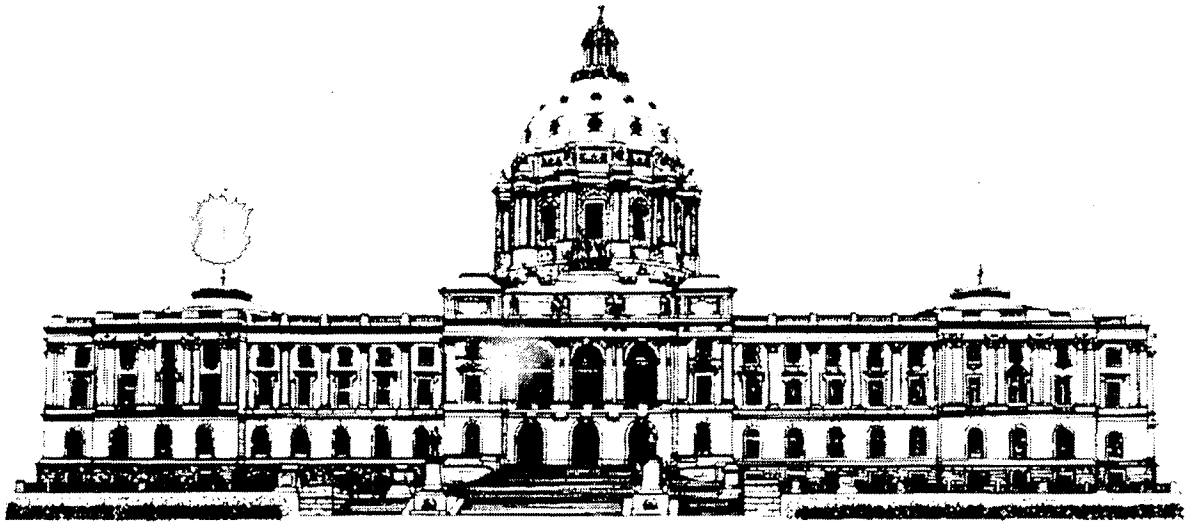
REPORT OF THE
REVISOR OF STATUTES

06 - 0590

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS



Submitted to the Legislature of the State of Minnesota
November 2006

Minn. Stat. 3C.04 Subd. 3

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, 2006

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

The Honorable Margaret Anderson Kelliher
Speaker Designate of the House
Room 261, State Office Building

Dear Mr. President and Madam 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, 2004, and September 30, 2006.

Sincerely,

Paul M. Marinac
Deputy Revisor of Statutes

PMM:jk

cc: The Honorable Lawrence J. Pogemiller
Majority Leader of the Senate

The Honorable Anthony "Tony" Sertich
Majority Leader of the House
of Representatives

The Honorable David H. Senjem
Minority Leader of the Senate

The Honorable Jeff Johnson
Chair, House Civil Law Committee
and Members

The Honorable Don Betzold
Chair, Senate Judicial Committee
and Members

The Revisor of Statutes wishes to acknowledge the efforts of the following individuals in the production of this report:

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
Robert P. Kittel
Craig E. Lindeke
Cindy K. Maxwell
Janet Rahm
Sheree R. Speer

Production Assistance:
Julie Campbell
Robert Chenier
Marilee Davis
Dan Israel
Patrick Tobin

Administrative Assistance:
Trevyn LaBlanc
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.

The U.S. Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); *Blakely v. Washington*, 124 542 U.S. 296, 124 S.Ct. 2531 (2004); and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), evolved into a constitutional rule enunciated by the Minnesota Supreme Court in *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005), as:

> Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

The Minnesota Supreme Court and Court of Appeals dealt with this principle in numerous other cases. In response, the legislature amended various criminal and sentencing statutes in Laws of Minnesota 2005, chapter 136, article 16, and again in Laws of Minnesota 2006, chapter 260, article 1.

In *Brink v. Smith Companies Construction, Inc.*, 703 N.W.2d 871 Minn.App. 2005), the court held that a 10-to-12-year statute of repose (Minnesota Statutes 2002, section 541.051, subdivision 1, paragraph (a), violated Brink's due process rights and right to a remedy, as applied to Brink. The legislature amended that section in such a way as make Brink's fact situation unlikely to happen again, in Laws of Minnesota 2004, chapter 196, section 1.

In *Unity Church of St. Paul v. State*, 694 N.W.2d 585 (Minn.App. 2005), the court declared as unconstitutional Minnesota Statutes, section 624.714, the Minnesota Citizens' Personal Protection Act of 2003, under the single subject clause. The legislature reenacted this statute retroactively at Laws of Minnesota 2005, chapter 83, section 1.

In F*edziuk v. Commissioner of Public Safety*, 696 N.W.2d 340 (Minn. 2005), the court declared unconstitutional Minnesota Statutes, section 169A.53, following its amendment in the 2003 legislative session to remove the requirement that a hearing on the suspension of a driver's license be held no later than 60 days after a petition for review, as a violation of due process. The legislature added the requirement to the statute in Laws of Minnesota 2005, chapter 136, article 8, section 4.

OTHER ACTION

In *MCCL v. Kelley*, 698 N.W.2d 424 (Minn. 2005), the court, in response to a certified question from the United States Court of Appeals for the Eighth Circuit, interpreted the words "to influence" and related phrases in the Ethics in Government Act's definitions of "political committee" and "political fund" (Minnesota Statutes, section 10A.01, subdivisions 27 and 28) to be narrowly construed to mean "expressly advocate" in order to avoid declaring the provisions unconstitutional in light of the decision by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976).

Minnesota Statutes, sec. 60C.11, subds. 3 and 7

Insurance Claim Recovery; Insolvent Insurer

MIGA v. Integra Telecom, Inc.
Minnesota Court of Appeals
June 7, 2005

Employee of appellant (Integra Telecom) filed a workers' compensation claim. Before the claim was paid, the appellant's insurer became insolvent. Without the permission of the appellant, who was the insured party in this case, the Minnesota Insurance Guaranty Association (MIGA) paid a stipulated award of $62,801 to the employee following an administrative hearing. MIGA is an organization created by the legislature (Minnesota Statutes, chapter 60C) to generally pay claimants who would otherwise have received compensation if the insurer had not become insolvent and, to that end, is "... deemed the insurer to the extent of its obligation on the covered claims and [has] the right to pursue and retain salvage and subrogation recoverables on covered claim obligations ..." under Minnesota Statutes, section 60C.05, subdivision 1, paragraph (a). MIGA sought reimbursement from appellant under Minnesota Statutes, section 60C.11, subdivision 7, which states in pertinent part, that MIGA is entitled to "... recover the amount of any covered claim ... paid, resulting from insolvencies ... on behalf of an insured who has a net worth of $25,000,000 ... and whose liability obligations to other persons are satisfied in whole or in part by payments made under this chapter." Appellant refused to pay, arguing, among other things, that MIGA was exceeding the authority granted it by the legislature, citing Minnesota Statutes, section 60C.11, subdivision 3, which provides that MIGA "... has no cause of action against the insured of the insurer for any sums it has paid out except the causes of action the insurer would have had if the sums had been paid by the insurer."

The court found that subdivisions 3 and 7 of section 60C.11 could "reasonably be interpreted" as conflicting, making the section ambiguous.

The court found that Minnesota Statutes, section 645.26, subdivision 2, stating the "... clause last in order of date or position shall prevail" to favor subdivision 7 over subdivision 3 of section 60C.11; that "While the purpose ... is to protect insureds like appellant, the subsequent enactment of subdivision 7 recognizes that certain insureds have the ability to pay judgments and that MIGA's limited funds should go to those least able to absorb the impact"; that "legislative history makes clear that subdivision 7 was intended to allow MIGA the right to recover amounts paid on behalf of a company with a net worth greater that $25 million ... to ensure that MIGA's limited funds would go to pay the claims of those insureds without substantial assets"; that providing a recoupment provision to recover claims paid to injured employees helps to accomplish the purpose of the Act; and that the legislature sought to balance the interests of claimants and policyholders by allowing MIGA to handle claims quickly and efficiently and by providing MIGA with an option to seek reimbursement from high net worth insureds ...."

The court held for MIGA stating "... the ... Act permits the Minnesota Insurance Guaranty Association to negotiate a settlement and recover the amount of any covered claim paid from an insured with a net worth exceeding $25 million ...."

Minnesota Statutes, sec. 62E.11, subd. 5

Insurers Assessed by Minnesota Comprehensive Health Association

BCBSM, Inc. v. Minnesota Comprehensive Health Association
Minnesota Court of Appeals
April 12, 2006

Blue Cross Blue Shield of Minnesota (BCBSM) challenged the assessment calculation of the Minnesota Comprehensive Health Association (MCHA), which included stop-loss insurance premiums as accident-and-health insurance premiums. BCBSM claimed that stop-loss insurance is not accident-and-health insurance for the purposes of the assessment statute so that stop-loss insurance premiums should not be included in calculation of the assessment.

Generally, stop-loss insurance is insurance purchased by a self-insuring employer to protect the employer from health care costs that exceed a certain monetary amount. Minnesota Statutes, section 62E.02, subdivision 11, defines "accident and health insurance policy" as "insurance or nonprofit health service plan contracts providing benefits for hospital, surgical and medical care." The definition also listed eight categories of insurance that are not covered by an accident and health insurance policy; stop-loss insurance was not included as a type of insurance not covered. The MCHA offers health insurance to "... Minnesota residents who have been rejected for standard insurance coverage because of high-risk health conditions ...." Health insurers are required to be members of the MCHA and to fund the costs of the MCHA as a condition of doing business in this state. The members, including BCBSM, are assessed proportionally by MCHA as calculated according to Minnesota Statutes, section 62E.11, subdivision 5, which states, in pertinent part:

> Each ... member ... shall share the losses due to claims expenses ... and shall share in the operating and administrative expenses ... [of] ... the association .... Claims expenses of the state plan which exceed the premium payments allocated to the payment of benefits shall be the liability of the ... members. Contributing members shall share in the ... expenses ... equal to the ratio of the ... member's total *accident and health insurance* premium ... as divided by the total *accident and health insurance* premium, received by all contributing members ... as determined by the commissioner. [Emphasis added]
> ....

The court found the statute to be ambiguous. The court found persuasive the district court's invocation of the rule of construction that "the expression of one thing excludes another" in reasoning that if the legislature had intended to exclude stop-loss insurance as accident and health insurance it would have expressly so stated, "as it did with other categories of insurance"; the legislature was aware of the existence of stop-loss insurance but did not include it as one of "...15 lines of insurance that can be sold in the state ..." which "supports MCHA's claim that stop-loss insurance is not a separate and distinct line of insurance but rather is a form of one of the enumerated lines, namely accident-and-

health insurance ..." because ... "[if] this were not so, BCBSM would have no authority to sell stop-loss insurance in Minnesota"; BCBSM's argument that stop-loss insurance covers employers and accident and health insurance covers employees is a "difference without a distinction" because both insure the costs of health care; a determination of whether state law or the federal ERISA law covers stop-loss insurance is "... irrelevant to a determination of whether stop-loss carriers were members of ... [a] comprehensive health insurance association ..."; and stop-loss insurance provides health and accident benefits.

The court determined "that the legislature intended that insurers who offer stop-loss insurance should be among those assessed. Consequently, we conclude that premiums for stop-loss insurance were properly included as accident-and-health-insurance premiums in calculating MCHA's annual assessment of its members.

Minnesota Statutes, sec. 152.01, subd. 12a

Drug Offense Within One City Block of Park Zone

State v. Estrella
Minnesota Court of Appeals
July 12, 2005

The district court denied the state's motion to amend its original complaint to include three additional charges of second-degree sale of a controlled substance for cocaine sales by Estrella in a "park zone." Sale of a controlled substance in a park zone is a controlled substance crime in the second degree. Minnesota Statutes, section 152.022, subdivision 1, clause (6). Investigation reports alleged that Estrella sold cocaine at two trailer homes located more than 300 feet from a municipal park in Cannon River. Minnesota Statutes, section 152.01, subdivision 12a, defines, "park zone" as, in pertinent part, "an area designated as a public park ... [and] includes the area within 300 feet or one city block, whichever distance is greater, of the park boundary." Testimony in the district court showed that the city is not laid out in a grid system; in other words, is not plotted into city blocks. The court concluded that the definition of "park zone" in this context is ambiguous.

The state argued that the court should interpret "city block" as including the municipal park, the trailer home park, and all other land bounded by streets on three sides without regard to its size; respondent Estrella argued that the legislature foresaw cases such as this and included the alternative measurement of 300 feet to be used when areas were not laid out in a grid system of blocks.

The court found Estrella's argument the more reasonable and concluded that "... under circumstances where no actual grid system is present, the term 'one city block' does not apply and, therefore, a drug transaction must take place within the ambit of the 'park zone' statute."

Minnesota Statutes, sec. 169A.20, subd. 1, clause (5)

DWI; Alcohol Concentration Within Two Hours of Driving

State v. Banken
Minnesota Court of Appeals
December 28, 2004

Appellant was convicted of driving while impaired under Minnesota Statutes, section 169A.20, subdivision 1, which states in pertinent part:

> Subdivision 1. ... It is a crime for any person to drive, operate, or be in physical control of any motor vehicle ... :
>
> ...
>
> (5) when the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.10[.]
>
> ....

A test to determine the appellant's alcohol concentration was administered two hours and 14 minutes after the appellant had been driving, which showed a concentration of 0.17.

The court found the word "measured" to be ambiguous because it was susceptible to two reasonable interpretations:

> On the one hand, "measured" could indicate the act of measuring, or taking the steps necessary to ascertain the quantity of the alcohol concentration. Using this meaning, law enforcement would have to obtain a sample and run the test for alcohol concentration within two hours. On the other hand, "measured" could indicate the quantity determined by measuring. Applying that meaning, "measured" would allow police to obtain or administer the test for the blood, urine or breath sample after two hours, as long as the quantity or measurement of alcohol concentration is accurately established as of a point in time within the two-hour limit. .... Using this second meaning, "measuring" would relate back to a specified earlier point in time by providing accurate proof that the driver's alcohol concentration was above the legal limit within two hours of driving.

The court examined the language and history of section 169A.20 and other, related statutes to discern the legislature's intent and held:

> Although the breath sample in this case was obtained more than two hours after appellant had been driving, the appellant's alcohol concentration in excess of the legal limit of .10 was measured as of a point within two hours of driving, and the district court properly determined that appellant was in violation of Minn. Stat. [section] 169A.20, subd. 1, [clause] (5).

Minnesota Statutes, sec. 176.061, subd. 5

Recovery Rights of Workers' Compensation Insurer

Zurich American Ins. Co. v. Bjelland
Minnesota Supreme Court
February 2, 2006

By stipulated facts, Appellant's negligence led to the death of insured's employee; respondent insurer, Zurich American Insurance Company, paid benefits on behalf of the employer to the employee's surviving dependents totaling $104,319, of which $48,336 represented damages recoverable under the Wrongful Death Act.

Zurich brought a subrogation action against appellant to recover all benefits in full, arguing that amendments to Minnesota Statutes, section 176.061, subdivision 5, by Laws of Minnesota 2000, chapter 447, section 5, allowed for full recovery. That provision states in pertinent part:

> ... If the ...employee's dependents ...[receive] benefits ... or [accept] ... payment on account of the benefits, the employer ... is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity against a third party *regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute*. [Emphasis added]

Appellant argued that Zurich was limited to the recovery of wrongful death damages and that the amendment "does not enlarge the employer's right to recover the third-party tortfeasor but rather, it expands the definition of what types of benefits are eligible to be recovered and that his liability remained one of subrogation only.

The court found that the statute was "not clear and free from all ambiguity"; that the "legislative history provides no clear indication that the legislature intended to accomplish what Zurich asserts" so consequently "... little legislative intent can be inferred ..."; that the unchanged language of section 176.061 "... continues to state that the employer is 'subrogated to the rights of the employee'"; that any intent of the legislature "to alter the fundamental nature of the employer's cause of action against the third party is belied by the fact that the legislature did not amend ... the distribution formula that allocates a recovery from a third party paying what it would normally pay if no compensation question were involved"; and that Zurich's interpretation, upheld by the court below, "would significantly shift the burden for the financial consequences of workplace accidents from employers onto third-party tortfeasors."

The court concluded:

> It seems to us fairly evident, then, that the 2000 amendments have not modified the measure of damages against which the employer may assert a right of recovery. In the absence of a definitive indication from the legislature that it meant to replace or otherwise enlarge the employer's cause of action against the third party beyond that of subrogation, we reaffirm the fundamental principle that

in a subrogation suit the employer has no greater rights than those of the employee.

Minnesota Statutes, sec. 204D.10, subd. 2

Elections; Primary Threshold Law

Candidacy of Independence Party Candidates v. Kiffmeyer

Minnesota Supreme Court

November 10, 2004

The Minnesota Secretary of State notified the Independence Party that the names of its candidates for elective office would not be placed on the 2004 general election ballot based on Minnesota Statutes, section 204D.10, subdivision 2, which requires that at least one candidate receive "... a number of votes equal to ten percent of the average of the votes cast at the last state general election for state officers of that major political party within the district for which the office is voted ...."

The Secretary of State and her counsel, the Minnesota Attorney General, conceded that "there is no rational state purpose served by the primary threshold law." The court found "irrationality and arbitrariness of the ... law are evident" and "supports the conclusion that the ... law cannot be justified."

The court held that "... by denying Independence Party candidates access to the general election ballot the primary threshold law violates petitioners' constitutional rights to vote and to associate for the advancement of political beliefs under the First and Fourteenth Amendments."

Minnesota Statutes, sec. 211B.04, para. (a)

Freedom of Speech; Election Campaign Material Disclaimer

Riley v. Jankowski
Minnesota Court of Appeals
April 26, 2006

Four days before an election, Jankowski, an attorney and son of a candidate for city office, distributed to voters campaign material, provided and prepared by at least one challenging candidate, charging that three incumbent office holders "attempted to profit illegally ... or allow the profiting ... from their elected positions ..." of the sale of city land. The distributed material did not carry a disclaimer, but stated on the envelope, "This publication is not circulated on behalf of any candidate ...." Suit was brought and a panel of administrative law judges determined that relators had violated, among other statutes not pertinent here, Minnesota Statutes, section 211B.04, paragraph (a), which states in pertinent part:

> (a) A person who participates in the preparation or dissemination of campaign material ..., that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor. [Paragraphs (b) and (c) set out in detail the form of the information required.]

The court reviewed *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S.Ct. 1511 (1995) and *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 291 F.Supp.2d 1052 (D.Minn.2003), aff'd in part, rev'd in part, 427 F.3d 1106 (8th Cir.2005), concluding "... there may be circumstances in which the disclaimer requirement is violated by completely truthful anonymous statements made by individuals acting independently from any candidate and using their own resources. Respondents have not identified an overriding state interest that permits ... [limiting] such political expression under the exacting scrutiny that we must apply.

The court held, "... Minn. Stat. [section] 211B.04 [, paragraph] (a)[,] directly regulates the content of pure speech in violation of the First Amendment ...."

Minnesota Statutes, sec. 216B.1691, subd. 2, paras. (a) and (b)

Renewable Energy Standards for Utilities

In re Detailing Criteria and Standards
Minnesota Court of Appeals
July 26, 2005

Environmental organizations challenged an order of the Minnesota Public Utilities Commission (PUC) setting standards for electric utilities to comply with Minnesota Statutes, section 216B.1691, subdivision 2, paragraphs (a) and (b), objectives for increasing the use of renewable energy resources.

Paragraph (a) reads, in pertinent part:

> (a) Each electric utility shall make a good faith effort to generate or procure sufficient electricity generated by an eligible energy technology ... so that:
>
> (1) commencing in 2005, at least one percent of the electric utility's total retail electric sales is generated by eligible energy technologies;
>
> (2) the amount provided under clause (1) is increased by one percent of the utility's total retail electric sales each year until 2015; and
>
> (3) ten percent of the electric energy provided to retail customers in Minnesota is generated by eligible energy technologies.

The utilities argued that paragraph (a) "set a one-percent baseline for total retail electric sales from eligible energy technologies in 2005 and required an increase by one percentage point each year until sales from eligible energy technologies reach 10 percent of total retail sales in 2015." The environmental groups argued that sales from eligible energy technologies would vary and that "once a utility established its annual percentage of retail electric sales from eligible energy technologies," it must annually increase those sales by one percent. The PUC's order reflected the utilities' position and allowed preexisting generation in computing utility compliance.

The court found the statutory language ambiguous, as susceptible to more than one reasonable interpretation; that the words "at least" in paragraph (a), clause (1), must be interpreted in the context of the entire subdivision and concluded that the "statutory scheme sets a baseline objective of one percent in 2005 with annual increases of one percent so as to reach the 10-percent objective by 2015"; and that the "legislative history supports the proposition that nonmandated sources of preexisting generation are included among eligible energy technologies" and does not require annual increases through new generation.

Paragraph (b) reads in pertinent part:

(b) Of the eligible energy technology generation required under paragraph (a), clauses (1) and (2), not less than 0.5 percent of the energy must be generated by biomass energy technologies .... By 2010, one percent of the eligible technology generation required under paragraph (a), clauses (1) and (2), shall be generated by biomass energy technologies....

The environmental groups argued that the biomass requirement was a percentage of a utility's total electric sales and the utilities argued that the biomass requirement was a percentage of all eligible energy sources.

The PUC found the statute ambiguous and concluded that "the percentages pertain to the 'eligible energy technology generation,' not total retail electric sales." The court accepted the PUC's judgment on this issue, stating that the provision's "phrase 'of the energy' plainly relates back to the opening phrase of the subdivision, which refers to 'eligible energy technology generation' under subdivision 2 [,paragraph] (a)" and that the "only reasonable construction ... is that the percentages ... are applied to the amount of eligible ... generation, not total retail electric sales."

The court held:

> The PUC did not commit an error law by concluding that the renewable energy objectives ... direct each electric utility to make a good faith effort to ensure that 10 percent of total electric sales to retail customers is generated by eligible energy technologies by 2015, with a one-percent initial objective in 2005 and a benchmark increase of one percent annually. The PUC's ... [calculation] of electrical generation from biomass energy technologies as compared to all eligible energy technologies was not arbitrary and capricious.

[NOTE: The Minnesota Supreme Court affirmed this decision by an evenly divided court by order dated May 22, 2006.]

Minnesota Statutes, sec. 244.11, subd. 3

Separation of Powers; Defendant's Right to Appeal Sentence

State v. Losh
Minnesota Supreme Court
September 28, 2006

Losh pleaded guilty to kidnapping and the court imposed a 120-month stayed sentence. Subsequently, at least 90 days after her sentence was pronounced, she violated the terms of her probation and the court executed her sentence. She appealed the sentence and the Supreme Court ordered supplemental briefs to address its appellate jurisdiction in light of Minnesota Statutes, section 244.11, subdivision 3, which states, in pertinent part:

(a) ....
(b) If a defendant agrees to a plea agreement and is given a stayed sentence, which is a dispositional departure ..., the defendant may appeal the sentence only if the appeal is taken:
    (1) within 90 days of the date sentence was pronounced; or
    (2) before the date of any act committed by the defendant resulting in revocation of the stay of sentence; whichever occurs first.
(c) ...
(d) ....

Losh did not meet the 90-day deadline to appeal her sentence. The court ruled that the statute is unconstitutional because it violates the separation of powers doctrine, explaining, inter alia, that "the court has previously construed statutes that set time limits for an appeal as procedural," ... "this court has 'primary responsibility for the regulation of evidentiary matters and matters of trial and appellate procedure,'" ... and "this authority over procedural matters is derived from the court's inherent judicial powers." [citations omitted]

The court held: "To the extent section 244.11, subd. 3, purports to limit this court's ability to hear an appeal in certain cases, it violates the separation of powers by encroaching on this court's power to define its appellate jurisdiction."

Minnesota Statutes, sec. 260B.130, subd. 4, para. (b)

Equal Protection; Extended Juvenile Jurisdiction

In re Welfare of T.C.J.
Minnesota Court of Appeals
January 26, 2005

TCJ, a 17-year-old juvenile, was charged with first-degree assault, a felony if committed by an adult. After the prosecution was unsuccessful in seeking certification as an adult offender, the juvenile court granted TCJ's motion that the proceeding be conducted as an extended juvenile jurisdiction (EJJ) case. The jury found him guilty of the charge of third-degree assault. However, it acquitted him of first-degree assault, the charged offense giving rise to the sought-after adult certification and the subsequent EJJ prosecution. The court "entered judgment on the jury's verdict finding juvenile committed conduct which would constitute third-degree assault if committed by an adult" and imposed a stayed adult criminal sentence under Minnesota Statutes, section 260B.130, subdivision 4, paragraph (a), in addition to the juvenile disposition under section 260B.198.

TCJ argued that he should have been sentenced only to a juvenile disposition under Minnesota Statutes, section 260B.130, subdivision 4, paragraph (b), which is limited to "a child prosecuted as an extended jurisdiction juvenile after *designation by the prosecutor*" and found guilty of an "offense that would not, on its own, have justified an EJJ prosecution ..." and "that the court's application of the EJJ statute violated his right to equal protection under the law.

The court found that the phrase "after designation by the prosecutor in the delinquency petition" in paragraph (b) to require "a disparately more severe sentence for every EJJ conviction that results from the juvenile court's rejection of adult certification" and that "... if the state had not sought the adult-certification process ... a decision entirely within the state's discretion and a choice which the court rejected ... he would only be subject to a juvenile disposition for the third-degree assault conviction."

The court applied the rational basis standard to determine if TCJ's equal protection rights under the state and federal constitutions were violated and held that Minnesota Statutes, section "260B.130, subd. 4 [, paragraph] (b) is unconstitutional ..." and that "the imposition of a stayed adult sentence on a juvenile defendant violates his right to equal protection, and we vacate the stayed adult sentence."

(Note: The court cited the Minnesota Supreme Court's equal protection analysis in *State v. Garcia*, 683 NW.2d 294 (Minn. 2004), reported in this office's 2004 report, in which another provision of the EJJ statute (sec. 260B.130, subdivision 5), which denied credit for time served in a juvenile facility, was held to be unconstitutional. That provision remains the same as when *Garcia* was decided.)

