that the crimes are "included offenses" and arose out of the same course of conduct. He argues, therefore, that the statute necessarily penalizes him with the same felony-like jail term the supreme court rejected in *Baker*. *See* Minn. Const. art I, § 6.

This court has not previously addressed whether Minn. Stat. § 171.24 is, in fact, a lesser-included offense of Minn. Stat. § 169.129. According to statute, in relevant part, an "included offense" may be either a "lesser degree of the same crime," or a "crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. (1), (4) (2002).

Blooflat contends that section 171.24, subdivision 5 is a "lesser degree" of section 169.129 because both offenses share the element of driving after an alcohol-related license cancellation. Although these offenses may often be proven with the same facts, Blooflat ignores the historical purpose and scope of the two laws. Historically, driving after cancellation, revocation, or suspension under section 171.24 was a misdemeanor offense, designed to punish those who drove without a valid drivers license. *See* Minn. Stat. § 171.24 (1941). Early incarnations of the section made no distinction between alcohol-related cancellation and non-alcohol-related revocation or suspension. *Id.*[2] Aggravated DWI under section 169.129, however, has always been associated *solely* with alcohol-related driving offenses, and was created to enhance the penalty of driving under the influence. *See* 1978 Minn. Laws ch. 727, § 9. It is therefore improbable that the legislature intended the crime of driving after cancellation to be a "lesser degree" of aggravated driving under the influence.

Nor can one crime be "necessarily proved" if the other crime were proved. Although both offenses may be partially proven when the defendant is operating a motor vehicle while his license is cancelled, section 171.24 additionally requires that "the person has been given notice of or reasonably should know of the cancellation." Minn. Stat. § 171.24, subd. 5(2) (Supp. 1999). Section 169.129, on the other hand, is silent as to notice, but requires that the defendant be under the influence of alcohol while he or she is operating the motor vehicle. Minn. Stat. § 169.129, subd. 1 (Supp. 1999). As such, each crime has separate elements that must be proven in order to be convicted, and either can be proven without necessarily proving the other.

Because section 171.24, subdivision 5 is not a "lesser degree" of section 169.129, and is not necessarily proven when section 169.129 is proven, the two offenses are not "included" as defined by statute. We cannot, therefore, agree with Blooflat's assertion that "piggy-backing" consecutive sentences for these offenses, in and of itself, is unconstitutional.

II.

We now turn to the broader question of whether section 609.035 deprives defendants of their constitutional rights by mandating consecutive sentences exceeding one year for a single behavioral incident, without providing the twelve-person jury required for felonies. In considering this question, we are both guided and limited by the same history that led to the supreme court's holding in *Baker*.

For more than a century, all Minnesota juries consisted of twelve people, even though the constitution was silent on the matter. *Baker*, 590 N.W.2d at 638. In 1988, however, Minnesota

voters adopted a constitutional amendment requiring twelve-person juries "[i]n all prosecutions defined by law as felonies," but only six-person juries in all other criminal prosecutions. Minn. Const. art. I, § 6. The effect of this amendment was notable, because guaranteeing twelve-person juries *only* in felony cases suddenly gave the definition of felony constitutional significance. *Baker*, 590 N.W.2d at 638.

The *Baker* court, after recounting and analyzing the development of felonies in Minnesota, determined that felonies had traditionally been defined as *any* crime subjecting the accused to more than one year imprisonment. *Id.* at 639. And with the constitutional implications created by the 1988 amendment, the court held that the legislature could not manipulate this historical definition "in a manner which impinges on an accused's constitutional rights, including the right to a twelve-person jury." *Id.* at 638. The court therefore concluded that the "enhanced gross misdemeanor" legislation, which reclassified and redefined criminal conduct in a manner allowing two-year sentences for offenses not defined as felonies, could not pass constitutional muster. *Id.*

Although we recognize that section 609.035 is unlike the statutes in *Baker* in that it does not reclassify or redefine any of the crimes delineated within it, we find the constitutional ramifications just as serious. By mandating consecutive sentences, the legislature effectively created two-year sentences for a single behavioral incident while continuing to label the crimes gross misdemeanors, so as to deny defendants their constitutional right to a twelve-person jury. This, as *Baker* notes, is expressly forbidden. *Id.* at 638.