Minnesota Statutes, sec. 299A.465, subd. 1, para. (c)

Family Health Coverage After Public Safety Officer's Death

Schmidt v. City of Columbia Heights
Minnesota Court of Appeals
May 24, 2005

A Columbia Heights police officer was disabled in the line of duty and, afterward, he and his family continued to receive health care coverage from the city. When the officer died from causes not related to his disability, the city discontinued coverage for his surviving dependents. The dependents brought suit claiming the city had violated Minnesota Statutes, section 299A.465, subdivision 1, paragraph (c), which states, in pertinent part:

> (c) The employer is responsible for the continued payment of the employer's contribution for [health] coverage of the officer ... and ... the officer's ... dependents. Coverage must continue for the officer ... and ... the officer's ... dependents until the officer ... reaches the age of 65 ....

The city argued that the statute conditions the payment of health coverage on the officer continuing to live to age 65 and contended that if the legislature had intended otherwise it could have made continued dependent coverage explicit in the statute. The court noted that other statutes cited by the city "... equally support the counterargument: if the legislature had intended the contribution requirement to expire upon the death of an officer, it could have explicitly stated so."

The court agreed with the district court that "the statutory language may be read to 'require coverage until the 65th anniversary of an officer's [birth].'" It found that to adopt the city's interpretation would lead to an unreasonable result; that the district court's interpretation was reasonable; that the legislature has recognized elsewhere in statutes the "special nature of [public safety officers'] sacrifice and contribution"; that to deny coverage to dependents because a disabled officer dies before reaching the age of 65 would frustrate the purpose of the statute to provide such coverage; and that legislative intent "...is best effectuated by reading this language to require contribution until the 65th anniversary of the officer's birth."

The court concluded "... when an officer who is disabled in the line of duty dies prior to attaining age 65, Minn. Stat. [section] 299A.465, subd. 1 [, paragraph] (c) ..., requires the officer's employer to continue to contribute to the health coverage of the officer's dependents until the 65th anniversary of the officer's birth.

Minnesota Statutes, sec. 340A.702, clause (6)

Liquor Sales Within 1,000 Feet of County Jail

Block 25 Committee v. City of Walker
Minnesota Court of Appeals
January 4, 2005

A citizens' group sought to prevent the city of Walker from moving its municipal liquor store to a historic building located within 1,000 feet of the county jail, arguing to do so would violate Minnesota Statutes, section 340A.702, clause (6), which reads in pertinent part:

> It is a gross misdemeanor:
> ...
> (6) to sell ... intoxicating liquor within 1,000 feet of a *state* hospital, training school, reformatory, prison, or other institution under the supervision and control, in whole or in part, of the commissioner of human services or the commissioner of corrections[.] [Emphasis added.]

The district court granted summary judgment to the respondent citizens' group, concluding that the county jail was an institution partially supervised or controlled by the Department of Corrections. The city appealed, arguing that the limitation only applied to state institutions.

The court of appeals found the statute ambiguous.

Based on its own examination of the statute's legislative history, the court found that the predecessor statute specifically named the applicable institutions, that they were all state institutions, and that the present statute's "change in wording ... appears to have been designed to eliminate the need to separately list each institution and to define in a more generic manner the set of institutions covered by the statute. Retention of the adjective 'state' ... appears to carry forward what was formerly a clear limitation of the application of the statute to state institutions."

The court reversed the district court, holding "... the statute refers only to sales within 1,000 feet of a state institution, and the statute does not apply to prohibit liquor sales within 1,000 feet of a county jail."

Minnesota Statutes, section 590.05

Right to Counsel for Postconviction Relief

Deegan v. State
Minnesota Supreme Court
March 23, 2006

Following a plea agreement, Deegan pleaded guilty and received a sentence of 360 months, less than the presumptive sentence. Later, Deegan requested the assistance of the Public Defender to file a postconviction petition, which was denied under Minnesota Statutes, section 590.05. The statute was amended in 2003 to include the following language:

> If, however, the person pled guilty and received a presumptive sentence or a downward departure in sentence, and the state public defender reviewed the person's case and determined that there was no basis for an appeal of the conviction or of the sentence, then the state public defender may decline to represent the person in a postconviction remedy case.

Deegan's motion for appointment of counsel was denied by the district court and court of appeals under section 590.05 and *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990 (1987), in which the U.S. Supreme Court held there is no 14th Amendment right to counsel for a state postconviction action.

The court accepted Deegan's petition to review the constitutionality of the 2003 amendment. After analyzing the history and scope of postconviction remedies and the right to counsel in Minnesota and other states, and at the federal level, the court concluded "... that the 2003 amendment deprives some defendants of meaningful access to one review of a criminal conviction, in violation of their right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution."

The court held that "a defendant's right to the assistance of counsel under ... the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding" so that, consequently, "section 590.05, as amended by ... [Laws] ... 2003, [1st Special Session] ch. 2, art. 3, [section] 2, ... is unconstitutional. The court's remedy was to sever the 2003 amendment so that section 590.05 exists "... as it existed before the 2003 amendment" and "... the version that existed prior to the 2003 amendment is revived."

[NOTE 1: Laws 2003, First Special Session chapter 2, article 3, section 3, also added identical language to Minnesota Statutes, section 611.14.]

[NOTE 2: Minnesota Statutes 2006, section 590.05, continues to show the language declared to be unconstitutional by this case, not the "revived" pre-2003 version.]

Minnesota Statutes, secs. 609.321, subd. 12, and 609.324, subd. 2

Prostitution; Public Place

State v. White
Minnesota Court of Appeals
March 1, 2005

After negotiating with an undercover police officer, while in the officer's car, for an exchange of oral sex for $30, the defendant was arrested and charged with prostitution under Minnesota Statutes, section 609.324, subdivision 2, which states, in pertinent part, "Whoever solicits ... to engage for hire in sexual ... contact while in a *public place* may be sentenced ...." [Emphasis added.] Minnesota Statutes, section 609.321, subdivision 12, defines "public place" as "... a public street or sidewalk, a pedestrian skyway system ..., a hotel, motel, or other place of public accommodation, or a place licensed to sell intoxicating liquor, wine, nonintoxicating malt beverages, or food."

The defendant argued the interior of the officer's car is not a public place for purposes of the prostitution laws and the lower court agreed, dismissing the charge after finding "public place" to be ambiguous and concluding that the term "should be interpreted to refer to areas 'where the public is likely to be present.'"

The court framed the issue as "... whether that part of the 'public street' occupied by the vehicle inside which White was sitting was a 'public place.'"

After examining other cases and contexts determining the scope of "public place," the court noted that "Had the legislature so intended, it could have defined as a gross-misdemeanor offense the solicitation of prostitution in a motor vehicle." It affirmed the lower court and held that the term does not include the interior of a car.

STATE OF MINNESOTA

IN COURT OF APPEALS

A04-1877

Minnesota Insurance Guaranty Association,

Respondent,

vs.

Integra Telecom, Inc.,

Appellant.

Filed June 7, 2005

Affirmed

Kalitowski, Judge

Hennepin County District Court

File No. 03-14751

Stephen P. Lucke, Michelle S. Grant, Dorsey & Whitney LLP, Suite 1500, 50 South Sixth Street, Minneapolis, MN 55402-1498 (for respondent)

Dean A. LeDoux, Gray, Plant, Mooty, Mooty & Bennett, P.A., 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Minge, Judge.

S Y L L A B U S

1. The Minnesota Guaranty Association Act, Minn. Stat. § 60C01-.22 (2002), does not require the Minnesota Insurance Guaranty Association to obtain consent prior to negotiating a settlement and recovering the amount of a covered claim paid on behalf of an insured with a net worth exceeding $25 million.

2. Where the state is not a party, the rules of appellate civil procedure require a party challenging the constitutionality of a statute on appeal to timely notify the attorney general to afford an opportunity to intervene.

O P I N I O N

KALITOWSKI, Judge

Appellant Integra Telecom, Inc. challenges the district court's grant of summary judgment in favor of respondent Minnesota Insurance Guaranty Association (MIGA). Appellant argues that (1) the district court erroneously construed the Minnesota Insurance Guaranty Association Act to permit MIGA to maintain a reimbursement claim against appellant based on a settlement MIGA entered into without appellant's consent; (2) the district court erred because Minn. Stat. § 60C.11, subd. 3, prohibits MIGA from bringing a cause of action against appellant; and (3) the court's construction rendered the act unconstitutional by violating appellant's due process rights.

F A C T S

In 2000, Laura Breid filed a workers' compensation claim for injuries sustained in the course of her employment with appellant Integra Telecom, Inc. Appellant submitted the claim to its insurer, Reliance Insurance Company (Reliance). Prior to any settlement being reached, Reliance went into receivership and in October 2001, Reliance was declared insolvent by Pennsylvania court order.

Pursuant to Minnesota law, the responsibility for handling the Breid claim fell to respondent Minnesota Insurance Guaranty Association (MIGA). *See* Minn. Stat. § 60C.01-.22 (2002) (the Minnesota Insurance Guaranty Act).[1] MIGA is an association created by statute. Minn. Stat. § 60C.04. When an insurer is deemed insolvent, MIGA "shall [b]e deemed the insurer to the extent of its obligation on the covered claims and have the right to pursue and retain salvage and subrogation recoverables on covered claim obligations." Minn. Stat. § 60C.05, subd. 1(a). Accordingly, MIGA assumed Reliance's obligations.

In August 2002, MIGA authorized a settlement of the Breid claim and the Stipulation for Settlement was submitted to the office of administrative hearings, which issued an Award on Stipulation in September 2002. Subsequently MIGA sought reimbursement from appellant for the $62,801 paid on the Breid claim in addition to amounts that will come due in the future under the stipulation. MIGA cited its right to "recover the amount of any covered claim . . . resulting from insolvencies which occur after July 31, 1996, on behalf of an insured who has a net worth of $25,000,000 . . . and whose liability obligations to other persons are satisfied in whole or in part by payments made under this chapter." Minn. Stat. § 60C.11, subd. 7.

After appellant refused to pay, MIGA filed a complaint seeking reimbursement. Following discovery, the parties brought cross-motions for summary judgment. Appellant argued that MIGA did not have the authority to legally bind appellant to a settlement without first obtaining appellant's consent. Appellant argued in the alternative that to the extent the Minnesota Insurance Guaranty Association Act (the Act) gives MIGA the authority to settle claims for which an insured will be liable without the insured's consent, the statute is unconstitutional because it constitutes a taking without due process.

MIGA maintained that it did not need appellant's consent, or alternatively, that it had appellant's consent to settle the suit under the terms of appellant's insurance policy with Reliance that was transferred to MIGA under the Act when Reliance became insolvent. MIGA also argued that even if it did not receive consent, because the settlement was reasonable and made in good faith, appellant cannot show that it was prejudiced by the settlement.

The district court granted summary judgment in favor of MIGA concluding that (1) MIGA is not required to obtain consent from the insured before MIGA pays a claim under the insured's policy in order to maintain a reimbursement claim against the insured; and (2) the Act was constitutional.

I S S U E S

1. Did the district court erroneously construe the Minnesota Guaranty Association Act to permit MIGA to maintain a reimbursement claim against appellant based on a settlement MIGA entered into without appellant's consent?

2. Did the district court err by failing to properly reconcile conflicting provisions of the Minnesota Guaranty Association Act?

3. Did the district court's interpretation of the Minnesota Guaranty Association Act render the Act unconstitutional?

A N A L Y S I S

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I.

Appellant argues that the district court erred in its interpretation of the Act by construing the statute to impermissibly expand the scope of authority conveyed to MIGA in order to permit MIGA—when the underlying insurer becomes insolvent—to settle claims in its discretion without consent from the insured, and to then require the insured to reimburse MIGA for the full amount of the settlement. Appellant contends that if the legislature intended such a harsh result, the legislature would have clearly expressed that intent. Appellant maintains that MIGA only has the authority expressly contained within its enabling act and that the district court's construction of the Act overlooked this threshold principle. *See Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985) (stating that the public utilities commission, as a creature of statute, "has only those powers given to it by the legislature") (quotation omitted).

Statutory construction is a question of law that this court reviews de novo. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). "When interpreting a statute, we first look to see whether the statute's language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citation and quotation marks omitted). Where a statute is ambiguous,

> [b]asic canons of statutory construction instruct that we are to construe words and phrases according to their plain and ordinary meaning. A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant. We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations. Finally, courts should construe a statute to avoid absurd results and unjust consequences.

Id. at 277-78 (citations and quotation marks omitted).

In addressing appellant's argument, it is helpful to begin with the purposes of the Act as stated by the legislature:

> [t]he purposes of this chapter are to provide a mechanism for the payment of covered claims under certain insurance policies and surety bonds, to the extent provided in this chapter, minimize excessive delay in payment and to avoid financial loss to claimants or policyholders because of the liquidation of an insurer, and to provide an association to assess the cost of the protection among insurers.

Minn. Stat. § 60C.02, subd. 2 (2002). Such protection is not absolute; the Act places financial limits on covered claims and excludes some claims. *See* Minn. Stat. § 60C.09, subds. 2, 3 (2002). The Act "shall be liberally construed to effect the purposes stated in subdivision 2." Minn. Stat. § 60C.02, subd. 3 (2002).

Section 60C.05 delineates the powers and duties of MIGA. Following the insolvency of an insurer, MIGA "shall . . . [b]e deemed the insurer to the extent of its obligation on the covered claims and have the right to pursue and retain salvage and subrogation recoverables on covered claim obligations . . . ." Minn. Stat. § 60C.05, subd. 1(a) (2002). The statute also authorizes MIGA to "[n]egotiate and become a party to the contracts necessary to carry out the purpose of this chapter," and to "[p]erform other acts necessary or proper to effectuate the purpose of this chapter." Minn. Stat. § 60C.05, subd. 2(d), (e) (2002).

Appellant argues that because section 60C.05, delineating the MIGA's powers and duties, does not expressly vest MIGA with the authority to settle claims without the consent of an insured against whom MIGA will be seeking reimbursement, MIGA has no such authority. But statutory authority may be either express or implied. *In re Application of Minnegasco*, 565

N.W.2d 706, 711 (Minn. 1997). An implied authority may be inferred when the necessity and logic of the situation require it. *Id.*

There is no dispute that under the Act as it existed in 2001-2002, the Breid claim was a covered claim, and that MIGA was obligated to take over and pay the claim when Reliance became insolvent. The language of the Act vests MIGA with authority to negotiate claims as a party to the underlying policy contract, and it obligates MIGA to take additional steps to carry out the purposes of the statute, which includes minimizing delays in payment to claimants. Minn. Stat. §§ 60C.02, subd. 2, .05. Notably, the statute is silent as to whether MIGA must obtain consent from the insured before negotiating a settlement. But this does not mean that consent is required. Rather, the canons of statutory construction prohibit this court from adding words to a statute to supply that which the legislature purposefully omits or inadvertently overlooks. *Goplen v. Olmsted County Support & Recovery Unit*, 610 N.W.2d 686, 689 (Minn. App. 2000).

We therefore conclude that in light of (1) the broad description of MIGA's powers in section 60C.05, subdivision 2(d) and (e); (2) the absence of any consent requirement; and (3) the remedial purpose of the statute; an implied authority to settle covered claims without consent from the insured is inferred from the statutory scheme. *See Miklas v. Parrott*, 684 N.W.2d 458, 461 (Minn. 2004) (stating "[r]emedial statutes must be liberally construed for the purpose of accomplishing their objects") (quotation omitted). Without such authority, claimants would have to wait for MIGA and the insured to work out an agreement as to any settlement, thereby prolonging the delay in payment and contravening the clear purpose of the statute.

Because we conclude that MIGA has authority to settle claims without appellant's consent, we do not address MIGA's alternative argument that it had consent to settle under the terms of appellant's insurance policy with Reliance.

II.

Appellant contends the district court failed to apply Minn. Stat. § 60C.11, subd. 3 (2002), which provides: "The association [MIGA] *has no cause of action against the insured* of the insurer for any sums it has paid out except the causes of action the insurer would have had if the sums had been paid by the insurer." (Emphasis added.) The district court instead based its decision on Minn. Stat. § 60C.11, subd. 7 (2002), which provides: "The association [MIGA] *may recover the amount of any covered claim paid*, resulting from insolvencies which occur after July 31, 1996, on behalf of an insured who has a net worth of $25,000,000 . . . and whose liability obligations to other persons are satisfied in whole or in part by payments made under this chapter." (Emphasis added.) Because it could reasonably be interpreted that the two subdivisions are in conflict, we conclude that the statute is ambiguous. *See* Minn. Stat. § 645.26 (2002) (providing rules of construction for irreconcilable provisions); *Am. Family Ins. Group*, 616 N.W.2d at 277. The object of all statutory interpretation is to ascertain the intention of the legislature. Minn. Stat. § 645.16 (2002). And contemporaneous legislative history may be helpful in ascertaining the legislature's intent. *Id*.

When interpreting clauses in the same law that are irreconcilable, the "clause last in order of date or position shall prevail." Minn. Stat. § 645.26, subd. 2. Because subdivision 7 of section 60C.11 was added in 1996 and subdivision 3 has been in the Act since its inception in 1971, under the canons of statutory construction, subdivision 7 prevails. 1996 Minn. Laws ch. 446, art. 2, § 8 (adding subdivision 7 to the Act). While the purpose of the Act is to protect insureds like appellant, the subsequent enactment of subdivision 7 recognizes that certain insureds have the ability to pay judgments and that MIGA's limited funds should go to those least able to absorb the impact. Courts construing similar provisions in other states with comparable statutes have reached similar conclusions. *See Borman's Inc. v. Mich. Prop. & Cas. Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir. 1991) (stating parties agreed that purpose of net worth calculation was to ensure association's funds go to those insureds least able to absorb unexpected loss due to insolvency of insurer); *R.I. Insurers' Insolvency Fund v. Leviton Mfg. Co.*, 716 A.2d 730, 734-35 (R.I. 1998) (stating decision to include recoupment provision applicable to companies with net worths in excess of $50 million ensures sufficient funds will be available to accomplish important objective that benefits of fund first be paid to injured employees).

Appellant asserts that subdivisions 3 and 7 can be reconciled by interpreting subdivision 7 to mean that MIGA has the authority to enter into enforceable contracts with high net worth insureds in cases where MIGA agrees to handle the insured's claims in a manner and upon terms that MIGA and the insured agree to before the claim is settled, including a right of reimbursement by MIGA. Such an interpretation would not violate subdivision 3, according to appellant, because MIGA would still be prohibited from instituting a cause of action against an insured. But, as with section 60C.05, there is no language in subdivision 7 of section 60C.11 requiring MIGA to obtain agreement from the insured in order to settle a claim or recover the amount in claims paid out on the insured's behalf.

Moreover, legislative history makes clear that subdivision 7 was intended to allow MIGA the right to recover amounts paid on behalf of a company with a net worth greater than $25 million, who are presumably sophisticated insurance purchasers, in order to ensure that the MIGA's limited funds would go to pay the claims of those insureds without substantial assets. Hearing on S.F. No. 1980 Before the Senate Commerce & Consumer Protection Comm. (Feb. 7, 1996) (statement of Department of Commerce spokesperson P. Peterson); Hearing on H.F. 2378 Before House Fin. Institutions & Ins. Comm. (Feb. 14, 1996) (statement of Department of Commerce spokesperson Charles Nettell). Earlier agreement by the insured to a negotiated settlement with the claimant prior to recovering from the insured was never contemplated by the legislature, and the statutory language plainly does not require consent. Accordingly, and as stated above, because "the statute has no language that would support [appellant's] contention, . . . this court may not add to the statute what the legislature deliberately or inadvertently omitted." *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 667 N.W.2d 447, 450 (Minn. App. 2003), *aff'd*, 683 N.W.2d 274 (Minn. 2004).

Appellant also argues that use of the phrase "cause of action" in subdivision 3 demonstrates that the legislature knew how to allow or prohibit a cause of action by MIGA and that use of the less specific phrase "may recover" in subdivision 7 indicates that the legislature did not intend subdivision 7 to create a cause of action for MIGA against certain insureds. We

disagree. To adopt appellant's interpretation would read out of the statute the very explicit language permitting MIGA to recover amounts paid on behalf of high net worth insureds.

Appellant further argues that to permit an action against high net worth insureds essentially renders subdivision 3 superfluous. We disagree. MIGA is still prohibited from initiating any cause of action against an insured whose net worth is under $25 million. Minn. Stat. § 60C.11, subd. 3. We also reject appellant's argument that because subdivision 7 does not explicitly state that it is an exception to subdivision 3, it should not be interpreted as an exception. Even if subdivision 7 is not an exception, it is a more specific provision than subdivision 3 and, therefore, it prevails. *See* Minn. Stat. § 645.26, subd. 1 (providing interpretation of statutes should attempt to give effect to all provisions but in event of irreconcilable provisions, specific controls over general).

Appellant also points out that subdivision 7 does not clearly state from whom or how MIGA may recover such amounts. However, to construe the statute to mean anything other than permitting MIGA to maintain a reimbursement claim against a high net worth insured would be absurd. It is on behalf of the high net worth insured that the claim was paid. "When the words of a law are not explicit, the intention of the legislature may be ascertained by considering . . . the object to be attained . . . [and] the consequences of a particular interpretation." Minn. Stat. § 645.16. It is presumed that the legislature (1) does not intend an absurd result; and (2) intends to favor the public interest over a private interest. Minn. Stat. § 645.17 (2002). Further, as noted above, legislative history does not support appellant's position.

Appellant next argues that to construe subdivision 7 to permit MIGA to maintain a reimbursement claim against high net worth insureds makes no sense if the underlying Breid claim is a "covered claim" under section 60C.09 (as it existed at the time of the settlement),[2] because such a construction essentially turns the covered claim into an excluded claim. *See* Minn. Stat. § 60C.09, subd. 1 (2002) (defining "covered claim"). That is to say, since the recoupment provision places appellant in the same position it would be if the Breid claim had been an excluded claim under the Act, then the legislature could have excluded claims from MIGA's coverage by changing the definition of what constitutes a "covered claim," which, appellant points out, the legislature did in 2003. First, we note that subsequent amendments are not relevant. Moreover, appellant's argument fails to recognize that even if appellant is ultimately responsible for any payment to Breid, the legislature still had a rational basis for transferring the case to MIGA for handling to ensure prompt payment to the injured employee—one of the primary purposes of the Act. Thus, providing a recoupment provision to recover claims paid to injured employees helps to accomplish the purpose of the Act.

Finally, appellant argues that to construe subdivision 7 to not require consent creates an absurd result because one of the purposes of the Act is to "avoid financial loss to . . . policyholders because of the liquidation of an insurer." Minn. Stat. § 60C.02, subd. 2. Appellant asserts that construing a recoupment provision absent consent into subdivision 7 leaves insureds in a worse position than they would have been had they never bought insurance in the first instance because they receive no benefit from the premiums that were paid. Appellant also asserts that depriving insureds of the opportunity to assess the reasonableness of a settlement that they will ultimately pay further disadvantages insureds. But the purpose of the Act is also to

avoid financial loss to claimants, and funds to cover the cost of the financial protection are not unlimited. By enacting subdivision 7, the legislature sought to balance the interests of claimants and policyholders by allowing MIGA to handle claims quickly and efficiently and by providing MIGA with an option to seek reimbursement from high net worth insureds, and thereby permit MIGA's limited funds to go to those most in need should their insurer become insolvent.

III.

Appellant argues that the district court's interpretation of the Act violates its state and federal constitutional rights to due process because allowing MIGA to seek reimbursement without appellant's consent constitutes a taking of property without due process.

But the party challenging the constitutionality of a statute on appeal must notify the attorney general in time to afford an opportunity to intervene. Minn. R. Civ. App. P. 144. Appellant did not do so, claiming that MIGA, as a legislatively-created body, should be considered a state party, thereby obviating the need to notify the attorney general. But MIGA is not a state agency; it is an unincorporated organization formed of insurers who transact insurance business in Minnesota. Minn. Stat. § 60C.04 (2002). "[B]ecause [appellant] failed to inform the attorney general of [its] constitutional claim, as required by Minn. R. Civ. App. P. 144, this issue is not properly before this court." *Theorin v. Ditec Corp.*, 377 N.W.2d 437, 440 n.1 (Minn. 1985); *see also Maxwell Communications v. Webb Publ'g Co.*, 518 N.W.2d 830, 834 n.6 (Minn. 1994) (finding violation of rules where no notice was given to attorney general in case where MIGA was a respondent).

D E C I S I O N

Because the Minnesota Guaranty Association Act permits the Minnesota Insurance Guaranty Association to negotiate a settlement and recover the amount of any covered claim paid from an insured with a net worth exceeding $25 million, we affirm the district court's grant of summary judgment in favor of Minnesota Insurance Guaranty Association.

Because MIGA is not a state agency and appellant failed to notify the attorney general of its constitutional challenge to the Minnesota Guaranty Association Act, we do not address this argument.

Affirmed.

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[1] The parties agree that Breid's claim is a covered claim under the act and is not affected by the 2003 changes to the act. Minn. Stat. § 60C.09, subd. 2(3) (2002). *See* 2003 Minn. Laws ch. 74, § 6 (amending act to exclude from the definition of "covered claims" any claims, not just first-party claims, by an insured whose net income exceeds $25 million).

[2] Section 60C.09 excluded any first-party claims resulting from insolvencies occurring after July 31, 1996, by high net worth insureds. Minn. Stat. § 60C.09, subd. 2(3). First-party claims

are claims where the insured itself has a loss that is covered by a policy. In contrast, third-party claims are those where the insured is covered for liability to third persons. *See RLI Ins. Co. v. Pike*, 556 N.W.2d 1, 3 (Minn. App. 1996), *review denied* (Minn. Jan. 29, 1997). The underlying Breid claim was a third-party claim; therefore it was not excluded.

STATE OF MINNESOTA

IN COURT OF APPEALS

A05-942

BCBSM, Inc. d/b/a Blue Cross
Blue Shield of Minnesota,
Appellant,

vs.

Minnesota Comprehensive Health Association,

Respondent.

Filed April 12, 2006

Affirmed

Willis, Judge

Hennepin County District Court

File No. MC 04-9472

Diane B. Bratvold, Karen B. Andrews, Rider Bennett, L.L.P., 33 South Sixth Street, Suite 4900, Minneapolis, MN 55402 (for appellant)

Ryan J. Burt, Halleland Lewis Nilan & Johnson, P.A., 600 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402-4501 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Willis, Judge; and Stoneburner, Judge.

S Y L L A B U S

Stop-loss insurance is accident-and-health insurance for the purpose of calculating, under Minn. Stat. § 62E.11, subd. 5 (2004), the Minnesota Comprehensive Health Association's annual assessment of its members based on the amount of the accident-and-health insurance premiums they have collected.

O P I N I O N

WILLIS, Judge

In this appeal from summary judgment, appellant argues that the district court erred by ruling that respondent properly assessed appellant for premiums from its sale of stop-loss insurance, based on the determination that stop-loss insurance is health-and-accident insurance.

We affirm.

FACTS

Appellant BCBSM, Inc. (BCBSM), an insurance company that does business in Minnesota as Blue Cross Blue Shield of Minnesota, is a member of respondent Minnesota Comprehensive Health Association (MCHA). From 1996 through 2002, BCBSM paid assessments to MCHA based on the amount of accident-and-health-insurance premiums collected by BCBSM, as required by statute, to help fund insurance that MCHA offers to individuals with high-risk health conditions who cannot otherwise obtain coverage. Included in this category of premiums used to calculate the assessment were premiums on stop-loss insurance purchased by employers who otherwise self-insure for their employees' health-care costs. Such inclusion was not questioned until BCBSM brought this challenge. Stop-loss insurance may be purchased by employers that self-insure their employees' health-care costs rather than purchasing health insurance but that want to protect themselves against employee health-care expenses above a stated dollar amount.

In 2003, BCBSM claimed for the first time that stop-loss insurance is not accident-and-health insurance and consequently that premiums received for stop-loss insurance should not be included in calculating its assessment. It appealed to the MCHA, seeking a reduction of its 2002 assessment. Before the MCHA reached a decision, BCBSM initiated this action in district court and withdrew its appeal to the MCHA. After a hearing, the district court granted summary judgment to MCHA. This appeal follows.

ISSUE

Is stop-loss insurance for employee health-care expenses within the statutory definition of "accident-and-health insurance" so that stop-loss premiums are included in the calculation of the Minnesota Comprehensive Health Association's annual assessments of its members under Minn. Stat. § 62E.11, subd. 5 (2004)?

In reviewing an appeal from summary judgment, the appellate court will determine whether there are any genuine issues of material fact and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The construction of a statute is a question of law. *Hibbing Educ. Ass'n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

When interpreting a statute, courts will first determine whether the language of the statute, on its face, is clear or ambiguous. *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). "If the words of the statute are 'clear and free from all ambiguity,' further construction is neither necessary nor permitted." *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000) (quotation omitted); *see* Minn. Stat. § 645.16 (2004). "A statute is only ambiguous when the

language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation omitted). In that event, the court must ascertain the intent of the legislature. *See* Minn. Stat. § 645.16. Legislative intent may be determined by considering factors such as the need for the law, the circumstances under which it was enacted, its purpose, legislative history, and administrative interpretations. *Id.* When a statute was not particularly clear and the parties provided reasonable but opposing interpretations, the court of appeals has concluded that the statute was ambiguous. *In re Will of Kipke*, 645 N.W.2d 727, 731 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). We conclude that Minn. Stat. § 62E.11, subd. 5 (2004), is ambiguous and that statutory construction is necessary, therefore, to determine its meaning.

The legislature established the Minnesota Comprehensive Health Association (MCHA) "to promote the public health and welfare of the state." Minn. Stat. § 62E.10, subd. 1 (2004). All insurers, self-insurers, and other specified insurance plans, programs, and organizations are members of the MCHA. *Id.* Membership in MCHA is a mandatory condition of doing business as an accident-and-health insurer, a self-insurer, a health-maintenance organization, or a community-integrated service-network in the state. *Id.*, subd. 3 (2004). The MCHA is statutorily mandated to offer health-insurance coverage to eligible persons who are otherwise unable to obtain insurance. Minn. Stat. § 62E.12(a) (2004) (mandating MCHA to offer such policies); Minn. Stat. § 62E.14, subd. 1 (2004) (providing for enrollment by eligible persons). Generally, this allows Minnesota residents who have been rejected for standard insurance coverage because of high-risk health conditions to obtain health insurance. *See* Minn. Stat. § 62E.14, subd. 1.

Those insured under these provisions pay premiums for their coverage. Minn. Stat. § 62E.08, subd. 1 (2004). But to the extent that the premiums are not sufficient to cover claims and expenses, the legislature also provided that MCHA's expenses for losses resulting from claims and for operating and administrative expenses are to be funded by annual assessments levied on MCHA's members. Minn. Stat. § 62E.11, subd. 5. The amount of the assessment is "equal to the ratio of the contributing member's total accident and health insurance premium, received from or on behalf of Minnesota residents as divided by the total accident and health insurance premium, received by all contributing members from or on behalf of Minnesota residents." *Id.*

MCHA's assessment of each of its contributing member is based on the amount of the accident-and-health insurance premiums collected by that member. *Id.* The term "accident and health insurance policy" is defined as "insurance or nonprofit health service plan contracts providing benefits for hospital, surgical and medical care." Minn. Stat. § 62E.02, subd. 11 (2004). The statute then provides that accident-and-health insurance *does not* include eight specified types of other coverage, including disability insurance; automobile medical coverage; supplemental liability insurance; certain coverage that makes fixed payments; credit accident-and-health insurance; dental- or vision-care insurance; blanket accident-and-sickness insurance under section 62A.11; and accident-only coverage based on the cost of the covered services. *Id.*

Stop-loss coverage is

> [i]nsurance that protects a self-insured employer from catastrophic losses or unusually large health costs of covered employees. Stop-loss insurance essentially provides excess coverage for a self-insured

> employer. The employer and the insurance carrier agree to the amount the employer will cover, and the stop-loss insurance will cover claims exceeding that amount.

Black's Law Dictionary 807 (7th ed. 1999); *see* Minn. Stat. § 60A.235 (2004) (discussing standards for determining whether insurance policy is one for accident-and-sickness insurance or a stop-loss policy for purposes of regulation of the business of insurance).

The district court invoked the doctrine of "expressio unius est exclusio alterius" or "the expression of one thing indicates the exclusion of another." *See Harris v. County of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004); *see also* Minn. Stat. § 645.19 (2004) ("Exceptions expressed in a law shall be construed to exclude all others."). The doctrine is a rule of construction and an aid to determining legislative intent. *N. Pac. Ry. Co. v. City of Duluth*, 243 Minn. 84, 89, 67 N.W.2d 635, 638 (1954). The district court found "that stop-loss coverage, although providing coverage only after the specified attachment point is reached, provides benefits for hospital, surgical and medical care." The district court reasoned that, had the legislature intended to exclude stop-loss premiums from the calculation of MCHA's assessment, it would have done so explicitly, as it did with certain other categories of insurance.

BCBSM raises a number of arguments in support of his claim that stop-loss premiums should not be included in calculating its assessment. We first examine its contention that because stop-loss coverage is not mentioned in chapter 62E or specifically defined as accident-and-health insurance, the legislature did not intend that premiums for such insurance should be included in calculating the assessment. Courts may not add words to a statute to "supply that which the legislature purposely omits or inadvertently overlooks." *Goplen v. Olmsted County Support & Recovery Unit*, 610 N.W.2d 686, 689 (Minn. App. 2000) (quotation omitted).

We agree with the district court that the legislature's decision not to specifically exclude stop-loss insurance from the definition of accident-and-health insurance in Minn. Stat. § 62E.02, subd. 11, is compelling support for the assertion that it is accident-and-health-insurance subject to inclusion in the calculation of the assessment. The Indiana Court of Appeals considered a similar circumstance in addressing the issue of whether a stop-loss carrier was a member of the state's comprehensive-health-insurance association and subject to mandatory assessments. *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 121 (Ind. Ct. App. 2004) (upholding preliminary injunction ordering stop-loss insurer to comply with orders of the Commissioner of Insurance). There, the court found it significant that while the issuers of certain categories of insurance were excluded from membership in the association, stop-loss carriers were not. *Id.* at 123. As evidenced by the enactment of Minn. Stat. §§ 60A.235-.236 (2004), which describes standards for determining whether an insurance policy is accident-and-sickness insurance or stop-loss insurance for the purpose of regulating the business of insurance, the legislature was aware of the existence of such insurance and could have specifically excluded it from assessment. Applying the same analysis used in *Avemco*, we likewise find that the Minnesota legislature's failure to exclude stop-loss insurance from the definition is a strong indication that it intended that stop-loss insurance is accident-and-health insurance.

Further, Minnesota law specifically lists some 15 lines of insurance that can be sold in the state, but that list does not include stop-loss insurance. Minn. Stat. § 60A.06, subd. 1 (2004). This supports MCHA'S claim that stop-loss insurance is not a separate and distinct line of insurance but rather is a form of one of the enumerated lines, namely accident-and-health insurance. If this were not so, BCBSM would have no authority to sell stop-loss insurance in Minnesota.

In support of its argument that stop-loss insurance is not accident-and-health insurance, BCBSM contends that an important distinction between the two is that accident-and-health-care policies provide *employees* with benefits for hospital, surgical, and medical care, while stop-loss insurance provides no medical-care benefits for an employee. Instead, it covers the *employer's* risk for health-care expenses in excess of a stated amount, or attachment point. Further, BCBSM contends that stop-loss insurance premiums are paid from the employer's assets, and the employer receives the benefits of the policy. BCBSM contends, therefore, that "if stop-loss insurance provides benefits to self-insured employers, it cannot also provide benefits to employees for hospital, surgical and medical care."

We are not persuaded by BCBSM's argument. Stop-loss insurance plainly provides benefits for the expenses of medical care, and we conclude that the fact that it is paid to the employer to cover expenses rather than directly to employees or providers is a difference without a distinction. The underlying expenses being covered in either case are for hospital, surgical, or medical care. In *Avemco*, the court held, in relevant part, that "the medical stop loss insurers insure for medical expenses incurred by individuals within the scope of their policies." 812 N.E.2d at 122. It rejected the insurer's argument that they were not members of the state's comprehensive-health-insurance association because, as stop-loss insurers, they did not provide health insurance and stop-loss insurance benefits were received by the employer rather than the employees. *Id.* at 124.

BCBSM next cites Minn. Stat. § 60A.235, subd. 1, which specifically addresses whether a policy is considered to be a health-plan contract [1] or a stop-loss contract, for the proposition that because the legislature expressly distinguished between stop-loss policies and accident-and-sickness policies, [2] MCHA's position that stop-loss insurance and accident-and-health insurance are indistinguishable must fail.

Section 60A.235 sets out standards for determining whether a policy is a health-plan contract or a stop-loss contract for purposes of regulating the business of insurance. Minn. Stat. § 60A.235, subd. 1. The statute provides that if a policy issued to an employer for the health-care expenses of its employees has an attachment point of less than $10,000 per individual, it is considered a health plan. *Id.*, subd. 3(a) (also providing an alternative method of calculating attachment point). In stop-loss insurance, an "attachment point" means "the claims amount beyond which the insurance company or health carrier incurs a liability for payment." Minn. Stat. § 60A.235, subd. 2(a). Section 60A.235 appears to be directed at the issue of whether stop-loss policies issued in Minnesota are governed by state law or by the federal ERISA law. The latter has been described as "a comprehensive federal statute regulating private employee benefit plans, including plans maintained for the purpose of providing medical or other health benefits for employees." *Am. Med. Sec., Inc. v. Bartlett*, 111 F.3d 358, 361 (4th Cir. 1977). ERISA

broadly preempts states from regulating fully self-funded plans. *Id.* Nonetheless, under a "savings clause," state laws that regulate insurance are saved from ERISA preemption. *Id.* But a state law that merely "deems" an employee-benefit plan to be an "insurance company" in order to regulate it is preempted. *Id.*

A number of cases, including some that BCBSM cites, have addressed the issue of whether stop-loss insurance is health insurance for purposes of determining whether ERISA or state law governs. *See, e.g.*, *Ramsey County Med. Ctr., Inc. v. Breault*, 525 N.W.2d 321, 325 (Wis. Ct. App. 1994) (holding that stop-loss insurance is not health insurance under ERISA and that ERISA preempts application of state law). As the court in *Avemco* noted, however, issues raised in ERISA preemption cases generally involve "1) whether the purchase of stop loss insurance by employee benefit plans alters the preemption analysis under ERISA, or 2) the extent to which states may indirectly regulate ERISA plans." 812 N.E.2d at 122 n.6 (citations omitted). Thus, *Avemco* found these cases irrelevant to a determination of whether stop-loss carriers were members of the Indiana comprehensive-health-insurance association because such cases primarily addressed ERISA preemption issues. *Id.* Likewise, we do not find determinative the cases addressing the issue of ERISA preemption cited by BCBSM.

BCBSM also cites a tax case, in which the Minnesota Supreme Court held that "premiums received by an insurer on stop-loss insurance policies issued to employers who self-fund health care coverage for their employees" are not subject to a premium tax. *BCBSM, Inc. v. Comm'r of Revenue*, 663 N.W.2d 531, 531, 534 (Minn. 2003).[3] BCBSM asserts that the supreme court made two relevant observations regarding stop-loss policies. First, under a self-funded plan, "the employees' health care costs are paid directly out of the employer's assets and it is the employer who assumes the risks for the employees' health care coverage." *Id.* at 532. Second, because a stop-loss policy covers "the employer's risk above a specified amount known as the attachment point," the stop-loss insurer consequently "has no direct [insuring] relationship with the employee[s]." *Id.* Consequently, BCBSM contends, stop-loss policies should be considered excess insurance for employers rather than accident-and-health insurance for employees.

We do not find *BCBSM* helpful. First, it interprets tax provisions that are not at issue here. Further, as already noted, we find unpersuasive BCBSM's argument that because stop-loss benefits are paid to the employer, they cannot constitute accident-and-health benefits.

Next, we address the purpose of the statute. Minn. Stat. § 645.16. MCHA was created to provide health-insurance benefits to Minnesota residents who would otherwise be unable to obtain insurance because of their high-risk health conditions. *See* Minn. Stat. §§ 62E.12(a), 62E.14, subd. 1(c). The legislature determined that unfunded expenses and claims should be paid for by assessments based on the premiums collected by accident-and-health insurers. Minn. Stat. § 62E.11, subd. 5.

BCBSM asserts that the amount realized from the assessments would remain the same regardless of whether stop-loss premiums are included and that the only effect is that the assessment would be reallocated. But we determine that the legislature intended that insurers who offer stop-loss insurance should be among those assessed. Consequently, we conclude that

premiums for stop-loss insurance were properly included as accident-and-health-insurance premiums in calculating MCHA's annual assessment of its members.

D E C I S I O N

We affirm the decision of the district court that stop-loss premiums are included in the definition of accident-and-health insurance for purposes of calculating MCHA's annual assessment of its members.

Affirmed.

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[1] "Health plan" is defined in Minn. Stat. § 62A.011. Minn. Stat. § 60A.235, subd. 2(e). Minn. Stat. § 62A.011, subd. 3 (2004), defines "health plan" as a policy of accident-and-sickness insurance as defined in Minn. Stat. § 62A.01.

[2] Minn. Stat. § 60A.235 uses the term "accident-and-sickness insurance," while Minn. Stat. § 62E.02, subd. 11, uses the term "accident-and-health insurance."

[3] The parties note that Minn. Stat. § 297I.05, addressing the premium tax at issue, was amended so that "direct business" is defined as including stop-loss insurance. Minn. Stat. § 297I.01, subd. 6a (Supp. 2005) (containing amended language). They dispute the effect of this amendment on the holding in *BCBSM*, 663 N.W.2d at 534, but we do not find it necessary to address this dispute.

STATE OF MINNESOTA

IN COURT OF APPEALS

A05-43

State of Minnesota,

Appellant,

vs.

Jesus Antonio Estrella,

Respondent.

Filed July 12, 2005

Affirmed

Randall, Judge

Rice County District Court

File No.

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

G. Paul Beaumaster, Rice County Attorney, Nathaniel J. Reitz, Assistant Rice County Attorney, 218 N.W. Third Street, Faribault, MN 55021 (for appellant)

Mark D. Nyvold, 332 Minnesota Street, W1610, St. Paul, MN 55101 (for respondent)

Considered and decided by Randall, Presiding Judge; Toussaint, Chief Judge; and Kalitowski, Judge.

S Y L L A B U S

1. A district court's dismissal, based on a finding of insufficient evidence to support a charge, is not appealable by the state. Minn. R. Crim. P. 28.04, subd. 1(1)(a).

2. The definition of "park zone" in Minn. Stat. § 152.01, subd. 12a (2002), as applied in cases where no grid system is present, is ambiguous. Where no grid system is

present, the term "one city block" does not apply. Thus, a drug transaction must take place within 300 feet of a park to come within the ambit of Minn. Stat. § 152.022, subd. 1(6) (2002).

O P I N I O N

RANDALL, Judge

The state appeals from a pretrial order dismissing a charge of racketeering and denying its motion to add second-degree controlled substance offense charges. The state argues that the district court erred in ruling that respondent's family could not provide the "organization" required for the existence of an "enterprise" under the racketeering statute. The state also argues that the court erred in ruling the mobile-home park where the cocaine sales occurred was not within the required proximity of a "park zone" so as to constitute second-degree controlled substance offense. The state argues that the court erred in construing the statutory term "city block" to require a street grid. Alternatively, the state argues that the mobile-home park, considered as a single entity because it had the same address, was within 300 feet of the park. We affirm the trial court.

FACTS

Respondent, Jesus Antonio Estrella, was charged with one count of Racketeering and three counts of Third-Degree Sale of a Controlled Substance (cocaine) on September 23, 2004. On December 3, 2004, the district court conducted an omnibus hearing. At the hearing, respondent challenged the existence of probable cause on the racketeering charge, and the state moved to amend its original complaint in order to include three additional charges of Second-Degree Sale of a Controlled Substance based on its allegation that the alleged cocaine sales took place in a "park zone."

The state offered investigation reports compiled by the police along with its original and amended complaints as exhibits in support of the racketeering charge.[1] The state also called the officer who arranged the alleged controlled drug buys that provided the basis for the complaints here. The officer's testimony related only to the issue of whether the alleged cocaine sales took place in a "park zone."

During his direct examination, the officer testified that there are 184 trailers in the Cannon River Trailer Park (Cannon River) and, of the three controlled buys at issue, two took place at trailer number 19 and one took place at trailer 162. The officer also stated that Cannon River sits directly west of a municipal park; railroad tracks separate Cannon River from the park; and some of the lots in Cannon River are within 300 feet of the park. As for the two trailers at issue here, the officer testified that neither trailer 19 nor trailer 162 is within 300 feet of the park. The officer also stated that each trailer in Cannon River shares the same address: 1407 Hulett Avenue.

On cross-examination, the officer agreed that the area between Cannon River and the park is not plotted into city blocks, and "there is no city block as such in between [the park] and [Cannon River]."

On January 4, 2005, the district court granted respondent's motion to dismiss the racketeering charge for lack of probable cause. Then the court denied the state's motion to amend the complaint (to include the "park zone" charges) based on a "lack of probable cause to support those proposed charges." This appeal followed.

ISSUES

1. Is the district court's dismissal of the racketeering charge appealable by the state?

2. Did the district court err in determining there is no probable cause to believe that the Cannon River Trailer Park lies within "one city block" of North Alexander Park under Minn. Stat. § 152.01, subd. 12a?

ANALYSIS

I. Jurisdiction

As a threshold issue, respondent argues that the state has no right to appeal the district court's dismissal of the racketeering charge.[2] Respondent bases his argument on the Minnesota Rules of Criminal Procedure, which prohibit the state from appealing a pretrial dismissal "if it is based solely on a factual determination dismissing a complaint for lack of probable cause[.]" Minn. R. Crim. P. 28.04, subd. 1(1)(a). A dismissal for lack of probable cause is appealable *only* if it is based on a question of law, such as the interpretation of a statute. Minn. R. Crim. P. 28.04, subd. 1(1); *State v. Linville*, 598 N.W.2d 1, 2 (Minn. App. 1999).

At issue here is whether the district court's primary finding that "there is no evidence of a criminal enterprise between [respondent] and his parents" is a legal determination. This court addressed the same question in *State v. Duffy*, 559 N.W.2d 109, 110 (Minn. App. 1997). In *Duffy*, the district court dismissed four counts of controlled substance violations for lack of probable cause. *Id.* This court then dismissed the state's appeal. The *Duffy* court stated:

> By finding no evidence in the record that any cocaine was under the control or possession of respondent or that a transaction was possible, the [district] court was simply stating that the complaint lacked either direct evidence or sufficient circumstantial evidence of an overt act . . . . The district court's dismissal of the charges for lack of probable cause was not based on a legal question; the district court made a factual determination that the conversation between the officer and respondent did not rise to the level of an overt act in furtherance of the goal of a cocaine sale. The district court relied on the lack of evidence showing that a transaction could have occurred. The order is not appealable. [The state] is attempting to find a legal issue where there is none.

559 N.W.2d at 111.

The language of *Duffy* is inescapable. We reject the state's attempt to classify the issue as one "of law," thus giving them a pretrial right of appeal. Simply put, all criminal cases involve factual and credibility determinations, whether by a judge or by a jury. All determinations revolve around some principle of law. That does not make all pretrial dismissals appealable by the state. Here, we have a district court that simply determined there were not enough facts to support a racketeering charge. This is the exact situation that Minn. R. Crim. P. 28.04, subd. 1(1)(a) was designed for. We find no merit in the state's attempts to create a legal issue here. Accordingly, we conclude that the state's appeal from the district court's dismissal of the racketeering charge for lack of probable cause is not appealable.

We point out that when dismissal is based on a factual determination, rather than a legal determination, the state is free to reissue the complaint if the state later obtains evidence that establishes probable cause. *Duffy*, 559 N.W.2d at 110. The state has the right to gather more evidence against respondent and re-file if it so chooses.

II. Zone

The state also challenges the district court's denial of its motion to amend the complaint to include charges of Second Degree Sale of a Controlled Substance. Unlike its challenge to the district court's dismissal of the racketeering charge, the state's appeal on this issue presents a legal question. The district court based its denial on a finding that the state lacked probable cause to support the charge that the alleged drug sales took place in a "park zone," as defined by Minn. Stat. § 152.01, subd. 12a (2002) (stating that "park zone" includes the area within 300 feet or one city block, whichever distance is greater, of the park boundary). The state argues that this court should find that the alleged drug sales by respondent took place within "one city block" of North Alexander Park (the park) and, thus, there is probable cause to charge him with a second-, rather than a third-degree controlled substance crime.

This is a question of statutory construction, and construction of a criminal statute is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). The purpose of statutory interpretation is to give effect to the intention of the legislature. Minn. Stat. § 645.16 (2002); *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). Accordingly, a statute must be construed according to its plain language. Minn. Stat. § 645.16 (2002). But if a statute is ambiguous, the intent of the legislature controls. *Id*.

Minn. Stat. § 152.022, subd. 1(6) (2002) states that "[a] person is guilty of controlled substance crime in the second degree if: the person unlawfully sells [any amount of a schedule I or II narcotic drug] in a school zone, a park zone, a public housing zone, or a drug treatment facility." Thus, where a controlled substance crime occurs in a "park zone," the commission of the crime within the zone operates as an aggravating element that heightens the degree of the offense. At issue is whether the alleged drug buys took place in a "park zone" under the definition provided by Minn. Stat. § 152.01, subd. 12a. Subdivision 12a states:

> "Park zone" means an area designated as a public park by the federal government, the state, a local unit of government, a park district board, or a park and recreation board in a city of the first class. "Park zone" includes the area within 300 feet or one city block, whichever distance is greater, of the park boundary.

The phrase "one city block" in subdivision 12a is undefined. Without defining "one city block," the statute, by its terms, implies that a distance of "one city block" could be greater than 300 feet. And, while the legislature's inclusion of a distance of 300 feet implies that a distance of "one city block" should be in the neighborhood of 300 feet, the exact definition is not apparent based on the plain language of the statute. Accordingly, we conclude that the statute is ambiguous in its definition of how far from the actual park boundary a "park zone" extends.

The state argues for a broad construction of the term "park zone" in order to allow its charge of second-degree sale of cocaine here. The state first points to *State v. Terrell*, No. C1-95-1808, 1996 WL 330509 (Minn. App.), *review denied* (Minn. Aug. 20, 1996), an unpublished opinion where this court cited Black's Law Dictionary's general definition of a block as "a part of a city or town that is surrounded by streets or avenues on at least three sides." *Id*. at *4. Based on this definition, the state asserts that "Cannon River Trailer Park and North Alexander Park are on the same block." The state also asks that this court interpret the "park zone" to include the park and all of the surrounding land bounded by city streets. But, as the district court pointed out, "[i]t is unreasonable to construe the term 'one city block' to apply to a parcel of land that is at least *3075 feet by 2050 feet*." *See* Minn. Stat. § 152.01, subd. 12a ("Park zone" includes the area *within 300 feet or one city block*, whichever *distance* is greater, *of the park boundary*) (emphasis added). Rather than creating room for an argument that "one city block" includes *any* area surrounded by streets on three sides, no matter how large, the language of subdivision 12a indicates that "300 feet" and "one city block" are measures of *distance* used to determine proximity to a park's boundary. We refuse to endorse the state's proposed unlimited definition of the term "city block."

The question of how far beyond the park's boundary "one city block" extends is more problematic. As the state points out, "[i]f a 'city block' is to be considered to be no more than 300 feet long, and a 'park zone' includes the area within the greater of a city block or 300 feet, then the addition of the term 'city block' is meaningless." But the state proposes no set limit on how far outside a park's boundaries a "park zone" should extend. And, while the state points out that the *Terrell* court "accepted the fact that the definition of 'city block' would include . . . a hypothetical suburban block extending for half a mile," that language is distinguishable here. The *Terrell* court was discussing subdivision 12a in the context of a claim by a criminal defendant that the definition of "park zone" was unconstitutionally vague and did not provide adequate notice to criminal defendants.

Respondent argues that the legislature, when defining "park zone" in subdivision 12a, contemplated cases such as this—where the park and its "adjoining areas" are not laid out in city blocks—and therefore included the alternative measurement of 300 feet. We find this argument more reasonable than the state's attempts to dramatically expand a "park zone" far beyond a distance of 300 feet. Respondent's reading also comports with the settled principle that, when

construing criminal statutes, a rule of strict construction applies and all reasonable doubt concerning legislative intent should be resolved in favor of the defendant. *State v. Olson*, 325 N.W.2d 13, 19 (Minn. 1982).

Accordingly, we conclude that under circumstances where no actual grid system is present, the term "one city block" does not apply and, therefore, a drug transaction must take place within 300 feet of a park to come within the ambit of the "park zone" statute. While we recognize that this interpretation means the phrase "whichever distance is greater" is rendered meaningless where a standard grid system does not exist, this reading avoids constitutional complications and resolves the statute's ambiguities in favor of the defendant. *See id*. Our legal conclusion is based on this narrow set of facts.