Further, without a felony classification, we are unable to "graft" a twelve-person jury requirement onto the statute. As the supreme court observed, "voters did not constitutionally guarantee a defendant accused of a crime other than a felony the right to a twelve-person jury." *Id.* at 640. Were we to uphold the statute by reading such a requirement into it, we would essentially be holding that violating the statute constitutes a felony, "as only individuals accused of felonies have a right to a twelve-person jury." *Id.* We cannot ignore the legislature's clear language, which labeled the crimes listed in Minn. Stat. § 609.035, subd. 2(g) as gross misdemeanors, simply to uphold the statutes. *Id.* Thus, while we are mindful of our power to declare a statute unconstitutional "only when absolutely necessary," *In re Haggerty,* 448 N.W.2d 363, at 364 (Minn. 1989), we hold that the legislature overstepped its constitutional authority in enacting Minn. Stat. § 609.035, subd. 2(g). We must therefore reverse Blooflat's sentence, and remand to the district court for re-sentencing.

III.

Although we reverse Blooflat's sentence, there is no basis to reverse his convictions. Blooflat asserts that the state failed to produce sufficient evidence to prove beyond a reasonable doubt (a) that his license status was cancelled as inimical to public safety, as required for conviction under Minn. Stat. § 169.129; and (b) that he had a "prior impaired driving conviction" within five years preceding the incident in the present case, as required for his conviction under Minn. Stat. § 169.121. To the contrary, Blooflat's driving record, in evidence at trial, clearly indicates both his driver's license status and a 1998 conviction for aggravated DWI. Additionally, Blooflat's arresting officer testified that Blooflat's license at the time of his arrest

was canceled as inimical to public safety, a term that was later explained to the jury. Viewed in the light most favorable to conviction, a jury could reasonably accept this evidence as truthful, and disbelieve any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). As such, we find no reason to disturb the convictions.

Blooflat also raises several arguments concerning the propriety of the district court's jury instructions. Since he failed to object to the jury instructions at trial, we decline to address his arguments here. *State v. Cross*, 577 N.W.2d 721, 724 (Minn. 1998).

DECISION

Minn. Stat. § 171.24, subd. 5 (Supp. 1999) is not a lesser-included offense of Minn. Stat. § 169.129 (Supp. 1999); a defendant may be convicted of both offenses, even if the offenses arose out of the same course of conduct. Nonetheless, we conclude Minn. Stat. § 609.035, subd. 2(g) (Supp. 1999) is unconstitutional because, by mandating consecutive sentences, it deprives defendants facing more than one year incarceration of their constitutional right to a twelve-person jury.

Reversed and remanded.

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[1] All references to statutes refer to the laws in effect at the time of Blooflat's arrest. Chapter 169 was significantly modified in 2000, recodifying all alcohol-related driving offenses to the newly-created Chapter 169A. 2000 Minn. Laws ch. 478.

[2] Section 171.24 remained virtually unchanged until a 1993 legislative amendment, which enhanced the crime of driving after cancellation as inimical to public safety to gross misdemeanor status. 1993 Minn. Laws ch. 347, § 16.

STATE OF MINNESOTA

IN COURT OF APPEALS

C4-03-229

State of Minnesota,

Respondent,

vs.

Larry Allen Nelson,

Appellant.

Filed November 18, 2003

Affirmed in part, reversed in part

Toussaint, Chief Judge

Olmsted County District Court

File No. K502428

Mike Hatch, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Raymond F. Schmitz, Olmsted County Attorney, Olmsted County Courthouse, 151 Fourth Street SE, Rochester, MN 55904-3712 (for respondent)

David T. Redburn, 8525 Edinbrook Crossing, Suite 207, Brooklyn Park, MN 55487 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Toussaint, Chief Judge; and Shumaker, Judge.

S Y L L A B U S

A condition precedent to a criminal nonsupport of a child charge is an attempt by the state to obtain a court order holding the person in contempt for failing to pay support during the time period specified in the complaint.

OPINION

TOUSSAINT, Chief Judge

On appeal from his conviction of criminal nonsupport of a child, appellant argues that Minn. Stat. § 609.375, subd. 2b requires the state to attempt to obtain a contempt order against an obligor for failure to pay child support during the time period specified in the complaint. Because the district court erred in concluding that contempt orders obtained for failure to pay during unrelated time periods satisfied the statutory prerequisite, but the statute does not apply to four of the five counts, we affirm in part and reverse in part.