Here, the only evidence in the record regarding the actual distance between the property on which the alleged drug transactions took place and the park boundary is the testimony of Officer Cordova. And Cordova stated that neither trailer 19 nor trailer 162 is within 300 feet of the park. Thus, we affirm the district court's denial of the state's motion to amend the complaint, based on its finding that the state lacked probable cause to support a charge that the alleged drug sales by respondent took place in a park zone.

D E C I S I O N

Because the district court based its probable cause dismissal of the racketeering charge on a lack of evidence, the state has no right to appeal that factual determination.

On the issue of whether the alleged drug sales here took place in a "park zone," as defined by Minn. Stat. § 152.01, we affirm the district court's dismissal of that charge.

Affirmed.

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[1] The investigation reports and complaints refer to eight "controlled buy" drug transactions: two involving respondent's mother, three involving respondent's father, and three involving respondent. Based on evidence gathered during these eight transactions, the state filed racketeering charges against respondent.

[2] The state did not address this issue in its brief.

STATE OF MINNESOTA

IN COURT OF APPEALS

A04-477

State of Minnesota,

Respondent,

vs.

Jeremy Q. Banken,

Appellant.

Filed December 28, 2004

Affirmed; motion denied

Minge, Judge

Carver County District Court

File No. T4-01-008434

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

Brendan J. Flaherty, Elliott B. Knetsch, Campbell Knutson Scott & Fuchs, 1380 Corporate Center Curve, Suite 317, Eagan, MN 55121 (for respondent)

Charles A. Ramsay, Ramsay, Devore & Olson, P.A., 2860 Snelling Avenue North, Roseville, MN 55113 (for appellant)

Considered and decided by Schumacher, Presiding Judge; Minge, Judge; and Crippen, Judge.*

S Y L L A B U S

Minn. Stat. § 169A.20, subd. 1(5) (2002) allows use of a breath test sample obtained more than two hours after driving to measure and determine that a driver's alcohol concentration exceeded the legal limit within two hours of driving.

O P I N I O N

MINGE, Judge

Appellant challenges his conviction of driving while impaired, arguing that a test administered more than two hours after driving cannot be used as evidence to convict him for having an alcohol concentration of .10 or more as measured within two hours of driving under Minn. Stat. § 169A.20, subd. 1(5) (2000). Because the statutory language is ambiguous and because other analysis supports a reading which allows a test taken more than two hours after driving to be used as evidence, we affirm.

FACTS

Appellant, Jeremy Q. Banken, was involved in an automobile accident that occurred at 1:16 a.m. on December 8, 2001. The Carver County Sheriff's Office was called to the scene. Because deputies suspected appellant had been drinking alcoholic beverages, they administered a preliminary breath test and roadside sobriety tests. Appellant failed the tests. The deputies placed appellant under arrest and transported him to the Carver County jail. At 2:39 a.m. officers read the implied consent advisory to appellant who indicated he wished to speak to an attorney. Appellant attempted to reach an attorney until 3:20 a.m. At 3:30 a.m., two hours and fourteen minutes after the accident, appellant agreed to and was given an Intoxilyzer breath test. The test registered a result of .17. Appellant admits that he did not consume any alcohol between the time of driving and the time the Intoxilyzer test was administered.

Appellant was charged with count one, driving while under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1) (2000); and count two, having an alcohol concentration at the time, or as measured within two hours of the time of driving, of .10 or more in violation of Minn. Stat. § 169A.20, subd. 1(5) (2000). Only the second count is at issue in this case. The state and appellant agreed to a trial based on stipulated facts. The state stipulated that it could not prove beyond a reasonable doubt that the appellant's alcohol concentration was .10 or more at the time he was driving. Appellant stipulated that the state could prove his alcohol concentration was greater than .10 one hour and fifty-nine minutes after driving. The district court found appellant guilty of having an alcohol concentration of .10 within two hours of driving based on stipulated facts and stayed the sentence during the appeal. Appellant argued that the test measuring his alcohol concentration had to have been administered within two hours to be used to show that the concentration was .10 or more as measured within two hours of driving. The other charge, driving while under the influence or impaired, is subject to a stay of prosecution pending the outcome of this appeal.

ISSUES

I. Does Minn. Stat. § 169A.20, subd. 1(5) (2002) require that the test for alcohol concentration be administered within two hours of driving?

II. Should appellant's motion to strike text in respondent's brief be granted?

ANALYSIS

I. Test administered more than two hours after driving.

An appellate court reviews whether a district court has properly construed a statute as a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). If the language in a statute is clear, courts will rely on the plain meaning. Minn. Stat. § 645.16 (2002); *Correll v. Distinctive Dental Servs.*, 607 N.W.2d 440, 445 (Minn. 2000). If the language is ambiguous, courts apply the rules of statutory construction. Minn. Stat. § 645.16; *Correll*, 607 N.W.2d at 445. Language is ambiguous if it is reasonably subject to more than one interpretation. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996).

Appellant was charged under Minn. Stat. § 169A.20, subd. 1(5) (2002)[1]:

> Subdivision 1. Driving while impaired crime. It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state or on any boundary water of this state:
> . . . .
>
> (5) when the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.10 or more[.]

Appellant argues that the language "as *measured* within two hours of the time of driving" clearly requires that the sample be taken within two hours of driving. *Id.* (emphasis added). Respondent concedes that appellant's interpretation of the law is reasonable, but contends that the section is ambiguous and that the word "measured" should be interpreted to allow accurate proof that the alcohol concentration of the driver was above the legal limit within two hours of driving by a test administered more than two hours after driving.

According to the American Heritage College Dictionary, the first definition of the word "measured" is "determined by measurement"; in turn, the word "measurement" is defined as "1. The act of measuring or the process of being measured. 2. A system of measuring: *measurement in miles*. . . . 3. The dimension, quantity, or capacity determined by measuring: *the measurements of a room*." The *American Heritage College Dictionary* 859 (4th ed. 2002). For our purposes, these definitions indicate two possible meanings of the word "measured." On the one hand, "measured" could indicate the act of measuring, or taking the steps necessary to ascertain the quantity of the alcohol concentration. Using this meaning, law enforcement would have to obtain a sample and run the test for alcohol concentration within two hours. On the other hand, "measured" could indicate the quantity determined by measuring. Applying that meaning, "measured" would allow police to obtain or administer the test for the blood, urine or breath sample after two hours, as long as the quantity or measurement of alcohol concentration is accurately established as of a point in time within the two-hour limit. Under this approach, the

actual taking of the sample and the scientific/computational work is separate from the time as of which the alcohol concentration level is determined. Using this second meaning, "measuring" would relate back to a specified earlier point in time by providing accurate proof that the driver's alcohol concentration was above the legal limit within two hours of driving. Because either interpretation of "measured" is reasonable, there is an ambiguity in the statutory language.

The phrase "as measured within two hours" was interpreted by this court in *State v. Gebeck* in deciding a vehicular homicide case under Minn. Stat. § 609.21, subd. 1(4) (2000). 635 N.W.2d 385, 387 (Minn. App. 2001). The issue in *Gebeck* was whether the phrase "while having an alcohol concentration of 0.10 or more, as measured within two hours of the time of driving" meant that the tests had to be run, the scientific/computational work then done, and the results obtained within two hours of driving. *Id.* at 387-88. The *Gebeck* court found the language ambiguous and held that the actual testing process could be completed after two hours. *Id.* at 388-89. In reaching this result, the court indicated that the collection of the sample should occur within two hours of driving. *Id.* However, the *Gebeck* court was not directly faced with the question of whether the sample must be obtained within two hours, therefore the decision is not binding on this issue. *See id.* at 387 (noting that the parties stipulated that the sample was taken within two hours of the accident). The *Gebeck* conclusion is consistent with the conclusion that steps taken after the two-hour period are a necessary part of the measurement process.

To ascertain the intent of the legislature, courts may consider:

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

Minn. Stat. § 645.16. Courts presume that the legislature does not intend a result that is "absurd, impossible of execution, or unreasonable" and intends the entire statute to be effective and certain. Minn. Stat. § 645.17 (2002).

One way to determine what a section of a statute means is to look at other related parts of the statute and other related statutes that use similar language.[2] *See generally State v. Koka*, 672 N.W.2d 1 (Minn. App. 2001) (statutes relating to the same subject should be construed with reference to each other). Several statutes from chapter 169A use the "as measured within two hours" language in a slightly different way. Minn. Stat. §§ 169A.03, subd. 3; .275, subd. 5; .285, subd. 1; .54, subd. 5 (2002). We note most of these provisions also prohibit an alcohol concentration of .10 "as measured" at the time of driving. It is impossible to administer an accurate alcohol test while a person is driving. Of necessity, it will always be given afterwards – perhaps just minutes. Therefore, the language in these statutes supports reading "as measured" to

mean that the actual test can be given later and the result used to determine the alcohol concentration as of an earlier time.

Use of samples taken more than two hours after driving is addressed by Minn. Stat. § 169A.45 (2002), which deals with evidence in driving while impaired offenses. Section 169A.45, subd. 4 reads:

> **Other competent evidence admissible.** The preceding provisions do not limit the introduction of any other evidence bearing upon the question of whether the person violated section 169A.20 (driving while impaired) or 169A.31 (alcohol-related school bus or Head Start bus driving), *including tests obtained more than two hours after the alleged violation* and results obtained from partial tests on an infrared breath-testing instrument. (Emphasis added.)

This section indicates its provisions do not limit use of samples obtained more than two hours after driving to show alcohol concentration as measured within two hours of driving. Because Minn. Stat. § 169A.20, subd. 1(5) includes both driving with an alcohol concentration of .10 or greater and an alcohol concentration of .10 or more as measured within two hours of driving, the language quoted arguably means a sample obtained more than two hours after driving could be used through a retrograde extrapolation calculation to show that the driver had an alcohol concentration of .10 or more at the time of driving or within two hours of driving.[3] We recognize that section 169A.45, subd. 4 is couched in the negative, it does not limit introduction of evidence. However, because it encourages use of evidence, we conclude that the implication of section 169A.45 is that any accurate proof that the driver's alcohol concentration was above the legal limit within two hours of driving, including a test taken more than two hours after driving, can be used as evidence for Minn. Stat. § 169A.20, sub. 1(5).

The history of section 169A.20 is of interest in our analysis of this matter. Minn. Stat. § 169A.20 replaced repealed Minnesota statute designated as section 169.121. The "as measured" language in that predecessor statute was adopted in 1984. 1984 Minn. Laws ch. 622, § 5. Before 1984 there had been a statutory presumption that the alcohol concentration of the defendant at the time of driving was the same as the result of a test administered within two hours of driving. 1984 Minn. Laws ch. 622, § 7. This presumptive language was deleted at the same time the clause "as measured within two hours of driving" was added. 1984 Minn. Laws ch. 622, §§ 5, 7. The language was apparently changed to eliminate a defense based on the fact that alcohol concentration typically peaks sometime after drinking. *State v. Favre*, 428 N.W.2d 828, 831 (Minn. App. 1988). As found in *Favre*, the delayed peak in alcohol concentration allowed defendants to argue that their measured alcohol concentration was higher when tested than it had been when they were driving. *Id.* The apparent reason for this statutory change was that the legislature wanted to eliminate the evidentiary problem of proving that an alcohol concentration within two hours of driving was not higher than, but reflected an unacceptable alcohol concentration, when the defendant was driving. *Id.* The reading of .10 was deemed high enough to be a per se violation, even if it was two hours after driving. A narrow reading of this history would require the test to be administered within two hours because the legislature only intended to change the presumption that a test administered within two hours accurately reflected the

driver's alcohol concentration at the time of driving into a rule. However, the broader intent of the legislature appears to have been to make having an alcohol concentration that is accurately ascertainable as above the legal limit within two hours of driving have the same consequence as an alcohol concentration above the legal limit at the time of driving. Therefore, the important question is whether the alcohol concentration can be accurately shown to be above the legal limit at any time within two hours of driving, not whether the sample was actually taken during that window of time.

The appellant received a test that showed his alcohol concentration was .17 two hours and fifteen minutes after driving. This measurement of appellant's alcohol concentration more than two hours after driving clearly supports appellant's stipulation that his alcohol concentration was above .10 within two hours of driving. We conclude that the requirement of the phrase "as measured" in section 169A.20, subdivision 1(5) is the time as of which the driver's alcohol concentration is accurately ascertained or calculated or determined or measured. The critical time for purposes of "measured" in the statute is not when the sample is obtained or taken or the computations are made.

Our conclusion avoids an evidentiary battle over exactly what time the defendant stopped driving. In many cases, police are called to the scene of an accident occurring at a recent but undetermined time rather than stopping a driver for driving while impaired when they can note the exact time of the stop. It would be unreasonable to distinguish between a test taken one hour and fifty-nine minutes after a defendant was driving and one taken two minutes later, when both accurately establish that the defendant exceeded the alcohol concentration within two hours of driving.

II. Motion to strike.

Appellant has moved to strike a portion of respondent's brief that discusses who caused the delay in the proceedings on the basis that this material was outside the record. Appellant correctly notes and respondent concedes that the material in question is not covered by the stipulated facts. However, respondent argues that the material is contained in the district court memorandum accompanying the order. Since the issue of delay is not before us, it appears the material in question is irrelevant to this appeal.

"The record on appeal shall consist of the papers filed in the trial court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. The district court's memorandum is unquestionably part of the record before the court. Although the information in question is outside the stipulated facts, is irrelevant and is not considered by this court, it is in the court record and, accordingly, the motion to strike is denied.

D E C I S I O N

Although the breath sample in this case was obtained more than two hours after appellant had been driving, the appellant's alcohol concentration in excess of the legal limit of .10 was measured as of a point within two hours of driving, and the district court properly determined that appellant was in violation of Minn. Stat. § 169A.20, subd. 1(5).

Affirmed; motion denied.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] The limit for alcohol concentration has been lowered to .08 in a provision effective after appellant's offense. 2004 Minn. Laws ch. 283, § 1.

[2] Language similar to section 169A.20 is used in several statutes including the criminal vehicular homicide and injury statute, Minn. Stat. § 609.21, subd. 1 (2002). *See* Minn. Stat. §§ 97B.065, subd. 1; 360.0752, subd. 2 (2002). In all three of these statutes, the violations are distinctly divided into one offense if the person exceeds the legal alcohol concentration at the time of the activity and a different offense if the person's alcohol concentration as measured within two hours of the activity exceeds the legal limit. The use of "as measured" in only the latter offense indicates the offenses have different requirements because otherwise the as measured language would be superfluous.

[3] Here the parties have stipulated that the state could prove that appellant had an alcohol concentration above .10 within two hours of driving. For this reason, we are not addressing the ability of a retrograde extrapolation calculation to accurately measure alcohol concentration within two hours of driving.

STATE OF MINNESOTA

IN SUPREME COURT

A04-709

Court of Appeals

Meyer, J.
Took no part, Gildea, J.

Zurich American Insurance Company,

Respondent,

vs.

Filed: February 2, 2006
Office of Appellate Courts

Donald A. Bjelland,

Appellant.

S Y L L A B U S

The 2000 amendments to Minn. Stat. § 176.061 (2004) did not modify the right of an employer to make a claim for reimbursement of benefits from a third-party tortfeasor; an employer's right of recovery remains a right of subrogation and the employer's right of recovery is no greater than that of the employee.

Where an employer has paid benefits to the spouse of a deceased employee, the employer's recovery from a third-party tortfeasor is measured by the damages recoverable by the employee's heirs and next of kin under the wrongful death statute.

Reversed and remanded to the district court for reinstatement of judgment.

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

O P I N I O N

MEYER, Justice.

In this appeal, we are called on to determine the meaning of Minn. Stat. § 176.061 (2004), the third-party liability section of the Workers' Compensation Act (the Act), as amended in 2000. The district court concluded that a workers' compensation insurer's recovery in a subrogation action against a third-party tortfeasor was measured by the employee's damages

recoverable in the tort action. The court then adopted the parties' stipulation, agreed upon to facilitate appeal, that the reasonable value of the wrongful death damages was less than the reasonable value of the workers' compensation benefits paid or payable. On appeal, the court of appeals determined that the 2000 amendments allow the workers' compensation subrogee "unlimited recovery of provable damages." *Zurich Am. Ins. Co. v. Bjelland*, 690 N.W.2d 352, 356 (Minn. App. 2004). Because we conclude that the 2000 amendments did not change the fundamental structure of third-party actions under the Act and that the employer's claim for reimbursement remains subrogated to the employee's claim for tort damages, we reverse.

The parties stipulated to the material facts in this case. On November 6, 2001, while driving in the course and scope of his employment with Associated Milk Producers, Inc., Eugene Bodeker was killed in a two-vehicle traffic accident. Appellant Donald Bjelland, driver of the other vehicle, ran a stop sign, striking Bodeker's vehicle.

Angeline Bodeker, Eugene Bodeker's wife, entered negotiations with Associated Milk Producers' insurer, respondent Zurich American Insurance Company, for workers' compensation benefits. Under the Act, a surviving spouse with no dependent children receives dependency benefits at 50 percent of the weekly wage of the employee at the time of the fatal injury for a period of 10 years. Minn. Stat. § 176.111, subd. 6 (2004). Zurich settled the dependency benefits claim for $92,382.95. Zurich also paid funeral benefits of $8,255.83 and medical benefits of $3,680.22, for a total settlement of the workers' compensation claim of $104,319.

Angeline Bodeker then brought a suit against Bjelland under the Wrongful Death Act. Before trial, she and Bjelland entered into what is known as a *Naig* settlement. Such a settlement resolves the suit brought by an employee (or his dependents if the work accident is fatal), against a third party for damages such as pain and suffering or loss of consortium that are not compensable under workers' compensation. *Jackson v. Zurich Am. Ins. Co*., 542 N.W.2d 621, 622 (Minn. 1996) (citing *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 893 (Minn. 1977)).[1] When an employee (or an employee's dependents) enters into a *Naig* settlement with a third-party tortfeasor, Minnesota law allows the employer or the employer's insurer to move ahead with the suit against a third-party tortfeasor to recover benefits that it has paid to the employee as a result of the tortfeasor's negligence. Minn. Stat. § 176.061, subd. 5(a); *Jackson*, 542 N.W.2d at 623. An employee who enters into a *Naig* settlement thereby relinquishes the statutory right to damages that are ultimately recovered from the third party for wage loss and other compensation provided by the employer under workers' compensation law. *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 894 (Minn. 1977).

Zurich commenced a subrogation action to recover the workers' compensation benefits paid and payable. On cross-motions for summary judgment on the measure of damages, Zurich argued that under the 2000 amendments to the third-party liability section of the Act, Bjelland should reimburse Zurich for the full amount of benefits paid. Four subdivisions of the section were supplemented with similar language in 2000. Act of April 27, 2000, ch. 447, §§ 4-7, 2000 Minn. Laws 1042, 1046-49 (codified at Minn. Stat. § 176.061, subds. 3, 5, 7, 10). Relevant to Zurich's argument, subdivision 5 was amended to read, in part:

> If the injured employee or the employee's dependents or any party on their behalf receives benefits from the employer or the special compensation fund or institutes proceedings to recover benefits or accepts from the employer or the special compensation fund any payment on account of the benefits, the employer or the special compensation fund is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity against a third party *regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute*.

Id. § 5, 2000 Minn. Laws at 1047-48 (codified at Minn. Stat. § 176.061, subd. 5) (amendment in italics).[2]

The district court denied Zurich's cross-motion for partial summary judgment seeking a determination that the proper measure of damages is the full amount of benefits Zurich had paid to Angeline Bodeker. The court simultaneously granted Bjelland's motion for partial summary judgment entitling him to a jury determination of his liability and damages. The court concluded that the 2000 amendments did not set the amount recoverable by Zurich at the total of benefits paid and payable, and that the amendments did not change the fundamental nature of the employer's claim as being subrogated to the employee's (that is, the amendments did not change the fact that the employer stands in the shoes of the employee to pursue a claim, even if the employee has removed himself from the suit by virtue of a *Naig* settlement).

To facilitate appeal, Bjelland and Zurich stipulated that: (1) if tried to a jury, the jury would find Bjelland was negligent and his negligence was a direct cause of the accident; and (2) if tried to a jury, the jury would find fair and reasonable wrongful death damages for medical expenses, funeral expenses, and loss of financial support to Angeline Bodeker in the amount of $48,336.05; and (3) $104,319 was the fair and reasonable value of workers' compensation benefits.[3]

The district court entered judgment for Zurich for $48,336.05, plus costs and disbursements, which was premised on the court's determination that the amount of Zurich's recovery is "limited to the amount of damages recoverable under the Wrongful Death Act." Zurich appealed to the court of appeals.

The court of appeals ruled that under the 2000 amendments to section 176.061 an insurer may recover from a third-party tortfeasor the full amount of workers' compensation benefits paid or payable. *Zurich*, 690 N.W.2d at 357. It based its ruling on the presumption that statutory amendments are meant to change laws. *Id.* at 356. The court determined that "either through the principle of statutory subrogation as defined by the workers' compensation amendments or the principle of indemnity, Zurich is entitled to recover, without limit, such damages as it may prove it is entitled to." *Id.* The court went on to state that the measure of Zurich's recovery was the full amount of workers' compensation benefits paid, $104,319. *Id.* at 357. We granted review.

The sole issue presented on appeal is the interpretation of the third-party liability provisions of the Act in the wake of amendments made in 2000. We interpret statutes and case law de novo. *Am. Nat'l Gen. Ins. Co. v. Solum*, 641 N.W.2d 891, 895 (Minn. 2002).

The first inquiry in statutory interpretation is whether the law is ambiguous. *See* Minn. Stat. § 645.16 (2004). If the words are clear and unambiguous, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit." *Id.* Zurich argues the statute unambiguously allows a workers' compensation insurer the right to recover from a third-party tortfeasor the full amount of benefits paid or payable to the employee and the employer's right of recovery is no longer limited to the common law or wrongful death measure of damages. It maintains that the amendatory words of Minn. Stat. § 176.061— "regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute"— enlarge the employer's right to recover from a third-party tortfeasor.

Bjelland also urges us to conclude that the statutory changes are unambiguous but argues a contrary meaning to the changes: the amendatory language does not enlarge the employer's right to recover from the third-party tortfeasor but rather, it expands the definition of what types of benefits *are eligible* to be recovered. Bjelland points to the unchanged portions of the statute in support of his position that the tortfeasor's liability remains essentially one of subrogation. 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. We may rely on certain presumptions in ascertaining legislative intent. The first presumption we rely on in this case is that we presume that "the legislature intends the entire statute to be effective and certain." Minn. Stat. § 645.17(2) (2004). Further, we have held that the "provisions of Minnesota's workers' compensation statute should not be construed in isolation, but must be considered in light of related provisions of the statute." *Conwed Corp. v. Union Carbide Chems. & Plastics Co.*, 634 N.W.2d 401, 406 (Minn. 2001) (citing *Allstate Ins. Co. v. Eagle-Picher Indus., Inc.*, 410 N.W.2d 324, 327 (Minn. 1987)). There are two primary considerations in discerning legislative intent in this case: the contemporaneous legislative history and the consequences of a particular interpretation. *See* Minn. Stat. § 645.16(6), (7).

The contemporaneous legislative history provides no clear indication that the legislature intended to accomplish what Zurich asserts. The addition of the "regardless" language to subdivisions 3, 5, 7, and 10 was part of a package of reforms to the third-party liability section of the law that "clarifie[d] some laws that have been very confusing, confusing case law." Hearing on S.F. 3644, Sen. Jobs, Energy, & Cmty. Dev. Comm., 80th Minn. Leg., March 1, 2000 (statement of Beth Hargarten Minn. Dep't of Labor & Indus.). No specific cases were mentioned.[4] Describing the statutory amendments as "clarif[ying]" undermines Zurich's position that the amendments were intended to effect the substantial change to the operation of an employer's right of subrogation.

Given that little legislative intent can be inferred from the legislative history, we consider the consequences of a particular interpretation. In cases decided before the 2000 amendments, we

have consistently maintained that section 176.061, subdivision 5, grants an employer a right of subrogation, not a right of indemnity—that is, the employer steps into the shoes of the employee to pursue the employee's tort claim against the third-party tortfeasor. *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 903 (Minn. 1984) (citing *Metro. Transit Comm'n v. Bachman's*, 311 N.W.2d 852, 903 (Minn. 1981)). By its terms, subdivision 5 continues to apply to events creating a "*legal liability* for damages on the part of a party other than the employer." Minn. Stat. § 176.061, subd. 5 (emphasis added). We have indicated that this language restricts the application of the section to tort claims against third parties, affirming that the employer's right of subrogation may only be asserted against damages recoverable by the employee in a third-party claim. *See Minn. Brewing Co. v. Egan & Sons Co.*, 574 N.W.2d 54, 59-60 (Minn. 1998) (citing *Janzen v. Land O' Lakes, Inc.*, 278 N.W.2d 67 (Minn. 1979) (explaining that "legal liability" refers to tort liability)). Interpreting the amendments as replacing this measure with a full right of recovery for the employer conflicts with the meaning of the unchanged language of the statute. Also, the section continues to state that the employer is "subrogated to the rights of the employee." Minn. Stat. § 176.061, subd. 5(a).

More importantly, the assertion that the legislature intended to alter the fundamental nature of the employer's cause of action against the third party is belied by the fact that the legislature did not amend Minn. Stat. § 176.061, subd. 6, the distribution formula that allocates a recovery from a third party between the employer and employee. Instead, the formula continues to distribute recovery along the lines of a well-drawn subrogation statute, with "the third party paying what it would normally pay if no compensation question were involved." *Conwed*, 634 N.W.2d at 412 (quoting 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 116.02 (2000)). Zurich's interpretation of the 2000 amendments could seriously impede the operation of the distribution formula, running counter to our presumption that the entire statute be given effect.

In ascertaining legislative intent, we also presume that "when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language." Minn. Stat. § 645.17(4) (2004). The court of appeals based the employers' right of indemnity on language of section 176.061, subdivision 10, that was not amended. *Zurich*, 690 N.W.2d at 356. This court has before construed the indemnity language of section 176.061 and held that the right of indemnity referred to in the statute is more limited than common-law indemnity:

> It must be observed * * * that the right of indemnity with which we are here concerned is not the equitable remedy of indemnity but is rather a statutory cause of action incorporated into the Workers' Compensation Act, a statutory system of compensation for workers disabled by reason of injury arising out of and in the course of employment.

Allstate Ins. Co. v. Eagle-Picher Indus., Inc., 410 N.W.2d 324, 327 (Minn. 1987). Further, we noted with regard to the subdivision 10 indemnity provision,

> [i]t seems to us most unlikely that the legislature intended to shift the employer's obligations under the employment contract to third parties who are strangers to that contract in complete disregard of the principles of respondeat superior, comparative negligence, and the common law measure determinative of the nature and extent of damages recoverable in actions sounding in tort.

Id. at 328. The court of appeals' interpretation would significantly shift the burden for the financial consequences of workplace accidents from employers onto third-party tortfeasors. Such a change would mean that third-party tortfeasors would face significantly different liability if they cause injury to someone in the course and scope of employment than they would otherwise. We reaffirm our conclusion in *Allstate* that the indemnity language in subdivision 10 of section 176.061 was not intended by the legislature "to shift the employer's obligations under the employment contract to third parties who are strangers to that contract in complete disregard" of common law damages. *Allstate*, 410 N.W.2d at 328.

It seems to us fairly evident, then, that the 2000 amendments have not modified the measure of damages against which the employer may assert a right of recovery. In the absence of a definitive indication from the legislature that it meant to replace or otherwise enlarge the employer's cause of action against the third party beyond that of subrogation, we reaffirm the fundamental principle that in a subrogation suit the employer has no greater rights than those of the employee.

Reversed and remanded to the district court for reinstatement of judgment.

GILDEA, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

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[1] An employer or workers' compensation insurer also can settle pretrial, thereby "waiv[ing] any rights it might have to the employee's subsequent recovery, specifically, the right to claim a portion of the employee's recovery as a credit against future compensation payable." *Folstad v. Eder*, 467 N.W.2d 608, 612 (Minn. 1991); *see* Minn. Stat. § 176.061, subd. 6(d) (allowing an employer to recover a credit for future compensation payable in a subrogated suit). *Folstad* involved an insurer, but in the context of the third-party liability provisions of Minnesota's workers' compensation law, the rights of the employer and the employer's workers' compensation insurer, Zurich here, are coextensive. *Folstad*, 467 N.W.2d at 611 n.3.

[2] While the addition of essentially identical language to four subdivisions of section 176.061 indicates a common intended change, the appeal at hand implicates the change in the context of subdivision 5, which governs cumulative remedies. Minn. Stat. § 176.061, subd. 5. Subdivision 3 relates to situations where the third party and the employer are engaged in a common enterprise. *Id.*, subd. 3. Subdivision 7, we have explained, provides a separate cause of action for the employer to recover medical benefits and other compensation paid when the employee does not meet tort thresholds in Minnesota's no-fault automobile insurance act, with

damages subject to the formula found in subdivision 6 of the section allocating a tort recovery between the employee and employer. *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837-38 (Minn. 1988). Finally, we have explained that the right of indemnity in subdivision 10 does not represent the traditional legal right "which inures to a person who has discharged a duty owed by him but which, as between himself and another, should have been discharged by the other," and, more important, that it does not grant the employer a cause of action separate from the injured employee's cause of action. *Allstate Ins. Co. v. Eagle-Picher Indus., Inc.*, 410 N.W.2d 324, 328 (Minn. 1987) (citing Restatement of Restitution § 76 (1937)); *see also Folstad*, 467 N.W.2d at 611 (noting that the indemnity provision reflects the fact that some third-party claims do not involve fault on the part of the employer).

[3] We observe that in most cases the damage award in the employee's tort suit is enough to ensure that the employer is fully reimbursed for benefits paid. In this case, because Zurich was obligated under the statute to pay Angeline Bodeker 10 years of dependency benefits even though her husband was 66 years old and near the end of his working years, the total amount of benefits paid ($104,319) exceeded the stipulated wrongful death damages ($48,336.05).

[4] What little testimony there was regarding the 2000 amendments was given to the Senate Jobs, Energy, and Community Development Committee:

> [L]anguage is added which will allow an employer who is required to pay workers' compensation benefits as a result of negligence of a third party the right to recover all benefits it has paid because of that negligence, regardless of whether those benefits were recoverable by common law or not.

Hearing on S.F. 3644, Sen. Jobs, Energy, & Cmty. Dev. Comm., 80th Minn. Leg., March 1, 2000 (statement of Beth Hargarten, Minn. Dep't of Labor & Indus.). The 2000 testimony virtually mirrors a statement given during the 1999 legislative session by the senate author of the bill, Sen. Steve Novak, when the same amendments to section 176.061 were introduced the first time. *See* Hearing on S.F. 1848, Sen. Jobs, Energy, & Cmty. Dev. Comm., 79th Minn. Leg., March 19, 1999. The statement tends to support Zurich's argument that the employer can recover the full amount of benefits paid, though the statement is not clear in that regard; "all benefits" could also indicate that "all kinds of benefits" paid or payable by an employer are eligible for recovery.

STATE OF MINNESOTA

IN SUPREME COURT

A04-1775

Original Jurisdiction

Blatz, C.J.
Took no part, Anderson, G. Barry, J.

In re Candidacy of Independence Party Candidates

James Moore, David Allen, and
Maureen Peterson,

Petitioners,

Filed: November 10, 2004
Office of Appellate Courts

vs.

Mary Kiffmeyer, as Secretary of State
for the State of Minnesota,

Respondent.

S Y L L A B U S

Depriving candidates of a major political party access to the general election ballot based on failure of any candidate of that party to satisfy the minimum vote threshold required by Minn. Stat. § 204D.10, subd. 2 (Supp. 2003), at the primary election does not serve any rational governmental purpose and therefore violates the First and Fourteenth Amendment rights of those candidates and their supporters.

Petition granted.

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

O P I N I O N

BLATZ, Chief Justice

On September 21, 2004, James Moore, David Allen, and Maureen Peterson[1] filed a petition under Minn. Stat. § 204B.44 (2002) requesting an order directing the respondent Mary Kiffmeyer, as Secretary of State of the State of Minnesota, to place the names of Independence

Party nominees for the Minnesota House of Representatives and the United States House of Representatives on the November 2, 2004 general election ballot. The secretary of state had previously notified the Independence Party that its candidates would not appear on the general election ballot because none of the candidates had received the minimum number of votes required by Minn. Stat. § 204D.10, subd. 2 (Supp. 2003), in the September 14, 2004 primary election. After the parties and amicus curiae American Civil Liberties Union of Minnesota (ACLU-Minnesota) filed legal memoranda on an expedited basis, oral argument was heard on September 27, 2004. This opinion follows the order filed on September 27 granting relief to petitioners.

I.

The dispute in this case centers on interpretation and application of Minn. Stat. § 204D.10, subd. 2,[2] which creates a threshold minimum percentage of votes that must be received in the partisan primary election for a major political party's[3] candidates to appear as the party's nominees on the general election ballot.[4] The primary threshold law provides that if any *one* of the candidates of a major political party receives the required number of votes in the partisan primary, then *all* of that party's candidates who received the highest number of votes for an office at the primary are the party's nominees on the general election ballot. However, if none of the party's candidates receive the threshold number of votes, then *none* of the party's candidates are nominated. The threshold number of votes is defined in the primary threshold law as ten percent of the average number of votes received by that party's candidates for state constitutional offices in the previous general election. The primary threshold law also provides that if none of the party's candidates meet the threshold, then the individual candidates of that party may be nominated "by nominating petition as provided in sections 204B.07 to 204B.09." Minn. Stat. § 204D.10, subd. 2. If the party's candidates do not qualify as the party's nominees under section 204D.10, they cannot appear on the general election ballot.

The secretary of state determined that none of the 24 candidates of the Independence Party for the Minnesota or United States House of Representatives satisfied the ten percent threshold of the primary threshold law in the September 14, 2004 partisan primary election. After consultation with, and based on advice from, the Minnesota Attorney General, the secretary of state notified the Independence Party on September 17 that all of the Independence Party candidates for the state legislature and for congress would be excluded from the general election ballot based on the primary threshold law. Each of the three other major political parties[5] satisfied the statutory threshold, because at least one of their candidates reached the ten percent mark.[6]

II.

Petitioners make two arguments in support of their request that the Independence Party candidates be placed on the general election ballot despite their failure to satisfy the primary vote threshold of Minn. Stat. § 204D.10, subd. 2.[7] First, petitioners argue that the primary threshold law was repealed in 1996 and therefore cannot be applied in this election. Second, petitioners argue if the primary threshold law was not repealed, its application to prevent Independence Party candidates from appearing on the general election ballot is unconstitutional as a violation of their rights under the United States and Minnesota Constitutions to associate for political

purposes and to vote, as well as their rights to equal protection and due process. Although petitioners do not make the argument, the amicus curiae ACLU-Minnesota contends that the post-primary nominating petition process mentioned in the primary threshold law should be available to the Independence Party candidates.[8] The secretary of state disagrees that the primary threshold law was permanently repealed and that the nominating petition process is available after the primary election, but does not dispute petitioners' constitutional argument.

A. Repeal of the Primary Threshold Law

Petitioners first argue that the primary threshold law is no longer in effect because it was repealed by the 1996 Legislature in Act of Apr. 2, 1996, ch. 419, § 9, 1996 Minn. Laws 982.[9] Section 9 provides: "Minnesota Statutes 1994, section 204D.10, subdivision 2, is repealed." That section clearly espouses the legislature's intent to repeal the primary threshold law.

The secretary of state contends that this repeal "expired" by the operation of section 10 of the 1996 Act, so that the primary threshold law remains applicable today. Section 10 of the 1996 Act provided that the "amendments" made by the act would expire if a particular decision of the Eighth Circuit Court of Appeals were reversed. Section 10 provided:

> This act is effective for the state primary election in 1996 and thereafter.
>
> The amendments made by this act are suspended during any time that the decision of the eighth circuit court of appeals in *Twin Cities Area New Party v. McKenna*, No. 94-3417MN, is stayed or the mandate of the court is recalled. *If the McKenna decision is reversed, the amendments made by this act expire and the prior law is revived.* The purpose of this paragraph is to provide an orderly procedure for complying with the *McKenna* decision while retaining the prior law prohibiting simultaneous nominations to the extent permitted by the United States Constitution.

1996 Act, § 10, 1996 Minn. Laws at 982 (emphasis added). The Eighth Circuit *McKenna* decision referenced in section 10 had struck down the Minnesota statute that prohibited candidates from appearing on the ballot as the nominee of more than one party. Sections 2 through 8 of the 1996 Act amended Minnesota election laws to comply with the mandate of the Eighth Circuit decision to allow multi-party candidacies. *Id.*, §§ 2-8, 1996 Minn. Laws at 979-82. At the time the 1996 Act was enacted, the *McKenna* case was still pending in the United States Supreme Court under the name of *Timmons v. Twin Cities Area New Party*. In April 1997, the Supreme Court reversed the Eighth Circuit decision, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), triggering the "expire-and-revive" language of section 10.

Petitioners argue that the repeal of the primary threshold law by the 1996 Act did not "expire" with the reversal of *McKenna* in *Timmons* because section 10 states that only the "amendments" made by the Act expire, and section 9 was not an amendment, but a repealer. Petitioners contend that the plain language of the 1996 Act compels this conclusion because

sections 2 through 8 each provides that a particular statute "is amended," whereas section 9 refers only to "repeal." Further, petitioners argue that section 9 served an entirely different purpose than the preceding sections of the 1996 Act, all of which dealt with the issue of multi-party candidacies, whereas section 204D.10, subd. 2, and its repeal have nothing to do with multi-party candidacies. Petitioners assert that because the primary threshold law had nothing to do with multi-party candidacies, there was no reason to revive it based on the reversal in *Timmons*, as there was for the statutes amended by the 1996 Act. Petitioners argue that further evidence that the primary threshold law was permanently repealed is (1) that the primary threshold law was not applied in the 2000 elections, (2) that the legislature has made no provision for post-primary nomination by petition, even though the nomination process is expressly mentioned in the primary threshold law, and (3) that the primary threshold law has been preempted by an entirely new "system of campaign financing and regulation of political parties and ballot access."

The secretary of state argues that the primary threshold law remains in effect because its repeal by the 1996 Act was "expired" by the reversal of *McKenna* in *Timmons*. The secretary of state asserts that the section 9 repealer was part of the "amendments" made in the 1996 Act and that the primary threshold law was encompassed in the "revival of the prior law" provided for in section 10 in the event of *McKenna*'s reversal. The keystone of the secretary of state's argument that the primary threshold law remains in effect is that the legislature amended the primary threshold law in 2003. *See* Act of May 27, 2003, ch. 112, art. 2, § 50(a), 2003 Minn. Laws 680. The 2003 amendment deleted the phrase "state treasurer" from the primary threshold law as part of broader legislation eliminating that state office. The secretary of state contends that the8 2003 amendment, as well as two previous legislative attempts to amend the primary threshold law after 1996, demonstrate that the legislature did not think the subdivision had been permanently repealed in 1996.

B. Nomination by Post-Primary Nominating Petition

The primary threshold law provides that if none of the candidates of a major party are nominated because of the failure of all of the party's candidates to meet the ten percent threshold, "all of the candidates of that major political party may be nominated by nominating petition as provided in sections 204B.07 to 204B.09." Minn. Stat. § 204D.10, subd. 2. The secretary of state asserts that the nominating petition process referenced in the primary threshold law is not available at this time to the candidates of the Independence Party because the deadline for filing nominating petitions is 56 days *before* the state primary. Minn. Stat. § 204B.09, subd. 1(a) (2002).[10] Petitioners do not disagree with this interpretation. Moreover, at oral argument they appeared to assert that even if a post-primary nominating petition process were made available under the primary threshold law, the law would nonetheless violate their constitutional rights because of the undue burden of obtaining the required signatures in the short time available.

The amicus curiae ACLU-Minnesota does, however, argue that the nominating petition process should be available, despite the conflict between the provision for post-primary nominating petitions in the primary threshold law and the pre-primary deadline established for nominating petitions in Minn. Stat. § 204B.09. Amicus contends that as a matter of statutory

interpretation the more recent and more specific provision – the primary threshold law allowing post primary nominating petitions – should prevail over the pre-primary deadline provision. *See* Minn. Stat. § 645.26, subd. 1 (2002). Moreover, amicus argues that applying the section 204B.09 deadline to prohibit post-primary nominating petitions would violate the canon of statutory construction that statutes should be read to give effect to all of their provisions. *See* Minn. Stat. § 645.16 (2002). We conclude that we do not need to decide these preliminary issues because the constitutional issue is determinative.

C. Constitutionality of the Primary Threshold Law

Petitioners argue that by prohibiting access to the general election ballot for Independence Party candidates the primary threshold law violates petitioners' rights protected under the First and Fourteenth Amendments to the United States Constitution to vote and to associate for the advancement of their political beliefs, as well as their rights to equal protection of the laws and due process. Petitioners also assert analogous rights under the Minnesota Constitution.

Petitioners argue that these constitutional rights are infringed because of the discriminatory impact the primary threshold law has on Independence Party candidates and their supporters. Petitioners point out that the number of votes needed to satisfy the ten percent threshold of the statute is different in each legislative district and is different for each party within a district. According to petitioners, the two "old and well-established" major political parties easily satisfy the threshold, but the statute imposes an unfair burden for less-established major political parties. Disparate treatment is also evidenced, petitioners assert, by the fact that the Green Party was able to satisfy the threshold with only 35 votes, but the Independence Party was required to receive over twice as many votes in the same district. Moreover, petitioners argue minor political party candidates who can use the nominating petition process need not satisfy the ten percent threshold at all. Petitioners assert that the primary threshold law denies access to the ballot to the political parties that have "gained sufficient momentum to threaten the well-established major parties." Petitioners contend that such burdens must be subjected to strict scrutiny and cannot survive unless they are narrowly tailored to fulfill a compelling state interest.

The secretary of state does not disagree with petitioners' constitutional arguments. Although pointing out that the United States Supreme Court has recognized the right of states to require candidates and political parties to make some preliminary showing of support in order to qualify for a place on the ballot, citing *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the secretary of state explains that the Minnesota primary threshold law imposes a burden on candidates that is significantly different than the statute upheld in *Munro*, because the number of votes required can be significantly different for different parties in the same election year. The secretary of state concludes "[i]t is, therefore, unclear what the State's interest is in imposing the voting threshold set forth in section 204D.10, subdivision 2."

Denial of a candidate's access to the ballot implicates important constitutional rights that are central to preservation of our democracy: the right to vote and the right to associate in pursuit of common political ends. *E.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983). It is equally well-established that to maintain fair, honest and orderly elections, states may impose

regulations that in some measure burden the rights to vote and associate. *Id.* at 788. In *Timmons*, the Supreme Court summarized the analytical approach used to address these competing interests in a challenge to a state's electoral regulations:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" No bright line separates permissible election related regulation from unconstitutional infringements on First Amendment freedoms.

520 U. S. at 358-59 (citations omitted); *see also Clayton v. Kiffmeyer*, __N.W.2d__, 2004 WL 2403651, at *10-11 (Minn. Oct. 28, 2004). Petitioners argue, and respondent agrees, that the discriminatory treatment and denial of access to the ballot effected by the primary threshold law are not justified by any compelling, or even rational, state interest.

The irrationality and arbitrariness of the primary threshold law are evident in several aspects of the statute's operation. First, there is a different primary vote threshold applicable to different political parties. The result is that Independence Party candidates with more demonstrated voter support than Green Party candidates are nevertheless denied access to the general election ballot. This result supports the conclusion that the primary threshold law cannot be justified as a statute that restricts ballot access to candidates who demonstrate some minimum level of support.[11] Moreover, as petitioners point out, there is the incongruity that the Independence Party has qualified as a major political party based on the strength of the votes it received at the last general election. By statute, it retains that major political party status until it fails to gain the requisite voter support at another general election. Minn. Stat. § 200.02, subd. 7(d) (2002). Nevertheless, the primary threshold law deprives candidates of a major political party access to the general election ballot based on the party's primary results. Finally, although the primary threshold law purports to provide an alternative process for access to the general election ballot through nominating petitions, the statutory reference is to a petition process that is not available after the primary election.

In light of these characteristics of the challenged law and the unusual circumstance that the state, through respondent secretary of state and her counsel, the Minnesota Attorney General, acknowledges that there is no rational state purpose served by the primary threshold law, we need not engage in the weighing of burdens and state regulatory interests prescribed in *Timmons*. In the absence of any suggested rational purpose for the law, we have no difficulty concluding that by denying Independence Party candidates access to the general election ballot the primary threshold law violates petitioners' constitutional rights to vote and to associate for the advancement of political beliefs under the First and Fourteenth Amendments.[12] On that

basis, we ordered the secretary of state to certify the candidates of the Independence Party who received the most votes in the primary as the nominees of that party for placement on the general election ballot.

Petition granted.

ANDERSON, G. Barry, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

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[1] According to the petition, each of the petitioners is a registered voter in Minnesota. In addition, petitioner Moore is the chair of the Minnesota Independence Party. Petitioner Allen is the Independence Party candidate for Minnesota House of Representatives from District 41B and received the most votes for that office in the Independence Party primary on September 14, 2004.

[2] Section 204D.10, subd. 2, is referred to in this opinion as the "primary threshold law."

[3] "Major political party" is defined in Minn. Stat. § 200.02, subd. 7 (2002). To qualify as a major political party a party must maintain a party organization and must either have had a candidate for Minnesota constitutional office, presidential elector, or U.S. Senator who received votes in each county in the preceding state general election and received votes from not less than five percent of the total number of individuals who voted in that election. A party can also qualify as a major political party by submitting a petition to the secretary of state containing the signatures of party members equal to at least five percent of the total number of voters in the preceding state general election.

[4] Section 204D.10, subd. 2, provides:

> If at the state primary any individual seeking a major political party's nomination for an office receives a number of votes equal to ten percent of the average of the votes cast at the last state general election for state officers of that major political party within the district for which the office is voted, then all candidates of that major political party who receive the highest vote for an office are the nominees of that major political party. If none of the candidates of a major political party receive the required ten percent, then no candidates are nominated, and all the candidates of that major political party may be nominated by nominating petition as provided in sections 204B.07 to 204B.09. For the purposes of this subdivision, "state officers" mean the governor, lieutenant governor, secretary of state, state auditor, and attorney general.

[5] Those parties are the Democratic-Farmer-Labor Party, the Green Party, and the Republican Party.

[6] The nominees of these parties who did not individually meet the threshold nevertheless benefited from other nominee(s) in their party who met the threshold.

[7] Apparently, petitioners do not challenge the secretary of state's determinations that none of the Independence Party candidates received the requisite number of votes in the primary election to satisfy the primary threshold law and that at least one of the candidates of each of the other major political parties did.

[8] The amicus curiae did not interject this issue. Rather, in our order for briefing and hearing, the court raised the issue of availability of the nominating petition process referenced in the primary threshold law.

[9] Chapter 419 of the 1996 session laws is referred to in this opinion as "the 1996 Act."

[10] The secretary of state explains that the primary threshold law, including the safety net of nominating petition access to the ballot, was originally enacted in 1939, and the same legislation established the deadline for filing nominating petitions as 30 days before the general election. Consequently, when the primary threshold law was first enacted, the deadline for filing nominating petitions was *after* the primary election, and use of nominating petitions by candidates who failed to satisfy the primary election threshold was feasible. In 1961, the deadline for filing nominating petitions was changed to 56 days *before* the primary election, eliminating the post-primary nominating petition process, but the primary threshold law's reference to nominating petitions was not changed. *See* Act of Apr. 20, 1961, ch. 606, §§ 16, 19, 22, 1961 Minn. Laws 1117-19.

[11] We are less convinced that the primary threshold law discriminates in favor of long-established major political parties. Petitioners speculate that it is easier for such parties to satisfy the primary voting requirement, but those parties must reach a higher vote threshold in the primary if they received greater support in the previous general election. Logic suggests that the ability to meet the primary threshold may be more a factor of general voter turnout at the primary and the existence of intraparty contests in the primary, which would likely draw more voter interest.

[12] We noted in *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003), that our general practice is to avoid a constitutional ruling if another basis is available on which to decide the case. Nevertheless, as we did in *Erlandson*, we again address the constitutional issue presented without resolving statutory claims. This approach is appropriate where, as here, the unconstitutionality of the challenged law is conceded by the state, but resolution of contested statutory claims, which must occur on an expedited basis, could affect future issues of statutory interpretation. *Cf. id.*

STATE OF MINNESOTA

IN COURT OF APPEALS

A05-1125

Steven Riley,

Respondent,

Office of Administrative Hearings,

Respondent,

vs.

Stephen Jankowski, et al.,
Relators,

Leonard Jankowski,

Respondent Below.

Filed April 26, 2006

Reversed

Peterson, Judge

Administrative Hearings Office

File No. 12-6326-16420

Alain M. Baudry, Morgan L. Holcomb, Maslon Edelman Borman & Brand, L.L.P., 3300 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-4140 (for respondent Steven Riley)

Mike Hatch, Attorney General, Kenneth E. Raschke, Jr., Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent Office of Administrative Hearings)

Erick G. Kaardal, William F. Mohrman, Mohrman & Kaardal, P.A., Suite 4100, 33 South Sixth Street, Minneapolis, MN 55402 (for relators Stephen Jankowski, et al.)

Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

S Y L L A B U S

I. Because administrative decisions rendered in the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 (2004) are subject to judicial review by certiorari and the hearing process provides an administrative remedy for statutory violations without altering the district court's original jurisdiction to determine whether a criminal statute has been violated or removing from the executive branch of government the authority to decide whom to prosecute and what charges to file, the administrative-hearing process does not violate the separation-of-powers doctrine expressed in Minn. Const. art. III, § 1.

II. Because the rights and remedies provided by the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 did not exist when the Minnesota Constitution was adopted and the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 is not a criminal prosecution, a respondent to a complaint filed according to Minn. Stat. § 211B.32, subd. 1, is not entitled to a trial by jury under Minn. Const. art. I, §§ 4, 6.

III. Because Minn. Stat. §§ 211B.31 to .37 only establish a process for considering alleged violations of the substantive provisions of chapters 211A and 211B and do not impose any restrictions on speech, the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 does not violate First Amendment rights.

IV. To prove a violation of Minn. Stat. § 211B.06, subd. 1 (2004), a complainant must prove by clear and convincing evidence that a statement in campaign material is false and that the person who made the statement knew that it was false or made the statement while subjectively believing that the statement was probably false.

V. The disclaimer requirement of Minn. Stat. § 211B.04 (2004) directly regulates the content of pure speech in violation of the First Amendment.

O P I N I O N

PETERSON, Judge

In this proceeding arising out of a complaint about the content of certain campaign material, relators challenge the determination of respondent Office of Administrative Hearings (OAH) that relators violated Minn. Stat. §§ 211B.04 and .06 (2004) and must pay civil penalties. Relators argue that (1) the administrative-hearing process established by Minn. Stat. §§ 211B.31 to .37 (2004) (a) violates the separation-of-powers doctrine, (b) violates relators' constitutional right to trial by jury, and (c) unconstitutionally intrudes on relators' First Amendment rights; (2) respondent Steven Riley lacked standing to file a complaint under Minn. Stat. § 211B.32; (3) the panel of administrative-law judges that heard Riley's complaint erred in finding that relators violated Minn. Stat. § 211B.06, subd. 1; and (4) the disclaimer requirement of Minn. Stat. § 211B.04 is an unconstitutional restriction on relators' First Amendment rights. We reverse.

FACTS

The City of Greenfield is governed by a five-member council consisting of the mayor and four council members. Thomas Swanson was elected mayor in November 1994 and reelected every two years thereafter until he was defeated by relator Lawrence Plack in the November 2004 election. Cindy Sykes was appointed to the city council in 1995, elected to the council in 1996, and reelected in 2000. Roger Mattila was elected to the council in November 2000. In November 2004, Sykes and Mattila lost their reelection bids to Leonard Jankowski and Sylvia Walsh.

The City of Greenfield bought about 17 acres of property, known as the "Siwek property," and built a wastewater-treatment plant on part of the property. The city council then decided to sell the remaining property without the assistance of a real-estate agent. On the advice of city attorney Jeffrey Carson, the council arranged to have the property appraised. An appraisal company valued the property at $592,111, excluding special assessments, and $932,000, including special assessments for roads, water, and sewer.

At a June 2003 council meeting, the council instructed city staff to put a sign on the property indicating that it was for sale and to also advertise the property on the city's website. But no "for sale" sign was ever placed on the property. Instead, the property was advertised only via a link on the city's Web site.

Swanson sought Carson's advice about whether Swanson could legally and ethically bid on the Siwek property. Carson advised Swanson that as long as he recused himself from participating in any decision-making and voting on the sale in his capacity as mayor, he could pursue a bid. At a July 2003 council meeting, Swanson informed the council that he was interested in buying part of the Siwek property and that he would be putting together a bid proposal. Swanson submitted two undated letters to Carson, informing Carson that he would like to purchase two lots of the Siwek property and detailing his proposal. Swanson offered to pay $315,000 for the lots, which included $190,348 for the land and $124,652 to assume the special assessments. The appraised value of the two lots was $343,000, including special assessments.