FACTS

Following the dissolution of appellant Larry Nelson's marriage, the district court ordered him to pay $739 per month in child support and child-care reimbursement for his two children. Subsequently, the court modified Nelson's obligation multiple times to reflect changes in circumstances and cost-of-living adjustments.

In December 1995, the district court found Nelson in civil contempt for failure to divulge information on his current income and assets. The court ordered Nelson to remain in custody until he paid $2,000 toward his arrearages, disclosed information regarding his income and assets, and worked out a payment agreement for his child-support arrearages. In May 1996, the court released Nelson after finding that incarceration would not induce him to comply with the court's order and that continued incarceration would be in violation of his due-process rights.

Nelson made partial child-support payments from August 1996 through February 1997, but stopped making payments when he quit his job. As of October 1997, Nelson's child-support and child-care arrearages totaled $17,671.

In January 1998, the district court found Nelson in civil contempt for consciously and willfully failing to pay child support despite having the ability to do so. The district court stayed Nelson's jail sentence, provided that Nelson complied with several purge conditions, including the requirement that he remain current in his child-support, child-care, and arrearage obligations. As of February 1998, Nelson's child-support and child-care arrearages totaled $19,985.

In April 1998, the district court found Nelson in civil contempt once again, for failing to pay his child-support obligation and for failing to comply with the district court's order. Nelson was incarcerated. In June 1998, the district court denied Nelson's motion for release because he had not complied with the purging conditions of the district court's order. Nelson's appeal to this court was dismissed, and the Minnesota Supreme Court denied further review. At a contempt-review hearing in September 1998, however, the district court released Nelson, finding that he was unresponsive to the coercive aspects of incarceration.

From January 1998 to August 2001, only four payments, all involuntary, were made toward Nelson's child-support obligation. In January 2002, the state charged Nelson with one count of felony nonsupport of a child, in violation of Minn. Stat. § 609.375, subd. 2a (2000 &

Supp. 2001). The complaint alleged that except for the four payments, Nelson did not pay child support between January 1, 1998 and January 24, 2002. In May 2002, the state filed an amended complaint, charging Nelson under the same statute with five counts of felony nonsupport of a child. The complaint charged that Nelson failed to pay child support during five 180-day periods: January 24 through December 31, 1999; January 1 through June 30, 2000; July 1 through December 31, 2000; January 1 through June 30, 2001; and July 1, 2001 through January 24, 2002.

On the morning of Nelson's October 2002 trial, Nelson brought a motion to dismiss the amended complaint because the state had not first attempted to obtain a court order finding Nelson in contempt for nonpayment during each of the five different time periods set forth in the complaint. The district court denied Nelson's motion, reasoning that the statute did not contain a time limitation regarding when the state must attempt to obtain a contempt order, and that sufficient probable cause existed because the attempt requirement had been satisfied by the previous contempt orders. The district court found Nelson guilty on all five counts of criminal nonsupport following a stipulated-facts trial. This appeal followed.

ISSUE

As a prerequisite to prosecution of an obligor for criminal nonsupport of a child, does Minn. Stat. § 609.375, subd. 2b require that the state attempt to obtain a contempt order for failure to pay support during the same time period specified in the criminal complaint?

ANALYSIS

Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy,* 545 N.W.2d 909, 914 (Minn. 1996). The fundamental rule of statutory construction is to look first to the specific statutory language and be guided by its natural and most obvious meaning. *State v. Edwards*, 589 N.W.2d 807, 810 (Minn. App. 1999), *review denied* (Minn. May 18, 1999). But when a statute is reasonably susceptible to more than one meaning, it is ambiguous and subject to statutory construction. *Westchester Fire Ins. Co. v. Hasbargen*, 632 N.W.2d 754, 756 (Minn. App. 2001). The object of all statutory interpretation is to ascertain and effectuate legislative intent. Minn. Stat. § 645.16 (2002); *In re Welfare of C.R.M.,* 611 N.W.2d 802, 805 (Minn. 2000).

The state may not charge a person with criminal nonsupport of a child "unless there has been an attempt to obtain a court order holding the person in contempt for failing to pay support or maintenance under chapter 518." Minn. Stat. § 609.375, subd. 2b (2002). Nelson concedes that the state obtained at least two contempt orders before filing the criminal complaint against him for nonsupport. But, because the periods of failure to pay covered by the contempt orders did not match the times specified in the complaint, Nelson argues that subdivision 2b's contempt-order requirement was not satisfied.