Mattila also expressed an interest in the Siwek property. Like Swanson, Mattila sought Carson's advice about whether he could legally and ethically bid on the property. Carson advised Mattila as he had advised Swanson.

By the December 16, 2003 council meeting, the city had received four or five letters of interest regarding the property, including Swanson's letter. Mattila did not submit a letter of interest. Carson recommended that the council authorize city staff to begin negotiations with the interested parties. At the December 16 council meeting, Carson disclosed that Swanson was interested in the property and that Mattila had made an oral inquiry about it. Carson explained to the council that neither Swanson nor Mattila could vote once purchase agreements were created and recommended. When the issue of the Siwek property came up, Swanson asked Carson whether he should "step down" on the issue. Carson stated that he did not think there would be a conflict if Swanson participated in authorizing city staff to begin negotiations on the Siwek property. Nevertheless, Swanson recused himself from participating in the decision to authorize city staff to begin negotiations on the Siwek property. Mattila also recused himself, and both Swanson and Mattila left the room.

Earlier in the year, Swanson had appointed Sykes as acting mayor, which authorized her to perform the mayor's duties in the event of his absence. As acting mayor, Sykes took over running the December 16, 2003 council meeting when Swanson recused himself. After discussing the appraisals, on Carson's recommendation, the council voted to authorize two city employees to begin negotiations with interested parties. Carson sent information packets to all of the parties who had expressed an interest in the Siwek property, stating that the city would accept bids on the Siwek property until January 27, 2004.

Plack, who was a member of the Greenfield City Planning Commission and had run unsuccessfully for mayor in 2000, was present at the December 16, 2003 council meeting. Plack became outraged when he learned that Swanson and Mattila were considering bidding on the Siwek property. The next day, Plack drove by the Siwek property and saw that there was no "for sale" sign on it. Plack also called the state auditor's office and spoke with attorney David Kenney, who told Plack that the sale of city-owned property to the mayor or a council member would be illegal.

In January 2004, Kenney contacted Carson and advised him that it was the position of the state auditor's office, as well as the attorney general's office and the League of Minnesota Cities, that cities could not sell land to the mayor or council members. Kenney faxed Carson information from a League of Minnesota Cities handbook regarding the sale of land to interested city officers. By letter dated January 22, 2004, Carson informed Swanson and Mattila about what he had learned from Kenney and advised them not to bid on the Siwek property. Swanson and Mattila took no further action with respect to bidding on the Siwek property, and the city never entered into negotiations with either Swanson or Mattila for the purchase of the property.

The city received three sealed bids on the Siwek property, none of which included special assessments. Neither Swanson nor Mattila submitted a bid. At the February 3, 2004 city council meeting, the council rejected all three bids as too low and decided to hire a realtor to market the property.

Because they were frustrated by what they perceived as arrogance and a lack of communication by the city council and dissatisfied about a city ordinance governing the use of all-terrain vehicles, Plack and another Greenfield resident, James Stewart, formed a group called "Greenfield Awareness." Greenfield Awareness disseminated information stating that its goal was to bring "accountability, respect and communication" back to city government. More than 100 people attended Greenfield Awareness's first public meeting on February 9, 2004. At the meeting, Plack discussed Swanson's and Mattila's "attempts" to buy the Siwek property. After the meeting, Mattila approached Plack and said that he thought that what Plack had said at the meeting was false and irresponsible. Plack said that he would apologize for his mischaracterization of Mattila at the next Greenfield Awareness meeting, but he did not do so. At a city council meeting on February 17, 2004, Mattila clarified that he had only orally expressed an interest in the Siwek property and that he had never submitted a bid on any of the lots.

Plack filed to run for mayor in the November 2004 election. In a position statement issued as part of his mayoral campaign, Plack encouraged voters to vote for him for mayor and

Leonard Jankowski and Walsh for city council. In October 2004, Plack compiled a campaign mailing to send to all Greenfield residents except Swanson and the other city-council members. The mailing consisted of a cover letter drafted by Plack and the following documents: (1) minutes of the December 16, 2003 city-council meeting regarding Carson's recommendation to authorize city employees to enter into negotiations with parties interested in purchasing the Siwek property; (2) the undated letter from Swanson to Carson regarding Swanson's request to purchase city-owned land; (3) an appraisal of the Siwek property; (4) a letter from Kenney to the Greenfield city clerk notifying her about the complaint received regarding the sale of city-owned property; and (5) the letter from Carson to Swanson and Mattila advising them not to bid on the Siwek property.

The cover letter included in the mailing described Swanson's and Mattila's interest in the Siwek property and the city council's decision at its December 16, 2003 meeting to authorize city staff to begin negotiations with interested parties. The final paragraph of the letter stated:

> Why should you vote for Tom Swanson, Roger Mattila or Cindy Sykes after they attempted to illegally profit (in the case of Swanson and Mattila) or allow the profiting (in the case of Sykes) from their elected positions. Every tax payer in Greenfield should be outraged at the arrogance of this council. If re-elected, who knows what they will try to get away with next or what it could cost us.
>
> **Throw them out on November 2!**

Relator Stephen Jankowski, an attorney and Leonard Jankowski's son, reviewed the cover letter, approved its contents, and agreed to have the material sent out under his name. The campaign material did not contain a disclaimer, but the envelope had a sticker on it stating, "This publication is not circulated on behalf of any candidate or ballot question." The packet was delivered to Greenfield households about four days before the election.

Riley filed a complaint with the OAH alleging that Stephen Jankowski and Leonard Jankowski violated Minn. Stat. § 211B.06 (2004) by preparing and disseminating false campaign material. Riley filed two additional complaints alleging that Plack and Walsh violated Minn. Stat. § 211B.06 by disseminating false campaign material. An administrative-law judge (ALJ) determined that all four claims stated prima facie violations of Minn. Stat. § 211B.06, and the chief ALJ ordered that the four claims be joined for disposition under Minn. Stat. § 211B.33, subd. 4 (2004). A panel of ALJs granted Walsh's motion to dismiss the claim against her and granted Riley's motion to add claims against relators and Leonard Jankowski for failing to have a proper disclaimer on the campaign material as required by Minn. Stat. § 211B.04 (2004).

Following a two-day evidentiary hearing on the complaints, a panel of ALJs issued an order that dismissed the claims against Leonard Jankowski; found that relators had violated Minn. Stat. §§ 211B.04 and .06; ordered relators to each pay civil penalties of $2,400 for violating Minn. Stat. § 211B.06 and $600 for violating Minn. Stat. § 211B.04; and referred the

matter to the Hennepin County Attorney's Office for further consideration pursuant to Minn. Stat. § 211B.35, subd. 2 (2004). This certiorari appeal follows.

ISSUES

I. Does the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 (2004) violate the separation-of-powers doctrine expressed in article III, section 1, of the Minnesota Constitution?

II. Were relators' rights to trial by jury violated in the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37?

III. Were relators' First Amendment rights violated in the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37?

IV. Did respondent Riley lack standing to file a complaint under Minn. Stat. § 211B.32?

V. Did the ALJ panel that heard respondent Riley's complaint err in finding that relators violated Minn. Stat. § 211B.06, subd. 1 (2004)?

VI. Is the disclaimer requirement of Minn. Stat. § 211B.04 (2004) an unconstitutional restriction on relators' First Amendment rights?

ANALYSIS

Relators argue that the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 (2004) violates the separation-of-powers doctrine expressed in article III, section 1, of the Minnesota Constitution.

> We review a statute's constitutionality de novo. We presume statutes to be constitutional and exercise the power to declare a statute unconstitutional with extreme caution and only when absolutely necessary. The party challenging the constitutionality of the statute bears the burden of establishing beyond a reasonable doubt that the statute violates a constitutional right.

ILHC of Eagan, L.L.C. v. County of Dakota, 693 N.W.2d 412, 421 (Minn. 2005) (quotations and citations omitted).

In the hearing process, the OAH, an executive-branch agency, considers complaints alleging violations of Minn. Stat. §§ 211A.01 to .14 (2004), which establish financial-reporting requirements for political candidates and committees acting to influence the election of political candidates or to promote or defeat a ballot question, and Minn. Stat. §§ 211B.01 to .21 (2004), which regulate campaign practices. To initiate the hearing process, "[a] complaint alleging a violation of chapter 211A or 211B must be filed with the [OAH]." Minn. Stat. § 211B.32, subd.

1. If an expedited probable-cause hearing is not required, [1] the ALJ assigned to review the complaint must hold a probable-cause hearing on the complaint not later than 30 days after receiving the assignment. Minn. Stat. § 211B.34, subd. 1. If the ALJ determines that "[t]here is probable cause to believe that the violation of law alleged in the complaint has occurred . . . the chief administrative law judge must schedule the complaint for an evidentiary hearing under section 211B.35." Minn. Stat. § 211B.34, subd. 2(b). An evidentiary hearing under section 211B.35 is a hearing before a panel of three ALJs. Minn. Stat. § 211B.35, subd. 1.

> The panel must determine whether the violation alleged in the complaint occurred and must make at least one of the following dispositions:
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> (a) The panel may dismiss the complaint.
> (b) The panel may issue a reprimand.
> (c) The panel may find that a statement made in a paid advertisement or campaign material violated section 211B.06.
> (d) The panel may impose a civil penalty of up to $5,000 for any violation of chapter 211A or 211B.
> (e) The panel may refer the complaint to the appropriate county attorney.

Id., subd. 2.

> A party aggrieved by a final decision on a complaint . . . is entitled to judicial review of the decision as provided in sections 14.63 to 14.69; however, proceedings on a complaint . . . are not a contested case within the meaning of chapter 14 and are not otherwise governed by chapter 14.

Minn. Stat. § 211B.36, subd. 5.

I.

Relators contend that the authority exercised by the OAH in the hearing process is different from the authority exercised by the OAH in other administrative proceedings because the hearing process does not involve an administrative agency that regulates or oversees campaign practices. Instead, the OAH considers individual complaints alleging statutory violations, finds facts and determines whether statutory provisions have been violated, and issues final decisions regarding the complaints. Relators contend that as a matter of constitutional law, the inherently judicial functions of hearing and deciding charges alleging violations of chapters 211A and 211B cannot be delegated to an agency in the executive branch of state government.

Minnesota Constitution article III, section 1 states:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the

> others except in the instances expressly provided in this Constitution.

The Minnesota Supreme Court has explained the limits of legislative authority to delegate quasi-judicial power to the executive branch of state government. In *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719 (1949), which involved an action brought by an injured employee against her employer, the supreme court considered whether the legislature's delegation of quasi-judicial powers to the industrial commission, an administrative body, violated article III, section 1, of the state constitution. The powers delegated to the commission included the power to determine facts and apply the law to the facts in employment-accident controversies. *Id.* at 433, 35 N.W.2d at 734. The supreme court explained:

> These powers of determination do not partake of the finality of an adjudication, in that the commission is without final authority to decide and render an enforceable judgment, which is the essence of the judicial power. [The commission's] awards and determinations are not enforceable by execution or other process until a binding judgment is entered thereon by a regularly constituted court. Administrative or quasi-judicial determinations which are merely preparatory to an order or judgment to be rendered by a court cannot be properly termed judicial. In addition, the legislature not only denied an enforceable finality to the commission's powers of factual determination, but also made their exercise subordinate to the judiciary by providing for a review by certiorari by this court of errors of law and on the ground that the commission's findings or orders are unsupported by the evidence. . . . In *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 401, 97 N.E. 602, 607, 39 L.R.A., N.S., 694 (1912), the court observed: * * * What is judicial power cannot be brought within the ring-fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power. * * * [M]any boards hear and determine questions affecting private as well as public rights, * * *. The authority to ascertain facts and apply the law to the facts when ascertained pertains as well to other departments of government as to the judiciary.

Id. at 432-33, 35 N.W.2d at 733-34 (quotations and citations omitted).

The supreme court held that vesting these quasi-judicial powers in the industrial commission is not in violation of state constitutional provisions for the division of the powers of government or for the vesting of the judicial power in the courts, as long as the commission's awards and determinations are not only subject to review by certiorari, but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court.

Id. at 433, 35 N.W.2d at 734.

In *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 222 (Minn. 1979), the petitioners argued that the existence of the tax court as an independent agency of the executive branch of state government violated the separation-of-powers doctrine in article III, section 1, of the state constitution. In holding that the existence of the tax court did not violate the separation-of-powers doctrine, the supreme court stated:

> We believe that the criteria set out in *Breimhorst* mark the outside limit of allowable quasi-judicial power in Minnesota.
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> That decision was mandated in great part by the important social issues presented. The critical need for a method of compensating victims of work-related accidents justified the delegation in that case. Such a pressing need is not present here.
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> This case presents additional problems because of the legal effect of Tax Court decisions. Unlike decisions of most administrative agencies, such as the one reviewed in *Breimhorst*, which require judicial enforcement, Tax Court decisions, upon filing, automatically become orders of the court. It is precisely this type of impingement by other branches of government on the judiciary that concerns us.
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> In view of the aforementioned, we are reticent to approve such a legislative scheme. There are, however, additional factors which influence our decision. One is the unique nature and history of taxation. . . .
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> * * * Taxation is primarily a legislative function, and the steps taken under the authority of the legislature are administrative in character, in which judicial assistance may be invoked as a matter of convenience, because, with its assistance, the rights of parties and the interests of the public can be best protected and conserved. But the legislature might have authorized such proceedings to be conducted from beginning to end before or by administrative officers or bodies. Such functions are not judicial in the strict sense.
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> Recognizing that this feature of taxation does distinguish it from many other areas of present or future administrative adjudication, we have more latitude in permitting such delegation.

Id. at 223-24 (quotation omitted).

Citing two provisions of the state constitution, the petitioners also argued in *Wulff* that the existence of the tax court unconstitutionally encroached on the jurisdiction of the district court. The statute that created the tax court provided:

> The tax court shall have statewide jurisdiction. Except for an appeal to the supreme court or any other appeal allowed under this subdivision, the tax court shall be the sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state, as defined in this subdivision, in those cases that have been appealed to the tax court and in any case that has been transferred by the district court to the tax court.

Id. at 224 (quoting Minn. Stat. § 271.01, subd. 5 (Supp. 1977)). [2]

Under the state constitution, "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws." Minn. Const. art. I, § 8. The constitution also provides that "[t]he district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law." Minn. Const. art. VI, § 3. The petitioners in *Wulff* argued that when read together, these provisions require the district court to exercise its jurisdiction in tax cases, and any statutory provision purporting to allow a transfer to the tax court must be void. 288 N.W.2d at 224. In rejecting this argument, the supreme court explained:

> By providing this power to transfer, the legislature is not encroaching on the original jurisdiction of the district court. Because this power is discretionary, the decision to hear a case or to transfer it is entirely the court's. This legislative grant takes nothing from the district court that it does not voluntarily relinquish. At the same time, we find no violation of Minn. Const. art. 1, s 8, since an individual with a tax dispute does not go remediless. A remedy is provided by the tax court, subject to and including judicial review.
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> In analyzing the framework created by the tax statutes in question, it is crucial to note that the taxpayer always has the option to file in district court. This is perhaps the saving feature of this statutory scheme. Because the taxpayer has this opportunity to elect a judicial determination, because any transfer to the Tax Court is discretionary with the district court, and because there is always an ultimate check on administrative power in the form of review as of right in this court, we are satisfied that the Tax Court statute does not usurp judicial functions nor deprive taxpayers of constitutional rights. Therefore, in its present form, it is not an impermissible delegation by the legislature.

Id. at 224-25 (citation omitted).

More recently, in *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999), the supreme court held that an administrative child-support process violated the separation-of-powers doctrine. The supreme court explained that the statute that created the administrative process gave ALJs

> "all powers, duties, and responsibilities conferred on judges of district court to obtain and enforce child and medical support and parentage and maintenance obligations," including the power to issue subpoenas, conduct proceedings according to administrative rules in district court courtrooms, and issue warrants for failure to appear. In addition, ALJs may modify child support orders, even those granted by district courts. While ALJs cannot preside over contested parentage and contempt proceedings, they can grant stipulated contempt orders and uncontested parentage orders if custody and visitation are also uncontested.

Id. at 723 (quoting Minn. Stat. § 518.5511, subd. 1(e) (1996)) (citations omitted). Also, ALJ orders were "appealable to the court of appeals in the same manner as district court decisions, rather than by writ of certiorari." *Id.* at 722.

The *Holmberg* court held that the administrative child-support process violated the constitutional constraints on separation of powers for three separate and independent reasons: the administrative process infringed on the district court's original jurisdiction; ALJ jurisdiction was not inferior to the district court's jurisdiction; and the administrative process empowered nonattorneys to engage in the practice of law, "infringing on the court's exclusive power to supervise the practice of law." *Id.* at 726. The court explained:

> In determining if the original jurisdiction of the courts is being usurped, we look at the origins of the rights and relief, equitable or statutory, an agency oversees. . . . The *Wulff* court determined that the type of function delegated, judicial or legislative, plays a critical role in determining whether an administrative action impinges on the district court's original jurisdiction.
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> Unlike the tax court, the administrative child support process encompasses an area of the law which arises in equity. Family dissolution remedies, including remedies in child support decisions, rely on the district court's inherent equitable powers. Thus, cases involving family law fall within 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.
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> . . . .

> . . . . Minnesota's administrative child support process is mandatory for many parties, removing from the district court a class of cases that fall within its original jurisdiction. Further, under Minnesota's administrative process, ALJs are not only given powers which inherently belong to the district court, but they are placed on par with district courts in deciding child support cases. The statute explicitly grants ALJs all powers, duties, and responsibilities conferred on judges of district court to handle child support cases. Arguably, ALJs are even superior in some respects as ALJs are empowered to modify child support orders granted by district courts. Finally, ALJ child support orders are given the same deference as district court orders -- they are appealable by right and reviewed by the court of appeals under an abuse of discretion standard.
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> . . . .
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> The indicia that the *Breimhorst* court utilized in determining whether there was adequate judicial oversight are neither exclusive nor rigid. Rather, the *Breimhorst* court's analysis points to the importance of a flexible review standard when considering whether a statute violates separation of powers. While supreme court decisions following *Breimhorst* have relied, in part, on public policy to affirm legislatively created administrative schemes, they have also been shaped by the existence of adequate judicial checks on administrative actors, the function delegated, ALJ decision appealability, voluntariness of entry into the administrative system, and whether the legislative delegation is comprehensive or piecemeal.

Id. at 724-25 (quotation and citations omitted).

a. Citing *Holmberg*, relators argue that because the complaint filed against them with the OAH alleges a violation of Minn. Stat. § 211B.06 (gross misdemeanor to intentionally participate in production or dissemination of false political advertising or campaign material), delegating adjudication of the complaint to the OAH is an unconstitutional delegation of the district court's original jurisdiction in criminal cases. But the fact that the OAH has been given authority to determine whether Minn. Stat. § 211B.06 has been violated does not mean that the proceeding before the OAH is a criminal case.

Relators' argument appears to be based on a misreading of Minn. Stat. § 211B.32, subd. 1, which requires a complaint alleging a violation of chapter 211A or 211B to be filed with the OAH and states that "[t]he complaint must be finally disposed of by the [OAH] before the alleged violation may be prosecuted by a county attorney." Relators appear to read this subdivision to mean that filing a complaint in the OAH is a necessary first step in a criminal prosecution for violating chapter 211A or 211B. But a county attorney may prosecute violations

of chapter 211A and 211B. Minn. Stat. §§ 211A.08, subd. 3, 211B.16, subd. 3. And the plain language of Minn. Stat. § 211B.32, subd. 1, requires only that when a complaint has been filed, the OAH must finally dispose of the complaint before a county attorney can prosecute the same alleged violation. Nothing in the statutory language requires a county attorney to wait for a complaint to be filed before prosecuting a violation or limits a county attorney's authority to prosecute an alleged violation when no complaint has been filed or after a final disposition under Minn. Stat. § 211B.35. The statute only requires that the administrative process and a criminal prosecution not occur simultaneously.

Even if we consider the language of Minn. Stat. § 211B.32, subd. 1, to be ambiguous, we conclude that the legislature did not intend the proceeding in the OAH to be a criminal proceeding because the legislature specifically provided that in a proceeding in the OAH, the standard of proof for an alleged violation of Minn. Stat. § 211B.06 is clear and convincing evidence and the standard of proof for any other alleged violations of chapter 211A or 211B is a preponderance of the evidence. Minn. Stat. § 211B.32, subd. 4. The supreme court has explained that the Due Process Clause of the United States Constitution requires that to convict a defendant of a crime, the state must prove beyond a reasonable doubt all of the elements of the offense with which the defendant is charged. *State v. Clausen*, 493 N.W.2d 113, 116 (Minn. 1992). And in ascertaining the intention of the legislature, we may presume that "the legislature does not intend to violate the Constitution of the United States or of this state." Minn. Stat. § 645.17(3) (2004). Therefore, the legislature could not have intended the proceeding in the OAH to be a criminal prosecution because a criminal prosecution would require proof beyond a reasonable doubt, and the legislature explicitly required other standards of proof.

Because the proceeding in the OAH is not a criminal prosecution, delegating the adjudication of complaints filed under Minn. Stat. § 211B.32, subd. 1, to the OAH is not an unconstitutional delegation of the district court's original jurisdiction in criminal cases. A proceeding in the OAH and a criminal prosecution for any violation of chapter 211A or 211B are separate proceedings.

b. Relators argue that Minn. Stat. §§ 211B.31 to .37 establish a court that is not inferior to the district court, in violation of Minn. Const. art. III, § 1, and Minn. Const. art. VI, § 1, and that here, as in *Holmberg*, ALJs are placed on a par with district courts in deciding whether a criminal statute has been violated.

Minnesota Constitution article VI, section 1, states, "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."

Relators contend that the factors that the *Holmberg* court considered when determining whether the child-support administrative-review process violated the separation-of-powers doctrine included the function delegated; the appealability of ALJ decisions; the adequacy of judicial checks on administrative actors; the voluntariness of entry into the administrative system; and whether the legislative delegation was comprehensive or piecemeal. Relators argue that applying these factors to the administrative-review process established under Minn. Stat. §§

211B.31 to .37 demonstrates that the legislature has established an adjudicative body with powers that are not inferior to the district court.

(1) Relators argue that there are no checks on the ALJ panels at the district court level and that an order from an ALJ panel has judicial finality. But relators also acknowledge that a party who is aggrieved by a final decision of an ALJ panel "is entitled to judicial review of the decision as provided in [Minn. Stat. §§] 14.63 to 14.69." Minn. Stat. § 211B.36, subd. 5. Minn. Stat. §§ 14.63 to .69 (2004) provide for review of final administrative decisions in this court by writ of certiorari. The supreme court held in *Breimhorst* that vesting quasi-judicial powers in the executive branch did not violate the separation-of-powers doctrine or the constitutional requirement for vesting judicial power in the courts as long as the executive-branch decisions "are not only subject to review by certiorari, but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court." *Breimhorst*, 227 Minn. at 433, 35 N.W.2d at 734. An order from an ALJ panel is subject to review by certiorari, and relators have neither argued nor demonstrated that an order from an ALJ panel is enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court. Because relators have not shown that either of the *Breimhorst* requirements is absent from a proceeding in the OAH, the absence of checks on the ALJ panels at the district court level is of no consequence.

(2) Relators argue that the function delegated to the ALJ panels is the power to determine whether a criminal statute has been violated and to finally dispose of a criminal case by issuing a fine, which, relators contend, is an inherently judicial function. But, as we have already discussed, the proceeding in the OAH is not a criminal proceeding, and, therefore, any disposition rendered by an ALJ panel cannot be the final disposition of a criminal case. Furthermore, one of the statutory dispositions that an ALJ panel may make is to "refer the complaint to the appropriate county attorney." Minn. Stat. § 211B.35, subd. 2(e). If the legislature had intended the disposition made by an ALJ panel to be the final disposition of a criminal case, there would be no reason for allowing the panel to refer the complaint to a county attorney.

Also, relators' contention that an ALJ panel may dispose of a complaint by issuing fines ignores the plain language of the statute, which states, "The panel may impose a civil penalty of up to $5,000 for any violation of chapter 211A or 211B." Minn. Stat. § 211B.35, subd. 2(d). Although calling the penalty that an ALJ panel may impose a civil penalty, rather than a fine, does not, by itself, mean that a proceeding before the panel is a civil proceeding, the Minnesota Supreme Court has explained that

> [i]n determining whether an action is "criminal or civil," the intent of the legislature and the purpose of the penalty controls. *United States v. Ward*, 448 U.S. 242, 248-49, 100 S. Ct. 2636, 2641, 65 L.Ed.2d 742 (1980). The Supreme Court has emphasized that only upon the "clearest proof" will the assessment of a penalty convert a civil action into a criminal one.

State by Humphrey v. Alpine Air Prods., Inc., 500 N.W.2d 788, 792 (Minn. 1993). The supreme court has also identified the following factors to be considered when determining whether a penalty converts a civil action into a criminal action:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only upon a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions."

Id. (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567 (1963) (citations omitted)). Considering these factors, we do not find the clear proof needed to persuade us that the civil penalty that an ALJ panel may impose converts the proceeding before the panel from a civil proceeding into a criminal proceeding.

The civil penalty that an ALJ panel may impose does not involve any affirmative restraint. Although paying money is a punishment, it has historically been viewed as serving nonpunitive purposes. *Alpine Air Prods.*, 500 N.W.2d at 792. Some violations of chapters 211A and 211B require a finding of scienter and some do not. Presumably, a civil penalty will deter violations of chapters 211A and 211B, but these violations are already subject to criminal penalties under Minn. Stat. §§ 211A.11 and 211B.19, and the civil penalty permitted under Minn. Stat. § 211B.35, subd. 2(d), is rationally connected to the alternative purpose of providing a range of dispositions in an expeditious proceeding for considering complaints alleging violations during the course of ongoing political campaigns, when it is unlikely that either a civil or criminal action could be completed before election day. Finally, the maximum $5,000 civil penalty does not appear excessive in relation to this purpose.

(3) Quoting two phrases from *Holmberg*, 588 N.W.2d at 726, relators contend that "the Court in *Holmberg* held that 'the right to appellate review does not provide sufficient judicial oversight . . .' because 'many participants in the administrative process lack the resources to mount an appeal.'" Relators argue that the same is true here in that the typical respondent in a proceeding before the OAH "would be a political candidate who has already likely overextended himself or herself for the campaign" and who "would be especially hard pressed to pursue an appeal." But in making this argument, relators have quoted the two phrases from *Holmberg* out of context and have misstated the basis for the holding in *Holmberg*. The two phrases that relators quoted appear in the following paragraph from *Holmberg*:

> Under the criteria by which our court has measured the constitutional validity of specific statutory schemes, the administrative child support process raises grave separation of powers concerns. With its creation of the administrative process,

> the legislature has delegated to an executive agency the district court's inherent equitable power. This delegation infringes on the district court's original jurisdiction. Not only are ALJs given responsibilities and powers comparable to a district court, but ALJs also have the power to modify district court decisions. Finally, although appellants encourage us to rely on the availability of appellate review to conclude that there is adequate judicial supervision of the administrative process, *the right to appellate review does not provide sufficient judicial oversight* of this mandatory, albeit piecemeal, process. We find their contention particularly troubling in this instance, as *many participants in the administrative process lack the resources to mount an appeal.*

588 N.W.2d at 725-26 (emphasis added).

When the two quoted phrases are read in the context of the entire paragraph in which they appear, it is apparent that the supreme court did not hold in *Holmberg* that the right to appellate review does not provide sufficient judicial oversight *because* many participants in the administrative process lack the resources to mount an appeal. The supreme court found multiple reasons why appellate review did not provide sufficient judicial oversight to overcome the separation-of-powers concerns arising out of the administrative process in *Holmberg* and merely observed that the claim that appellate review was sufficient to overcome these concerns became even more troubling when many of the people who used the administrative process lacked the resources to mount an appeal to obtain even this insufficient oversight.

(4) Citing a concurring opinion in *Meath v. Harmful Substance Compensation Bd.*, 550 N.W.2d 275, 284 (Minn. 1996) (Anderson, J., concurring), relators argue that the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 violates the separation-of-powers doctrine because a respondent to a complaint is an involuntary participant in a quasi-criminal proceeding. But involuntary participation in an administrative process does not indicate a separation-of-powers violation when a decision rendered in the administrative process is subject to judicial review.

The concurring opinion in *Meath* recognized two different circumstances under which actions taken by an administrative entity are not "judicial" acts because the actions are not final. The first circumstance was present in *Breimhorst* and *Wulff*, where the administrative actions taken were not final because judicial review was available. *Id.* The second circumstance was present in *Meath*, where the administrative action taken was not final because the administrative mechanism was entirely voluntary and the administrative entity was not the final arbiter of whether Meath was entitled to receive compensation. *Id.* Under both circumstances, the issue was whether the administrative entity's acts were "judicial" acts because the parties were bound by the entity's decision. Either the availability of judicial review or an administrative mechanism that is entirely voluntary indicates that the parties are not bound by an administrative entity's acts; in the first case because the administrative decision is subject to judicial review, and in the second case because the administrative proceeding is voluntary and may be avoided entirely. Consequently, even though the respondent's participation in a hearing before an ALJ

panel is involuntary, the decision of the panel is not a "judicial" act because the decision is subject to review by certiorari in this court.

(5) Finally, relators argue that by failing to apply the hearing process established under Minn. Stat. §§ 211B.31 to .37 to other election statutes, the legislature established a piecemeal process for enforcing election statutes. The only other election statute that relators cite is chapter 10A, Minn. Stat. §§ 10A.01 to .37 (2004), which regulates campaign finance and public disclosure of expenditures related to political activity. Section 10A.02 creates the Campaign Finance and Public Disclosure Board and grants the board authority to enforce the provisions of sections 10A.01 to .37. The authority of the board with respect to sections 10A.01 to .37 appears similar in some respects to the authority of the OAH with respect to chapters 211A and 211B, and it is not apparent why the legislature chose to grant authority for regulating campaign activity to more than one administrative entity.

But considering all of the factors that relators have cited as reasons why the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 violates the separation-of-powers doctrine, we conclude that the process is much more similar to the process in *Breimhorst*, which the supreme court concluded did not violate the separation-of-powers doctrine, than to the process that the supreme court invalidated in *Holmberg*.

The powers of the ALJs in *Holmberg* significantly exceeded the powers granted to ALJs under Minn. Stat. §§ 211B.31 to .37. As the supreme court stated in *Holmberg*, the statute that created the child-support administrative review process explicitly granted "ALJs all powers, duties, and responsibilities conferred on judges of district court to handle child support cases. Arguably, ALJs are even superior in some respects as ALJs are empowered to modify child support orders granted by district courts." *Holmberg*, 588 N.W.2d at 724-25 (quotation and citation omitted). In contrast, ALJs considering unfair-campaign-practices complaints only have authority to hear evidence and determine whether the violation alleged in the complaint occurred, and, depending on their determination, render one or more of five specific statutory dispositions. Unlike the ALJs in *Holmberg*, they cannot modify a district court decision; their decisions are not granted the same deference as a district court order on appeal; and they do not take the place of the district court in criminal proceedings to enforce the provisions of chapters 211A and 211B as the *Holmberg* ALJs did in certain child-support cases.

c. Relators argue that Minn. Stat. §§ 211B.31 to .37 violate the separation-of-powers doctrine by removing from the executive branch the power to decide whom to prosecute and what offenses to charge. "Under our separation of powers doctrine, the power to decide whom to prosecute and what charge to file resides with the executive branch." *Johnson v. State*, 641 N.W.2d 912, 917 (Minn. 2002). Relators contend that the statute delegates executive-branch power to unelected and unaccountable citizens by permitting private citizens to commence and maintain private prosecutions for alleged violations of the criminal law.

Like relators' argument that Minn. Stat. §§ 211B.31 to .37 usurp the district court's original jurisdiction in criminal cases, this argument appears to be based on the mistaken belief that filing a complaint in the OAH is the necessary first step in a criminal prosecution for violations of chapters 211A and 211B. As we have already explained, a proceeding in the OAH

is not a criminal proceeding, and Minn. Stat. §§ 211B.31 to .37 do not alter a county attorney's authority to prosecute violations of chapters 211A and 211B. Minn. Stat. §§ 211B.31 to .37 do not permit private citizens to commence criminal prosecutions.

We conclude that relators have not met their burden of establishing beyond a reasonable doubt that the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 violates the separation-of-powers doctrine.

II.

Relators argue that their right to trial by jury was violated by the administrative hearing process established under Minn. Stat. §§ 211B.31 to .37. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." Minn. Const., art. I, § 6. The right to a jury trial extends "to all prosecutions for which the maximum authorized penalty is incarceration." *State v. Weltzin*, 630 N.W.2d 406, 410 (Minn. 2001). Relators contend that because a violation of Minn. Stat. § 211B.06, subd. 1, is a gross misdemeanor, and a person convicted of a gross misdemeanor for which no other punishment is provided may be sentenced "to imprisonment for not more than one year," Minn. Stat. § 609.03(2) (2004), they had a right to a jury trial on the claim that they violated Minn. Stat. § 211B.06, subd. 1. But, as we have already explained, a proceeding under Minn. Stat. §§ 211B.31 to .37 is not a criminal prosecution. Relators are not entitled to a jury trial under Minn. Const., art. I, § 6.

Relators argue that if the administrative-hearing process is a civil proceeding, they are entitled to a jury trial under Minn. Const. art. I, § 4, which states, "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy."

"This provision is intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when our constitution was adopted in 1857." *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002). It does not apply to rights and remedies later created by the legislature. *See Hawley v. Wallace*, 137 Minn. 183, 184-87, 163 N.W. 127, 128-29 (1917) (election contest based on violation of corrupt practices act); *see also Breimhorst*, 227 Minn. 433-34, 35 N.W.2d at 734 (workers' compensation).

Relators cite no authority that the rights and remedies provided by the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 existed when the Minnesota Constitution was adopted. Instead, they argue that the complaint against them alleged a violation of Minn. Stat. § 211B.06, which, they contend, is virtually identical with a defamation claim, and, therefore, makes the complaint a cause of action at law for which they are entitled to a jury trial. We disagree.

Minn. Stat. § 211B.06, subd. 1, states:

> A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

"In order for a statement to be considered defamatory it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him in the estimation of the community." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Proving a violation of Minn. Stat. § 211B.06, subd. 1, is distinguishable from a defamation action in that there is no need to prove that an alleged false statement harmed a person's reputation. Relators are not entitled to a jury trial under Minn. Const. art. I, § 4.

III.

Relators argue that the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 is an unconstitutional intrusion on their First Amendment rights. Citing *Brown v. Hartlage*, 456 U.S. 45, 61, 102 S. Ct. 1523, 1533 (1982), relators contend that the administrative process establishes a system of absolute accountability for factual misstatements. In *Brown*, the Supreme Court considered whether a county-commissioner candidate's First Amendment rights were violated by a Kentucky statute that, among other things, prohibited political candidates from promising "money or other thing of value, either directly or indirectly, to any person in consideration of the vote . . . of that person." *Id.* at 49, 102 S. Ct. at 1527. During the course of a political campaign, the county-commissioner candidate stated that one of his first official acts would be to lower the salary of a county commissioner. Upon learning that his statement arguably violated the statute that prohibited any promise of money to any person in consideration of the person's vote, the candidate issued a statement rescinding his pledge to reduce the county-commissioner salary. *Id.* at 48, 102 S. Ct. 1526-27. After the candidate won the election, the losing candidate filed an action alleging that the promise to lower the county-commissioner salary violated the statute and seeking to have the election declared void. *Id.* at 49, 102 S. Ct. at 1527. The Kentucky courts ultimately concluded that the candidate's statement promising to lower the county-commissioner salary was not constitutionally protected and granted the losing candidate his requested relief. *Id.* at 50-52, 102 S. Ct. at 1527-28.

The United States Supreme Court concluded that the Kentucky statute was applied to limit the candidate's speech in violation of the First Amendment and reversed the decision of the Kentucky courts. *Id.* at 62, 102 S. Ct. at 1533. In reaching this conclusion, the Supreme Court explained,

> The Commonwealth of Kentucky has provided that a candidate for public office forfeits his electoral victory if he errs in announcing that he will, if elected, serve at a reduced salary. As the Kentucky courts have made clear in this case, a candidate's liability under [the statute] for such an error is absolute: His election victory must be voided even if the offending statement was made in good faith and was quickly repudiated. The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. . . . There has been no showing in this case that [the candidate] made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not. Moreover, [the candidate] retracted the statement promptly after discovering that it might have been false. Under these circumstances, nullifying [the candidate's] election victory was inconsistent with the atmosphere of robust political debate protected by the First Amendment.

Id. at 61-62, 102 S. Ct. at 1533.

We read the Supreme Court's use of the phrase "absolute accountability for factual misstatements" as part of the court's explanation why the Kentucky statute infringed on the candidate's First Amendment rights; we do not understand the phrase to be used in relation to any procedural requirements. Minn. Stat. §§ 211B.31 to .37 establish an administrative-hearing process for considering alleged violations of the substantive provisions of chapters 211A and 211B; they do not establish substantive law.

Relators have not met their burden of establishing beyond a reasonable doubt that the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 is an unconstitutional intrusion on their First Amendment rights.

IV.

Relators argue that Riley lacked standing to file a complaint under Minn. Stat. § 211B.32. But relators did not raise this issue before the ALJ panel. Generally, failure to raise an issue in an administrative proceeding precludes review on appeal. *REM-Canby, Inc. v. Minn. Dept. of Human Servs.*, 494 N.W.2d 71, 76 (Minn. App. 1992), *review denied* (Minn. Feb. 25, 1993). Also, relators have not cited any authority that addresses standing to seek relief in an administrative proceeding; the authorities that they have cited address standing to seek judicial relief. Relators have waived the standing issue that they raise for the first time on appeal.

V.

The ALJ panel determined that relators violated Minn. Stat. § 211B.06, subd. 1, and ordered each of them to pay a $2,400 civil penalty for the violations. Relators argue that the ALJ panel's conclusion that relators violated Minn. Stat. § 211B.06, subd. 1, is based on erroneous findings that relators made a false statement and that they made the statement with actual malice.

> Actual malice is a term of art; it means that the defendant acted with knowledge that the publication was false or with reckless disregard of whether it was false or not. For example, as the Supreme Court has noted, a statement may have been made with actual malice if it is fabricated by the defendant, is the product of his imagination, * * * is based wholly on an unverified anonymous telephone call [or if] the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Moreover, actual malice does not mean that the defendant acted with ill will or spite.
>
> Notably, the standard for reckless disregard for truth is a subjective one; reckless disregard does not mean recklessness in the ordinary sense of extreme negligence. Instead, reckless disregard requires that a defendant make a statement while subjectively believing that the statement is probably false.

Chafoulias v. Peterson, 668 N.W.2d 642, 654-55 (Minn. 2003) (citations and quotations omitted). *Chafoulias* involved a defamation claim, and although we have already determined that a complaint filed in the OAH alleging a violation of Minn. Stat. § 211B.06, subd. 1, is not a defamation action, the plain language of Minn. Stat. § 211B.06, subd. 1, includes the definition of actual malice set forth in *Chafoulias*, and we see no reason why actual malice should be analyzed differently here than in a defamation action.

Under Minn. Stat. § 211B.06, subd. 1:

> A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate . . . that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office . . . that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In a hearing before an ALJ panel, the complainant bears the burden of proof, and a violation of Minn. Stat. § 211B.06 relating to false statements in campaign materials must be proved by clear and convincing evidence. Minn. Stat. § 211B.32, subd. 4. This means that to prove that relators violated Minn. Stat. § 211B.06, subd. 1, the complainant needed to prove by clear and convincing evidence that the campaign materials that relators distributed contained a

statement that was false and either that relators knew that the statement was false or that they recklessly disregarded whether the statement was false.

The ALJ panel concluded that "[t]he Complainant has shown by clear and convincing evidence that the cover letter [in the materials distributed to Greenfield residents] contained a false statement, namely, that Swanson, Mattila and Sykes attempted to use their elected positions to allow Swanson and Mattila to profit illegally." The panel also found that "[t]he Complainant has shown by clear and convincing evidence that [relators] knew that no illegal conduct was committed or attempted by Swanson, Mattila and Sykes or they communicated the false statement with reckless disregard for its falsity."

In a memorandum, the panel explained its findings:

> There is no evidence in the record that either Swanson or Mattila attempted to engage in illegal conduct. Instead the record established that they appropriately sought legal advice from the City Attorney and acted reasonably based on that advice. When the City Attorney's advice changed, Swanson and Mattila took no further action with respect to their interest in the Siwek property. Swanson and Mattila did not intend to do anything illegal and their preliminary inquiries regarding the property and subsequent recusal at the December 16 City Council meeting cannot properly be characterized as an attempt to engage in illegal conduct.
>
> Respondents Plack and Stephen Jankowski were aware prior to October 2004 that neither Swanson nor Mattila submitted a bid on the Siwek property. They were also aware that the most Mattila did with respect to purchasing the Siwek lots was to orally express an interest in the property and to recuse himself from the decision to begin negotiations at the December 16, 2003 City Council meeting. Nothing in Swanson or Mattila's behavior can fairly be characterized as "attempting to illegally profit from their elected positions." This is a very serious allegation. The Complainant has established by clear and convincing evidence that Respondent Plack and Stephen Jankowski knew the statement was false or at least communicated the statement with a reckless disregard of whether it was false.
>
> Respondents Plack and Stephen Jankowski also accused Cindy Sykes of "attempting to allow the illegal profiting." The evidence established that all Ms. Sykes did was take over the running of the December 16, 2003 City Council meeting once Mayor Swanson recused himself and vote along with the other Council members in support of the motion to authorize staff to begin negotiations with parties interested in purchasing the Siwek property. Nothing in this conduct amounts to "allowing" Swanson

> and Mattila to "attempt to illegally profit from their elected positions."
>
> . . . Even if Plack and Stephen Jankowski believed the accusation (as they testified), they did so only with a distorted interpretation of Swanson's, Mattila's and Sykes' actions and they must bear the consequences of their reckless disregard for whether the accusation was false.

This explanation demonstrates that the ALJ panel incorrectly analyzed whether relators acted with actual malice. The first three paragraphs of the explanation address whether it was true that there was an attempt to engage in illegal conduct. A false statement is a required element of a violation of Minn. Stat. § 211B.06, subd. 1, and the ALJ panel needed to determine whether the statement was false. But whether the statement was false was not the issue to be decided with respect to actual malice. When determining whether relators acted with actual malice, the issue was whether relators knew that the statement that Swanson, Mattila, and Sykes attempted to use their elected positions to allow Swanson and Mattila to profit illegally was false or made the statement with reckless disregard of whether it was false or not. Even if everything that Swanson, Mattila, and Sykes did was completely legal, if relators did not understand the applicable law, they could mistakenly believe that there was an attempt to act illegally and, consequently, they would not know that their statement was false.

The ALJ panel found that at the December 16, 2003 council meeting, Carson informed the council that Swanson and Mattila had made inquiries regarding the Siwek property and that Sykes took over running the council meeting and voted to authorize city staff to begin negotiations with people interested in purchasing the Siwek property. Relator Plack was at the meeting, and after learning that Swanson and Mattila were considering bidding on the Siwek property, Plack called the state auditor's office and spoke with David Kenney, an attorney with the office, who "indicated to Plack that the sale of city owned property to the Mayor or a council person would not be legal." The panel also found that in January 2004, Kenney called city attorney Carson and "told Carson that it was the position of the State Auditor's Office, as well as the Attorney General's Office and the League of Minnesota Cities, that cities could not sell land to members of the city council or the Mayor." The panel found that following this communication from Kenney,

> Carson informed Swanson and Mattila that it was the position of the League of Minnesota Cities, the State Auditor and the Attorney General that it is a conflict for cities to sell real estate to council members. Given this, Carson advised both Swanson and Mattila not to bid on the Siwek property. Based on this advice, Swanson and Mattila took no further action with respect to bidding on the Siwek property.

We do not disagree with the ALJ panel that these events could demonstrate that Swanson and Mattila did not intend to do anything illegal and that as soon as they learned that their purchasing the property would be a conflict of interest, they abandoned any attempt to do so.

But the events could also be perceived by relators as demonstrating that with Sykes' assistance at the December 16 council meeting, Swanson and Mattila took preliminary steps to attempt to purchase the Siwek property, which Plack learned from the state auditor's office would not be legal, and abandoned their purchase attempts after the state auditor's office informed the city attorney that cities could not sell land to members of the city council or the mayor.

Because relators could perceive these events in this way, the ALJ panel's findings do not support its conclusion that relators knew that their statement was false. The ALJ panel concluded that relators could believe their accusation "only with a distorted interpretation of Swanson's, Mattila's and Sykes' actions and they must bear the consequences of their reckless disregard for whether the accusation was false." But this conclusion fails to recognize that with respect to actual malice, "'reckless disregard' does not mean 'recklessness' in the ordinary sense of extreme negligence. Instead, 'reckless disregard' requires that a defendant make a statement while subjectively believing that the statement is probably false." *Chafoulias*, 668 N.W.2d at 654-55 (citations omitted). Instead of determining whether relators subjectively believed that their accusation was probably false, the ALJ panel determined whether relators' claimed interpretation of Swanson's, Mattila's, and Sykes' actions was a reasonable interpretation. Because the panel acted under an erroneous theory of law, it erred in determining that relators acted with actual malice. Therefore, we reverse the panel's conclusion that relators violated Minn. Stat. § 211B.06, subd. 1, and the civil penalties imposed for the violations. Because we reverse the panel's conclusion on this basis, it is not necessary for us to determine whether the panel erred in determining that relators' statement was false.

VI.

The ALJ panel determined that relators violated the disclaimer requirement in Minn. Stat. § 211B.04(a) and ordered each of them to pay a $600 civil penalty for the violations. Relators argue that the disclaimer requirement is an unconstitutional restriction on their First Amendment rights. Minn. Stat. § 211B.04(a) states:

> A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, [3] that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) [4] is guilty of a misdemeanor.

When used in this statute, "'[c]ampaign material' means any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media." Minn. Stat. § 211B.01, subd. 2.

In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345, 115 S. Ct. 1511, 1518 (1995), the United States Supreme Court concluded that an Ohio statute that prohibited the distribution

of anonymous campaign literature directly regulated the content of "pure speech" in violation of the First Amendment. The Ohio statute prohibited the production and distribution of

> a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election . . . unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.

McIntyre, 514 U.S. at 338-39 n.3, 115 S. Ct. at 1514-15 n.3.

Margaret McIntyre produced and distributed leaflets expressing her opposition to a proposed school levy. *Id.* at 337, 115 S. Ct. at 1514. Some of the leaflets identified McIntyre as the author; others did not. *Id.* And except for some help from her son and a friend who distributed some of the leaflets, McIntyre acted independently. *Id.* A school official filed a complaint with the Ohio Elections Commission, charging that McIntyre's distribution of unsigned leaflets violated the Ohio disclaimer statute. *Id.* at 338, 115 S. Ct. at 1514. The commission agreed and imposed a fine of $100. *Id.* Ultimately, the Ohio Supreme Court affirmed the fine. *Id.* at 339, 115 S. Ct. at 1515.

In reversing the decision of the Ohio Supreme Court, the United States Supreme Court explained that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342, 115 S. Ct. at 1516. Upon examining the Ohio statute, the Supreme Court determined that

> [the statute] does not control the mechanics of the electoral process. It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. . . . Furthermore, the category of covered documents is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings. Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny."

Id. at 345-46, 115 S. Ct. at 1518 (quoting *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 1891 (1988)). The Supreme Court explained further that, "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347, 115 S. Ct. at 1519.

The Supreme Court then rejected Ohio's claim that its interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information were sufficiently compelling to justify the anonymous-speech ban. The Court concluded that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.* at 348, 115 S. Ct. at 1520. And although it acknowledged that Ohio has a legitimate interest in preventing fraud and libel, the Supreme Court determined that this interest did not justify the broad prohibition in the Ohio statute. *Id.* at 350-51, 115 S. Ct. at 1521. The Court explained:

> As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity.

Id. at 351-52, 115 S. Ct. at 1521-22. The Court concluded:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.

Id. at 357, 115 S. Ct. at 1524.

In 1998, after *McIntyre* was decided, Minn. Stat. § 211B.04 was amended by adding a subsection (f), which states:

> This section does not apply to an individual who acts independently of any candidate, committee, political committee, or political fund and spends only from the individual's own resources a sum that is less than $300 in the aggregate to produce or distribute campaign material that is distributed at least 14 days before the election to which the campaign material relates.

1998 Minn. Laws ch. 376, § 2, at 832.

In 2003, the Minnesota federal district court held that "Minn. Stat. § 211B.04 is unconstitutional under the First Amendment." *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 291 F. Supp. 2d 1052, 1069 (D. Minn. 2003), *aff'd in part, rev'd in part*, 427 F.3d 1106 (8th Cir. 2005). The court explained:

> In response to [an opinion by the Office of the Minnesota Attorney General determining that Minn. Stat. § 211B.04 was unconstitutional], the legislature debated how best to amend Minn. Stat. § 211B.04. Many legislators were concerned that anonymity would fuel irresponsible allegations. . . .
>
> In the end, the legislature chose to amend § 211B.04 in the narrowest possible fashion, essentially exempting the exact factual scenario before the Court in *McIntyre*. . . .
>
> The Supreme Court's holding in *McIntyre*, however, is far broader than subsection (f) allows. While a more limited disclaimer requirement might indeed pass constitutional scrutiny, Minnesota's disclaimer requirement directly attacks core political speech "[un]supported by an interest in avoiding the appearance of corruption," *McIntyre*, 514 U.S. at 354, 115 S. Ct. 1511. Unlike disclosures related to lobbyists, "who have direct access to elected representatives" and thus "may well present the appearance of corruption" if their activities are not disclosed, Minnesota's disclaimer requirement "rests on different and less powerful state interests," such as ensuring responsible campaigning. *Id.* at 356, 115 S. Ct. 1511. Our society, however, "accords greater weight to the value of free speech than to the dangers of its misuse," *id.* at 357, 115 S. Ct. 1511, and unlike "ordinary election restriction[s]," § 211B.04 is a "limitation on political expression subject to exacting scrutiny," *id.* at 346, 115 S. Ct. at 1511. With no overriding interest supporting the statute, § 211B.04 cannot pass constitutional muster.

Id. at 1068-69 (citation omitted).

In 2004, the legislature amended Minn. Stat. § 211B.04(f) by broadening the exception from the disclaimer requirement to apply to both individuals and associations and to apply to expenditures of less than $500 and to materials distributed at least seven days before an election. 2004 Minn. Laws ch. 293, art. 3, § 2, at 1537. The OAH does not argue that the 2004 amendments make Minn. Stat. § 211B.04 constitutional under *Kelley*. Rather, the OAH argues that this court should decline to follow *Kelley*.

This court is not bound to follow *Kelley*. *See Northpointe Plaza v. City of Rochester*, 457 N.W.2d 398, 403 (Minn. App. 1990) (noting state courts are not bound by federal court decisions even as to construction of federal statutes), *aff'd*, 465 N.W.2d 686 (Minn. 1991); *Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. App. 1986) (noting although statutory construction of federal law by federal courts is entitled to due respect, this court is bound only by statutory interpretations of Minnesota Supreme Court and United States Supreme Court), *review denied* (Minn. Nov. 19, 1986); *see also Rasheed v. Chrysler Corp.*, 517 N.W.2d 19, 27 n.20 (Mich. 1994) ("Although federal precedent is persuasive, it is not binding on state courts."). But we see no basis for concluding that the federal district court's conclusion that section 211B.04 is overbroad is incorrect. Even with the amendments that broaden the exception from the disclaimer requirement, there may be circumstances in which the disclaimer requirement is violated by completely truthful anonymous statements made by individuals acting independently from any candidate and using their own resources. Respondents have not identified an overriding state interest that permits section 211B.04 to limit such political expression under the exacting scrutiny that we must apply.

When possible, this court will narrowly construe a statute "to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression." *In re Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991), *rev'd on other grounds*, 505 U.S. 377, 112 S. Ct. 2538 (1992). But even if relators' conduct falls outside First Amendment protection, we see no way to narrowly construe Minn. Stat. § 211B.04 to limit its scope to include relators' conduct while prohibiting its application to protected expression. We, therefore, conclude that, in its present form, Minn. Stat. § 211B.04 directly regulates the content of pure speech in violation of the First Amendment, and we reverse the portions of the ALJ panel's order requiring relators to each pay a $600 civil penalty for violating Minn. Stat. § 211B.04(a).