As a preliminary matter, subdivision 2b was not effective until August 1, 2001. 2001 Minn. Laws ch. 158, §§ 10, 13. Because the first four of the five counts against Nelson are for crimes entirely committed before that date, the contempt-order requirement does not apply to

them. The fifth count, covering July 1, 2001 through January 24, 2002, was based on conduct occurring, at least in part, on and after August 1, 2001. Therefore, only the fifth count is subject to the contempt-order requirement. *See State v. Robinson,* 480 N.W.2d 644, 645 (Minn. 1992) (holding defendant is subject to amended criminal statute if his criminal acts occurred at least in part after effective date of statute).Accordingly, we affirm Nelson's conviction as to the first four counts relating to crimes committed before the effective date of the statute and consider only the effect of the statute on the fifth count.

The state argues that subdivision 2b is "unambiguously" satisfied by the state's attempt to obtain contempt order at any time and that the facts supporting the contempt need not be tied in time to the criminal complaint. We agree that subdivision 2b does not expressly contain the requirement of identical time periods, but we conclude that, read in context, the subdivision reasonably could require this consistency and therefore is ambiguous.

First, looking at the specific statutory language, subdivision 2b references chapter 518 as the source of the contempt provision serving as the prerequisite to criminal prosecution. Minn. Stat. § 609.375. Three sections in chapter 518 authorize contempt citations for failure to pay court-ordered support. Minn. Stat. §§ 518.24, .617, .64 (2002). Under these sections, the child-support order itself is a prerequisite for civil-contempt orders. Underlying any child-support order are detailed findings reflecting the ability to pay and the specific support obligation. *See* Minn. Stat. § 518.551 (2002).

By tying the criminal prosecution and the civil-contempt proceedings to the child-support order, the legislature created a three-step process to enforce child support: (1) a child-support order setting the appropriate amount and duration of payments under chapter 518; (2) civil contempt based on a violation of that child-support order; and (3) criminal nonsupport based on a violation of that child-support order.

Nonpayment of ordered child support is prima facie evidence of civil contempt. Minn. Stat. §518.24. A showing of nonpayment of court-ordered support necessarily means that there was a legal obligation to pay support on certain dates and that the obligor failed to pay on certain dates. The offense of criminal nonsupport similarly requires proof of both a legal obligation and a failure to pay. Thus, we conclude that subdivision 2b could reasonably be interpreted as requiring that the contempt-order attempt embrace the same time period of nonpayment of child support as the criminal complaint.

Second, the felony nonsupport offense is based either on a violation continuing for over 180 days or on a violation amounting to nine times the monthly obligation. Minn. Stat. §609.375, subd. 2a. Here, the county alleged a continuing violation and set out the specific time period involved. An attempt to obtain a contempt order for a period outside of the alleged 180-day period could have no relevance to that period. Because both the civil-contempt order and the criminal conviction are time specific, we conclude that a reasonable interpretation of the statute could require the state to attempt to obtain contempt orders against Nelson for the same time period for which the charges are brought.

If a statute is ambiguous, it is permissible to look at legislative history to determine how the language should be read. *Baumann v. Chaska Bldg. Ctr., Inc.*, 621 N.W.2d 795, 797 (Minn. App. 2001). By requiring as a "prerequisite to prosecution" an attempt to obtain a contempt order, the legislature provided a civil incentive to spur an obligor to remain current on child-support obligations. This is consistent with the purpose of civil contempt which is to induce compliance with an order favoring the opposing party through imposition of a sanction of indefinite duration, to be lifted upon compliance. *Minn. State Bar Ass'n v. Divorce Assistance Ass'n,* 311 Minn. 276, 285, 248 N.W.2d 733, 741 (1976). The legislative history of subdivision 2b indicates that the legislature added the contempt-order attempt prerequisite out of concern that nonsupport cases were "moving too fast to criminal prosecution and not compliance" and that seeking compliance with child-support orders should take precedence. *See* Hearing on S.F. No. 1944 Before the Senate Comm. on Crime Prevention (Mar. 30, 2001) (comments of Sen. Knutson).

Based on the language of Minn. Stat. § 609.375 as a whole, related statutes, and relevant history, we conclude that subsection 2b is reasonably susceptible to the interpretation that the state is required to attempt to obtain a contempt order for failure to pay support during the time period specified in the criminal complaint. Minn. Stat. §§ 645.16, .17 (2002). Because subdivision 2b is reasonably susceptible to this alternative meaning, we must resolve all reasonable doubt concerning the legislature's intent in favor of Nelson. *State v. Colvin,* 645 N.W.2d 449, 452 (Minn. 2002) (holding that penal statutes are to be construed strictly so that all reasonable doubt concerning legislative intent is resolved in favor of the defendant). Thus, we hold that Minn. Stat. § 609.375, subd. 2b requires the state, as a prerequisite to prosecution, to attempt to obtain a contempt order for failure to pay child support during the time period specified in the complaint.

DECISION

Before charging a person with criminal nonsupport of a child, the state must attempt to obtain a court order holding the person in contempt for failing to pay support during the time period specified in the complaint. Because the district court erred in its application of this amendment to Minn. Stat. § 609.375, we affirm appellant's convictions on the first four counts and reverse the conviction on the fifth count.

Affirmed in part, reversed in part.

STATE OF MINNESOTA

IN SUPREME COURT

A03-1281

Hennepin County

Blatz, C.J.

State of Minnesota,

Petitioner,

vs.

Filed: February 12, 2004
Office of Appellate Courts

Shawnatee Marie Tennin,

Respondent.

SYLLABUS

The co-payment required by Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003), violates an indigent defendant's right to counsel under the United States and Minnesota Constitutions.

Certified question answered.

Heard, considered, and decided by the court en banc.

OPINION

BLATZ, Chief Justice.

We are asked to determine whether the State of Minnesota's imposition of a co-payment obligation on individuals who receive public defender services, in the manner prescribed by Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003), is constitutional. The district court declared section 611.17, subdivision 1(c) (Supp. 2003), unconstitutional, enjoined further collection of co-payments, and certified the question to the court of appeals pursuant to Minn. R. Crim. P. 28.03. We granted accelerated review.

On August 26, 2003, respondent Shawnatee Marie Tennin was charged with prostitution under Minn. Stat. § 609.324 (2002), and made her first appearance in district court shortly thereafter. Upon completing a public defender eligibility affidavit in which Tennin indicated that

her entire income comprised $250 per month in public assistance, the district court determined that Tennin met the criteria for public defender eligibility. The co-payment statute, as amended in 2003, was applied and Tennin was obligated to pay a $50 co-payment for public defender assistance. Upon notification of her obligation to pay, Tennin declined representation, claiming that she could not afford the co-payment. Later, Tennin determined that she needed the assistance of counsel and paid the $50 co-payment. A public defender was subsequently appointed to assist her.

Through counsel, Tennin challenged the constitutionality of the 2003 co-payment statute, arguing that the statute violated her right to counsel under the Minnesota and United States Constitutions. On September 2, 2003, the district court found Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003), unconstitutional. In arriving at its conclusion that the statute is unconstitutional, the court relied on State v. Cunningham, a Minnesota Court of Appeals decision that upheld Minn. Stat. § 611.17 (2002), which, unlike the amended statute, contained language allowing for judicial waiver of a co-payment. State v. Cunningham, 663 N.W.2d 7 (Minn. App. 2003). In Cunningham, the court of appeals instructed district courts to exercise their discretion to waive co-payments in a manner consistent with the United States Supreme Court decision in Fuller v. Oregon and the Sixth Amendment of the United States Constitution. Cunningham, 663 N.W.2d at 11; Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116 (1974); U.S. Const. amend. VI.

Applying the reasoning of Cunningham to the present version of section 611.17, the district court in the instant case found that "[t]he very [waiver] language in which the Court of Appeals predicated its finding that the previous version of the statute was constitutional is completely absent in the 2003 version of [Minn. Stat.] § 611.17." Further, the court noted that not only did the legislature eliminate the court's authority to waive the co-payment, it also chose to levy a flat co-payment against all public defender clients without distinguishing between their financial circumstances.

Based on this ruling, the district court enjoined further collection of co-payments and certified the issue for appellate review pursuant to Minn. R. Crim. P. 28.03. The state, joined by amici Minnesota State legislators,[1] challenges the district court's findings and order that section 611.17 is unconstitutional. On September 24, 2003, we granted accelerated review.

"A certified question 'should be carefully and precisely framed so as to present distinctly and clearly the question of law involved.'" State v. Larivee, 656 N.W.2d 226, 228 (Minn. 2003) (quoting Thompson v. State, 284 Minn. 274, 277, 170 N.W.2d 101, 103 (1969)). Otherwise, the certified-question procedure runs the risk of seeking an impermissible advisory opinion. Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 30 (Minn. 1998). While the district court did not precisely frame the certified question, the court's order and memorandum make clear that the question of law presented may fairly be stated as follows:

> Does Minn. Stat. § 611.17, subd. 1(c), as amended, violate the right to counsel under the United States and Minnesota Constitutions?

A certified question is a question of law which we review de novo. B.M.B. v. State Farm Fire & Cas. Co., 664 N.W.2d 817, 821 (Minn. 2003). The constitutionality and the

construction of a statute are also reviewed de novo. State v. Grossman, 636 N.W.2d 545, 548 (Minn. 2001); State v. Colvin, 645 N.W.2d 449, 452 (Minn. 2002).

Central to the issue raised in this case is the express statutory language set forth in section 611.17. The 2003 statute establishes co-payment fees to be paid by indigents who receive public defender services. Prior to amendment, the statute provided:

> Upon disposition of the case, an individual who has received public defender services shall pay to the court a $28 co-payment for representation provided by a public defender, unless the co-payment is, or has been, waived by the court. The co-payment shall be deposited in the state general fund. If a term of probation is imposed as a part of an offender's sentence, the co-payment required by this section must not be made a condition of probation. The co-payment required by this section is a civil obligation and must not be made a condition of a criminal sentence.

Minn. Stat. § 611.17(c) (2002).

The 2003 amended version of section 611.17, subdivision 1(c), instituted three significant changes: (1) the statute created a co-payment obligation upon appointment of the public defender rather than at disposition of the case; (2) it deleted the express language establishing a judicial waiver of the co-payment; and (3) it increased the amount of the co-payment. As amended, the statute provides in relevant part:

> Upon appointment of the public defender, an individual who receives public defender services shall be obligated to pay to the court a co-payment for representation provided by a public defender. The co-payment shall be according to the following schedule:
>
> (1) if the person was charged with a felony, $200;
> (2) if the person was charged with a gross misdemeanor, $100; or
> (3) if the person was charged with a misdemeanor, $50.
>
> * * * *
>
> If a term of probation is imposed as a part of an offender's sentence, the co-payment required by this section must not be made a condition of probation. The co-payment required by this section is a civil obligation and must not be made a condition of a criminal sentence. Collection of the co-payment may be made through the provisions of chapter 270A, the Revenue Recapture Act.

Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003). It was this amended version of the co-payment statute that was applied to Tennin.

Statutes are presumed constitutional and will be declared unconstitutional "with extreme caution and only when absolutely necessary." State v. Larsen, 650 N.W.2d 144, 147 (Minn. 2002) (citation omitted). A statute is unconstitutional only if there is no reasonable alternative construction available. State v. Harris, 667 N.W.2d 911, 919 (Minn. 2003). To successfully challenge the constitutionality of a statute, the challenger—here Tennin—must overcome the heavy burden of showing beyond a reasonable doubt that the statute is unconstitutional. State v. Merrill, 450 N.W.2d 318, 321 (Minn. 1990).

The United States and Minnesota Constitutions contain nearly identical language concerning a criminal defendant's right to counsel. "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." U.S. Const. amend. VI; Minn. Const. art. I, § 6.[2] In support of this constitutional right to counsel, Minnesota law provides that a defendant who is financially unable to afford counsel is entitled to have a public defender appointed. Minn. Stat. § 611.14 (2002); Minn. R. Crim. P. 5.02, subd. 1. The district court may require a defendant, to the extent able, to compensate the governmental unit which bore the cost of the appointed public defender. Minn. R. Crim. P. 5.02, subd. 5. The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the cost of these services does not impair the defendant's right to counsel. See Fuller, 417 U.S. at 53, 94 S.Ct. at 2124.

Nonetheless, the requirement to repay costs of counsel is not without limit. In analyzing a recoupment statute from the State of Oregon, the United States Supreme Court held that Oregon's statute requiring an individual to reimburse the state for the services of a public defender was in line with the Sixth Amendment where "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay." Id. The question thus arises, does Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003), which states that "[u]pon appointment of the public defender, an individual who receives public defender services shall be obligated to pay to the court a co-payment for representation provided by a public defender," exempt persons who remain indigent or for whom repayment of the co-payment would work a manifest hardship? The answer to this question is critical to our analysis of the certified question.

While we acknowledge that state legislatures are free to draft the language of their own statutes within the dictates of the Constitution, we draw guidance from the United States Supreme Court's review of the Oregon recoupment statute. Two particular components of that statute recognized by the Court are relevant to our analysis: (1) the Oregon statute's express language that a court could not order a defendant to pay legal expenses unless the defendant is or will be able to pay them, or if hardship would result if repayment was ordered; and (2) the Oregon statute's provision for a defendant to petition the court at any time for remission of the payment costs, which the court may grant if payment "will impose manifest hardship on the defendant or his immediate family." Fuller, 417 U.S. at 45-46, 94 S.Ct. at 2121.

Because the Oregon statute was "quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation," the Court held that the statute did not deprive indigent defendants of the right to counsel. Id. at 46, 2121. "Defendants with no

likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result." Id. In effect the statute provided two possibilities for indigent criminal defendants to be relieved of having to pay for legal services: "Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship." Id. at 54, 2125 (emphasis added). Relying heavily on the Fuller opinion, Tennin argues it is the absence of statutory language similar to that adopted by the Oregon legislature that is fatal to the current Minnesota co-payment statute's constitutionality. In Tennin's view, the Minnesota statute's requirement is non-waivable and must be imposed without regard to a defendant's ability to pay or the hardship caused.

While emphasizing the heavy burden placed on the defendant to overcome the presumption of constitutionality, the state advances three principal arguments in its briefs, and yet another separate argument during oral arguments in support of section 611.17, subd. 1(c) (Supp. 2003). We will address all four of the state's arguments in turn, but before doing so we must dispel the assumption the state makes that, because the Revenue Recapture Act is the only collection mechanism mentioned in the statute, it excludes all other means of collection. The final sentence of section 611.17, subdivision 1(c) clearly provides otherwise: "Collection of the co-payment may be made through the provisions of chapter 270A, the Revenue Recapture Act." Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003) (emphasis added). Under the canons of statutory construction, the word "may" is permissive and the word "shall" is mandatory. Minn. Stat. § 645.44, subds. 15, 16 (2002).[3] Therefore, the final sentence of section 611.17, subdivision 1(c) makes collection under the provisions of the Revenue Recapture Act optional, not mandatory.

The state first argues that the current version of the statute grants judges the express power to waive the co-payment. To support its argument the state ignores the part of section 611.17, subdivision 1(c) which states, " * * * [A]n individual who receives public defender services shall be obligated to pay * * * ," and instead focuses on the final sentence of the same section: "Collection of the co-payment may be made through the provisions of chapter 270A, the Revenue Recapture Act." Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003) (emphasis added). In the state's view, inclusion of this sentence empowers judges to make a finding on a particular defendant's indigence and then determine whether to waive the co-payment. In light of our reading of the Revenue Recapture Act provision of section 611.17 above, we find the state's argument unpersuasive. Further, prior to amendment, the previous version of section 611.17 contained an express judicial waiver provision, which was deleted by the legislature. Thus, the state's contention that the legislature removed an express waiver provision and still intended that co-payments could be waived by the court due to statutory language referencing one collection mechanism is untenable. We conclude that section 611.17, as amended, does not provide for judicial waiver.

Second, the state argues that even if the statute does not grant express judicial waiver of co-payments, courts maintain an implied power to refrain from imposing co-payments through their authority over the collection process. As such, when a court determines that a defendant is indigent[4] or that payment would work a manifest injustice, the court may simply decline to report a co-payment debt to the commissioner of revenue. As an initial matter, this argument

assumes that the Revenue Recapture Act is the exclusive means of collecting co-payments under section 611.17, a proposition we have already rejected above. Equally important, the argument overlooks language in the appropriations article of the same 2003 Act in which section 611.17 was amended. The appropriations article includes this provision:

> The court administrator in each county shall make all reasonable and diligent efforts to promptly collect public defender co-payments. If the court administrator is unable to collect the co-payment, the court administrator shall timely submit a claim for revenue recapture.

Act of May 28, 2003, ch. 2, art. 1 § 4 (2003 First Sp. Sess.), 2003 Minn. Laws 1387. The use of the word "shall" belies the state's argument that collection is discretionary. Therefore, we conclude that an implied judicial waiver does not exist in the statute.

Third, the state argues that the provisions of the Revenue Recapture Act offer indigent defendants sufficient protection from manifest hardship. The Revenue Recapture Act collects debts by withholding certain refunds, including income and property tax refunds as well as lottery prizes.[5] The interpretation advanced by the state equates a taxpayer who receives a refund with one who is able to afford the co-payment without manifest hardship, a conclusion which does not comport with the reality of our tax system. Recognizing that marginally employed or low-income employees are usually entitled to tax refunds, the Revenue Recapture Act, left to itself, would collect co-payment debts from indigent defendants, an unconstitutional result under Fuller. Further, as illustrated by the facts of the present case, some indigent defendants manage to pay the co-payment at the time it is imposed and therefore, never receive the purported protections of the Revenue Recapture Act. For these reasons, the Revenue Recapture Act, by itself, offers insufficient protection against imposing co-payments on defendants who remain indigent and those for whom repayment would cause a manifest hardship.

Finally, during oral argument, the state appeared to reframe its briefed arguments by arguing that Minn. Stat. § 611.17, subd. 1(c) provides district courts with discretion and that it is the duty of this court to instruct judges to exercise this discretion consistent with Fuller. The state bases this argument on the statute's use of the words "shall" and "may." The state contends that these words, used in the same section, create ambiguity and, therefore, judicial discretion must be read into the statute. However, a reading of the express language of the statute does not support the conclusion that ambiguity can be found within section 611.17, subdivision 1(c).

> Upon appointment of the public defender, an individual who receives public defender services shall be obligated to pay to the court a co-payment for representation provided by a public defender. * * * Collection of the co-payment may be made through the provisions of chapter 270A, the Revenue Recapture Act.

Id. (emphasis added). The co-payment statute clearly and unambiguously provides that a defendant shall pay a co-payment fee, which may be collected under the provisions of the Revenue Recapture Act. This construction does not give rise to ambiguity, much less discretion.

To read discretion into the statute, as the state asks us to do, would infringe on the proper exercise of legislative authority. Such an interpretation would raise concerns about the separation of powers, as it essentially transforms the statute back into its unamended form and directly contradicts the express language of the amendments made by the legislature in 2003.

Given the clear language of the amended statute, we hold that Tennin has met the heavy burden of showing that Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003) is unconstitutional. While co-payment and recoupment may properly be required, the Sixth Amendment's protections identified by the United States Supreme Court in its Fuller decision are absent in Minnesota's co-payment statute. The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1(c), as amended, violates the right to counsel under the United States and Minnesota Constitutions.

Certified question answered in the affirmative.

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[1] State Representatives Steve Smith, Eric Lipman, Doug Fuller, Dale Walz, and Steve Strachan submitted an amicus curiae brief, which concurred with the arguments advocated by the State.

[2] Where the Sixth Amendment of the United States Constitution reads "for his defense," the Minnesota Constitution, article I, section 6, reads, "in his defense."

[3] Even if section 611.17, subdivision 1(c) (Supp. 2003) had expressly mandated exclusive use of the Revenue Recapture Act, the Act itself provides, "The collection remedy under this section is in addition to and not in substitution for any other remedy available by law." Minn. Stat. § 270A.04, subd. 1 (2002).

[4] The standards for public defense eligibility are set forth in Minn. Stat. § 611.17 (2002) and Minn. R. Crim. P. 5.02.

[5] Under the Revenue Recapture Act the collection process is triggered once a claimant agency submits the debt to the commissioner of revenue. Minn. Stat. § 270A.07, subd. 1 (2002). Upon receipt, the commissioner initiates procedures to discover any refunds payable to the debtor. Minn. Stat. § 270A.07, subd. 2(a) (2002). Debts are deducted from refunds prior to distribution to the debtor. Minn. Stat. § 270A.07, subd. 2(b) (2002). The term "refund" includes individual income tax refunds, political contribution refunds, property tax credits or refunds, lottery prizes, and amounts granted to persons by the legislature on the recommendation of the joint subcommittee on claims. Minn. Stat. § 270A.03, subd. 7 (2002).