D E C I S I O N

Relators have not established beyond a reasonable doubt that the administrative-hearing process established under Minn. Stat. §§ 211B.31 to .37 violates the separation-of-powers doctrine. Neither relators' right to trial by jury nor relators' First Amendment rights were violated by the administrative process established under Minn. Stat. §§ 211B.31 to .37. Because the ALJ panel acted under an erroneous theory of law in determining that relators acted with actual malice, the panel erred in concluding that relators violated Minn. Stat. § 211B.06, subd. 1. Because Minn. Stat. § 211B.04(a) directly regulates the content of pure speech in violation of the First Amendment, the ALJ panel may not impose civil penalties on relators for violating Minn. Stat. § 211B.04(a).

Reversed.

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[1] Circumstances under which an expedited probable-cause hearing is required are set forth in Minn. Stat. § 211B.33, subd. 2(b) and (c). There is no claim that an expedited probable-cause hearing was required in this case

[2] The supreme court noted that this statute was clarified by 1978 Minn. Laws ch. 672, § 1, which added a subdivision 6, which reads: "A case arising under the tax laws of this state, as defined in subdivision 5, which was pending on July 1, 1977 may be transferred to the tax court by the district court in which it was pending."

[3] Minn. Stat. § 211B.05, subd. 1, applies to paid advertisements in print and broadcast news media.

[4] Paragraphs (b) and (c) set out in detail the required format of a disclaimer.

STATE OF MINNESOTA

IN SUPREME COURT

A04-1742

In the Matter of Detailing Criteria and Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691.

O R D E R

Based upon all the files, records, and proceedings herein, and upon an evenly divided court,

IT IS HEREBY ORDERED that the decision of the court of appeals filed July 26, 2005, be, and the same is, affirmed without opinion.

Dated: May 22, 2006

BY THE COURT:

_____

Russell A. Anderson
Chief Justice

ANDERSON, G. Barry, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA

IN COURT OF APPEALS

A04-1742

In the Matter of
Detailing Criteria and Standards for
Measuring an Electric Utility's Good Faith Efforts in
Meeting the Renewable Energy Objectives
Under Minn. Stat. § 216B.1691

Filed July 26, 2005

Affirmed

Wright, Judge

Minnesota Public Utilities Commission

File No. E-999/CI-03-869

Elizabeth Goodpaster, Minnesota Center for Environmental Advocacy, 26 East Exchange Street, Suite 206, St. Paul, MN 55101-1667 (for relators Izaak Walton League of America, Minnesotans for an Energy-Efficient Economy, and Minnesota Center for Environment Advocacy)

Mike Hatch, Attorney General, Kari Valley Zipko, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Minnesota Public Utilities Commission)

Denis R. Vogel, Mary Beth Peranteau, Wheeler, Van Sickle & Anderson, S.C., 25 West Main Street, Suite 801, Madison, WI 53703 (for respondent Dairyland Power Cooperative)

Michael J. Bradley, Moss & Barnett, 4800 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-4129 (for respondents Great River Energy, Interstate Power and Light Company, Minnesota Power, Otter Tail Power, Southern Minnesota Municipal Power Agency, and Northern States Power Company d/b/a Xcel Energy)

Delmar R. Ehrich, John F. Jeske, Faegre & Benson LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-3901 (for respondent Minnesota Chamber of Commerce)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Dietzen, Judge.

S Y L L A B U S

The renewable energy objectives of Minn. Stat. § 216B.1691, subd. 2(a) (2004), direct each electric utility to make a good faith effort to ensure that 10 percent of total electric sales to retail customers is generated by eligible energy technologies by 2015, with a one-percent initial objective in 2005 and a benchmark increase of one percent annually.

O P I N I O N

WRIGHT, Judge

The Minnesota Public Utilities Commission (PUC) issued an order that set certain objectives for the use of renewable energy resources by electric utilities. On certiorari review, relators assert that the PUC committed an error of law by misinterpreting the statute that establishes these objectives. In the alternative, relators argue that the PUC made an arbitrary and capricious decision by adopting inconsistent methods for determining the objectives for biomass energy technologies as compared to all eligible energy technologies. We affirm.

FACTS

In 2001, the Minnesota Legislature enacted Minn. Stat. § 216B.1691, which establishes objectives for the use of renewable energy resources by electric utilities. 2001 Minn. Laws ch. 212, art. 8, § 3. Section 216B.1691 provides that each electric utility "shall make a good faith effort" to generate a prescribed amount of electricity for its retail customers from a defined "eligible energy technology." Minn. Stat. § 216B.1691, subds. 1, 2(a) (2002). With respect to the utilities' compliance with these objectives, the PUC lacked enforcement authority but was directed to propose regulatory or legislative action to the Minnesota Legislature. *Id.*, subd. 2(b), (c) (2002).

The Minnesota Legislature made substantial amendments to section 216B.1691 in 2003. 2003 Minn. Laws 1st Spec. Sess. ch. 11, art. 2, § 3. The amendments established a more detailed definition of "eligible energy technology" and required the implementation of these technologies to be measured as a percentage of total retail electric sales. Minn. Stat. § 216B.1691, subds. 1(a)(1), (c), 2(a) (2004). The amendments also expanded the responsibilities of the PUC, requiring it to issue standards and reports on whether the utilities had made a good faith effort to implement eligible energy technologies. *Id.*, subd. 2(c), (d) (2004).

In accordance with the new amendments, on January 30, 2004, the PUC provided notice and solicited comment on the standards for determining the utilities' compliance with Minn. Stat. § 216B.1691. Among the issues considered was whether generation from eligible energy technologies may be from preexisting capacity or whether it should be from new sources. The PUC also requested comment on how to deal with inconsistent annual increases from the implementation of eligible energy technologies, which it characterized as the problem of "'lumpy' increments [when] measuring whether the year-by-year objectives are being met." But

the PUC did not directly solicit comment on the broader question of how to determine from year to year the percentage increase in retail electric sales each utility should derive from eligible energy technologies.

With respect to the latter question, most utilities asserted that the statute set a one-percent baseline for total retail electric sales from eligible energy technologies in 2005 and required an increase by one percentage point each year until sales from eligible energy technologies reached 10 percent of total retail sales in 2015. The utilities argued that compliance with the objectives of section 216B.1691 would be achieved as long as total retail electric sales from eligible energy technologies exceeds this annual benchmark.

Relators Izaak Walton League of America, Minnesotans for an Energy-Efficient Economy, and Minnesota Center for Environmental Advocacy (collectively Izaak Walton) countered that the statute did not set a uniform baseline percentage for all utilities. Under its theory, the percentage of sales necessary for compliance with section 216B.1691 would not be capped at 10 percent. Rather, it would vary by utility according to the amount of generation from eligible energy technologies each utility had established the previous year. Thus, once a utility established its annual percentage of retail electric sales from eligible energy technologies, the utility was directed to exceed that percentage by at least one percent the following year. For example, a utility that produced four percent annual retail electric sales from eligible energy technologies in year two would be required to achieve no less than five percent in year three.

The PUC issued its initial order setting standards for determining compliance with section 216B.1691 on June 1, 2004. The PUC's standards permit preexisting generation to qualify for the percentage of retail electric sales from eligible energy technologies. The PUC also adopted the position advanced by the utilities and held that the statute provides a progressive annual baseline percentage of retail electric sales required. This certiorari appeal followed.

ISSUES

I. Did the PUC err in concluding that, under Minn. Stat. § 216B.1691, subd. 2(a) (2004), each utility is given an overall objective of generating 10 percent of total electric retail sales from eligible energy technologies by 2015, with a one-percent initial objective in 2005 and an annual one-percent increase?

II. Was the PUC's adoption, under Minn. Stat. § 216B.1691, subd. 2(b) (2004), of different standards for calculating the percentage of electrical generation from biomass energy technologies as compared to all renewable eligible energy technologies arbitrary and capricious?

ANALYSIS

Appellate review of an agency decision is governed by the Minnesota Administrative Procedures Act, which provides in relevant part:

> In a judicial review . . . the court may affirm the decision of the agency or remand the case for further proceedings; or it may

> reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are: . . .
>
> (d) Affected by . . . error of law; or . . .
>
> (f) Arbitrary or capricious.

Minn. Stat. § 14.69 (2004); *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 463-64 (Minn. 2002). The decision of an agency is presumed to be correct, and we ordinarily accord deference to an agency in its field of expertise. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).

I.

A.

Izaak Walton principally argues that the PUC committed an error of law in its interpretation of the objectives for the use of renewable resources set out in Minn. Stat. § 216B.1691, subd. 2(a) (2004). When an agency's decision is based solely on statutory interpretation, we are presented with a question of law, which we review de novo. *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003) (citing *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989)).

The object of statutory interpretation is to give effect to the intention of the legislature. *Educ. Minn.-Chisholm v. Indep. Sch. Dist. No. 695*, 662 N.W.2d 139, 143 (Minn. 2003). If the meaning of a statute is clear, then it shall be given effect according to its plain language. *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). But if a statute is reasonably susceptible of more than one meaning, we employ other canons of construction to discern the legislature's intent. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002). In doing so, we apply principles of statutory construction in conjunction with a searching examination of the entire text. *Educ. Minn.-Chisholm*, 662 N.W.2d at 143. We construe the words and phrases in a statute in accordance with the rules of grammar and common and approved usage. Minn. Stat. § 645.08(1) (2004); *Sprint Spectrum LP v. Comm'r of Revenue*, 676 N.W.2d 656, 662 (Minn. 2004). No part of statutory language shall be disregarded as insignificant. Minn. Stat. § 645.16 (2004); *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn. 2004).

As established by the Minnesota Legislature, the renewable energy objectives for public utilities provide that

> [e]ach electric utility shall make a good faith effort to generate or procure sufficient electricity generated by an eligible energy technology to provide its retail customers . . . so that:

> (1) commencing in 2005, at least one percent of the electric utility's total retail electric sales is generated by eligible energy technologies;
>
> (2) the amount provided under clause (1) is increased by one percent of the utility's total retail electric sales each year until 2015; and
>
> (3) ten percent of the electric energy provided to retail customers in Minnesota is generated by eligible energy technologies.

Minn. Stat. § 216B.1691, subd. 2(a). The controversy here requires us to examine how the phrase "at least" informs the obligation in clause (1). Izaak Walton argues that "at least" implies an individual benchmark for each utility based on its preexisting generation. Thus, it asserts that the annual increases under clause (2) are in addition to any preexisting generation and that the utilities annually must add new generation from eligible energy technologies to maintain compliance with section 216B.1691. The utilities assert that "at least" implies a uniform minimum baseline of one percent that increases an additional percent annually in accordance with clause (2). Because the statutory language is susceptible of more than one reasonable interpretation, we resolve this ambiguity by utilizing canons of statutory interpretation.

When considering possible meanings for the phrase "at least," a plain reading of clauses (1) and (2) does not offer any clear guidance. But a searching examination of the statutory text requires us to construe the language of clauses (1) and (2) in the context of the entire subdivision. Without establishing a specific timeline for compliance, clause (3) provides for 10 percent of total electric sales to retail customers to be generated from eligible energy technologies. When this goal is considered in conjunction with clauses (1) and (2), which provide a discrete 10-year period for implementing these technologies, we conclude that this statutory scheme sets a baseline objective of one percent in 2005 with annual increases of one percent so as to reach the 10-percent objective by 2015. [1]

Asserting that the 10-percent goal in clause (3) is merely an "overall industry objective," Izaak Walton claims that clause (3) contemplates objectives beyond 10 percent for individual utilities with preexisting generation in renewable energy. Rather than viewing clause (3) as part of the guidelines in subdivision 2, this interpretation treats clause (3) as a statement of general policy. Izaak Walton's argument disregards the placement of clause (3) among the other guidelines for implementation of renewable energy objectives. Because the interpretation advanced by Izaak Walton would undermine the significance of applying the 10-percent objective to "[e]ach electric utility" and render this aspect of the statute largely superfluous, we decline to adopt it.

B.

We next consider what constitutes "eligible energy technology" under the statute. The utilities argue that, because preexisting generation is not excluded from the statutory definition of

"eligible energy technology," the renewable energy objectives cannot be interpreted to exclude preexisting generation from satisfying the objectives.

> Unless otherwise specified in law, "eligible energy technology" means an energy technology that:
>
> > (1) generates electricity from the following renewable energy sources: solar; wind; hydroelectric with a capacity of less than 60 megawatts; hydrogen, provided that after January 1, 2010, the hydrogen must be generated from the resources listed in this clause; or biomass, which includes an energy recovery facility used to capture the heat value of mixed municipal solid waste or refuse-derived fuel from mixed municipal solid waste as a primary fuel; and
> >
> > (2) was not mandated by Laws 1994, chapter 641, or by commission order issued pursuant to that chapter prior to August 1, 2001.

Minn. Stat. § 216B.1691, subd. 1(a) (2004). Nothing in the plain language of this definition suggests that, when determining whether certain sources are eligible energy technologies, the time of implementation is relevant. Rather, the criteria are qualitative—based on the type of energy source and whether that energy source was previously mandated.

When, as here, the statutory language is ambiguous, the inclusion of certain terms in the statute implies that other terms are excluded. *Green-Glo Turf Farms, Inc. v. State*, 347 N.W.2d 491, 494 (Minn. 1984). Furthermore, the historical record of amendments to that language may be employed to resolve ambiguity. *Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000).

Before section 216B.1691 was enacted in 2001, the Minnesota Legislature considered versions of the statute that would exclude preexisting generation from counting toward the renewable energy objectives. *See* S.F. 722, second engrossment ("Fifty percent of the renewable energy generated by wind energy facilities operational on or before December 31, 2000, and by biomass energy facilities operated on or before December 31, 2002, may be counted as renewable energy for purposes of determining compliance . . . ."); S.F. 722, Amend. Before the Telecomms., Energy, and Utils. Comm. (Mar. 22, 2001) ("Renewable energy generated by wind energy facilities operational on or before December 31, 2000, and by biomass energy facilities operated on or before December 31, 2002, may not be counted as renewable energy for purposes of determining compliance . . . .") But the version of the statute that was enacted only excludes certain mandated sources of preexisting generation. *See* Minn. Stat. § 216B.1691, subd. 1(a)(2).

This legislative history supports the proposition that nonmandated sources of preexisting generation are included among eligible energy technologies. We conclude that a utility's preexisting generation may count toward its good faith effort to satisfy the renewable energy

objectives of section 216B.1691, subdivision 2(a). Our conclusion comports with our prior determination that the renewable energy objectives set an overall goal of generating 10 percent of total retail electric sales from eligible energy technologies for each utility. Rather than requiring annual increases through new generation from eligible energy technologies, the annual increase of one percent serves as a benchmark to achieve the overall goal.

II.

Izaak Walton next asserts that, because the PUC adopted different methods for calculating electrical generation from biomass energy technologies as compared to all eligible energy technologies, the decision was arbitrary and capricious. An agency decision is arbitrary and capricious if it reflects an exercise of the agency's will rather than an exercise of its judgment, *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278-83 (Minn. 2001), or if the agency relies on factors that the legislature did not intend the agency to consider, fails to consider an important aspect of the issue, provides an explanation that is contrary to the record, or renders a decision so implausible that it could not be ascribed to agency expertise, *Trout Unlimited, Inc. v. Minn., Dep't of Agric.*, 528 N.W.2d 903, 907 (Minn. App. 1995) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983)), *review denied* (Minn. Apr. 27, 1995).

An agency decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001); *In re Petition of Minn. Power for Authority to Change Its Schedule of Rates for Retail Elec. Serv.*, 545 N.W.2d 49, 51-52 (Minn. App. 1996). And although an agency is not bound to follow its past decisions, it must provide a reasonable basis for departure from precedent. *In re Petition of N. States Power Gas Util. For Authority to Change its Schedule of Gas Rates*, 519 N.W.2d 921, 925 (Minn. App. 1994); *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 342 N.W.2d 348, 352-53 (Minn. App. 1983), *review denied* (Minn. Apr. 24, 1984).

Izaak Walton's argument is based in part on the PUC's interpretation of the biomass provisions of section 216B.1691, which provide:

> Of the eligible energy technology generation required under [subdivision 2(a)], clauses (1) and (2), not less than 0.5 percent of the energy must be generated by biomass energy technologies . . . by 2005. By 2010, one percent of the eligible technology generation required under paragraph (a), clauses (1) and (2), shall be generated by biomass energy technologies.

Minn. Stat. § 216B.1691, subd. 2(b) (2004). The PUC observed that, with respect to the one-half-percent and one-percent requirements, the statute is ambiguous as to whether the percentage is taken from total retail electric sales or from the amount of energy generated by eligible energy technologies. After providing notice and soliciting comments, the PUC concluded that, under the plain language of the statute, the percentages pertain to the "eligible energy technology

generation," not total retail electric sales. Acknowledging dissent by interested parties on the issue, the PUC stated that it would inform the legislature about this potential "drafting anomaly."

Our examination of the PUC's reasoning establishes that the PUC's decision reflects its judgment rather than its will. Subdivision 2(b) provides that "not less than 0.5 percent of the energy" must be generated from biomass energy technologies. The phrase "of the energy" plainly relates back to the opening phrase of the subdivision, which refers to "eligible energy technology generation" under subdivision 2(a). The only reasonable construction of this language is that the percentages in subdivision 2(b) are applied to the amount of eligible energy technology generation, not total retail electric sales.

Because the PUC adopted a plain language construction for subdivision 2(b) but did not do so for the controverted portions of subdivision 2(a), Izaak Walton contends that the decision was arbitrary and capricious. This argument, however, erroneously presumes that the legal issues presented by subdivisions 2(a) and 2(b) are substantially identical and thus call for substantially identical construction. But subdivision 2(a) controls all eligible energy technologies and measures their implementation as a percentage of total retail electric sales, whereas subdivision 2(b) controls biomass energy technologies as a subset of eligible energy technologies and does not relate its implementation to total retail electric sales. When considering these distinct provisions, the PUC carefully examined the statutory language and rendered its sound judgment. Accordingly, the PUC's decision was not arbitrary and capricious.

D E C I S I O N

The PUC did not commit an error of law by concluding that the renewable energy objectives of Minn. Stat. §216B.1691, subd. 2(a) (2004), direct each electric utility to make a good faith effort to ensure that 10 percent of total electric sales to retail customers is generated by eligible energy technologies by 2015, with a one-percent initial objective in 2005 and a benchmark increase of one percent annually. The PUC's adoption of different methods for calculating electrical generation from biomass energy technologies as compared to all eligible energy technologies was not arbitrary and capricious.

Affirmed.

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[1] Our interpretation is supported in part by the legislative history of Minn. Stat. § 216B.1691 (2004). We may consider legislative hearings and proposed amendments to resolve ambiguity in statutory language. *Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000). But statements on the meaning of a particular provision should be treated with caution. *Handle With Care, Inc. v. Dep't of Human Servs.*, 406 N.W.2d 518, 522 & n.8 (Minn. 1987).

The guidelines for the amount of generation from eligible energy technologies were not settled until hearings before a conference committee on May 20, 2001. Describing the effect of the guidelines to the committee, Senate Counsel John Fuller explained:

> It used to be a requirement . . . to phase in by 2015 ten percent renewable[] energy sources for the energy they provide to their retail customers in Minnesota. And now the way this language reads is that it's a goal. It's a goal for each of these entities to reach in the same timeframe the same percentages . . . .

House Counsel Michael Bull added:

> The house [members of the conference committee] then agreed with the senate [members of the conference committee] to set some pretty good goals—actually, "objectives" is the term we used—for renewable energy, still the one percent per year for the ten years.

Hearing on S.F. No. 722 Before the Conference Comm. (May 20, 2001). Both of these statements support an inference that the legislature intended a minimum benchmark of one percent in 2005, to increase annually by one-percent increments through 2015.

STATE OF MINNESOTA

IN SUPREME COURT

A04-1028

Court of Appeals

Anderson, G. Barry, J.
Dissenting, Hanson, Page, and Anderson, Paul H., JJ.

State of Minnesota,

Respondent,

vs.

Filed: September 28, 2006
Office of Appellate Courts

Stephanie Dawn Losh,

Appellant.

S Y L L A B U S

1. Minnesota Statutes § 244.11, subd. 3 (2004), violates the doctrine of separation of powers by unconstitutionally encroaching on a judicial function.

2. A sentencing appeal pursuant to *State v. Fields*, 416 N.W.2d 734 (Minn. 1987),and Minn. R. Crim. P. 27.03, subd. 9, is not "direct review" for purposes of retroactivity analysis.

3. The district court did not abuse its discretion in imposing an upward durational departure.

Affirmed.

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

O P I N I O N

ANDERSON, G. Barry, Justice.

Stephanie Dawn Losh was indicted for second-degree murder, Minn. Stat. § 609.19, subd. 2(1) (2004), for her actions in connection with the death of Brian Jenny. She pleaded guilty to kidnapping, Minn. Stat. § 609.25, subd. 2(2) (2004). At sentencing, the district court departed durationally and dispositionally, imposing a 120-month stayed sentence. On March 8,

2004, the district court found Losh to be in violation of the terms of her probation and executed her sentence. Losh appealed. The court of appeals affirmed Losh's sentence and the execution of her sentence. *State v. Losh*, 694 N.W.2d 98, 99 (Minn. App. 2005). We granted Losh's petition for further review and, after hearing oral argument, we ordered the parties to file supplemental briefs addressing whether this court has jurisdiction to entertain Losh's appeal in light of Minn. Stat. § 244.11, subd. 3 (2004). We hold that section 244.11, subdivision 3, violates the separation of powers under the Minnesota Constitution by encroaching on this court's appellate jurisdiction and this court's inherent authority over matters of appellate procedure. Addressing Losh's sentencing appeal on the merits, we conclude that Losh is not entitled to the retroactive effect of *Blakely v. Washington*, 542 U.S. 296 (2004),in this case and that the district court did not abuse its discretion in imposing an upward durational departure. Therefore, we affirm.

In early October 2002, Brian Jenny and his brother-in-law, David Matzke, were staying in a cabin in Federal Dam, Minnesota. After drinking beer at a local bar, Jenny and Matzke invited the bartender to join them at the cabin later that night. Sometime after 1:00 a.m., Losh, Kenneth Conger, Leaha Harper-Jenkins, and several other individuals arrived at the cabin. At some time after that, Jenny and Conger left to get more beer and Jenkins eventually joined them.

Jenkins later returned to the cabin and asked Losh for a ride. Losh drove Jenkins to a location where Losh observed Conger hitting a person (whom Losh later learned was Jenny) with a baseball bat. Losh and Jenkins returned to the cabin, and after leaving the cabin once again, they noticed Conger by the side of the road. Conger joined them in the vehicle and instructed Losh to drive to the location where he had left Jenny. Conger and Jenkins placed Jenny in the back of the car. Losh stated that she did not look at Jenny when Jenkins and Conger placed him in the car and that Jenny was not saying anything. Jenkins and Conger told Losh to drive "toward Sugar Point or * * * Peter's Pond Road" and told Losh to stop "by the pond or the bog." After Losh stopped, Jenkins and Conger took Jenny out of the vehicle and placed him by the side of the road—Losh stated that she did not help move Jenny. Losh then drove Jenkins and Conger to Sugar Point. Days later, Jenny died from blunt force trauma to the head.

Losh was indicted for second-degree felony murder; the underlying felony was kidnapping. Losh reached a plea agreement with the state, and the district court accepted Losh's plea of guilty to kidnapping involving unsafe release and great bodily harm, Minn. Stat. § 609.25, subd. 2(2). This is a severity level nine offense with a presumptive sentence of imprisonment for 86 months.[1] Minn. Sent. Guidelines IV, V. On August 18, 2003, the district court sentenced Losh to a 120-month term of imprisonment. The district court stayed the execution of this sentence. Losh's sentence, therefore, was an upward durational departure and downward dispositional departure. At the sentencing hearing, the district court stated that the upward durational departure was based on the vulnerability of the victim. Losh was placed on probation—conditions included serving 365 days in jail, abstaining from mood-altering substances, and submitting to random drug testing.

On March 8, 2004, the district court found that Losh had violated the terms of her probation, namely by ingesting a pill containing a narcotic. The district court executed her 120-month sentence. Losh appealed to the court of appeals, and while her appeal was pending, the

Supreme Court decided *Blakely*. The court of appeals affirmed the district court, holding that *Blakely* did not apply retroactively to Losh's sentence because *Blakely* was decided after the time to file a direct appeal from the judgment had expired. *Losh*, 694 N.W.2d at 99. We granted review, and before this court, Losh challenges her sentence on two grounds: (1) that her sentence violates *Blakely*, a rule to which Losh claims she is entitled, and (2) that the district court abused its discretion in imposing an upward durational departure. After hearing argument, we ordered the parties to file supplemental briefs addressing the question of whether we have jurisdiction to entertain Losh's appeal in light of Minn. Stat. § 244.11, subd. 3. We first address the jurisdictional issue and then Losh's sentencing challenges.

I.

The threshold issue of this case is whether Losh's appeal is time-barred by section 244.11, subd. 3.[2] If the appeal is time-barred, then this court appears to be without jurisdiction to entertain this appeal. *See Ford v. State*, 690 N.W.2d 706, 709 (Minn. 2005) ("[T]ime requirements for the filing of an appeal are jurisdictional.").[3] The state argues, and Losh does not contest, that section 244.11, subd. 3, applies to Losh's appeal and that Losh did not meet the time requirements set out by the statute. The statutory text provides:

> (a) As used in this subdivision, "appeal" means:
>
> (1) an appeal of a sentence under rule 28 of the Rules of Criminal Procedure; and
>
> (2) an appeal from a denial of a sentence modification motion brought under Rule 27.03, subdivision 9,[4] of the Rules of Criminal Procedure.
>
> (b) If a defendant agrees to a plea agreement and is given a stayed sentence, which is a dispositional departure from the presumptive sentence under the Minnesota Sentencing Guidelines, the defendant may appeal the sentence only if the appeal is taken:
> (1) within 90 days of the date sentence was pronounced; or
>
> (2) before the date of any act committed by the defendant resulting in revocation of the stay of sentence; whichever occurs first.
>
> (c) A defendant who is subject to paragraph (b) who has failed to appeal as provided in that paragraph may not file a petition for postconviction relief under chapter 590 regarding the sentence.
> (d) Nothing in this subdivision shall be construed to:
> (1) alter the time period provided for the state to appeal a sentence under Rule 28 of the Rules of Criminal Procedure; or
>
> (2) affect the court's authority to correct errors under Rule 27.03, subdivision 8,[5] of the Rules of Criminal Procedure.

Minn. Stat. § 244.11, subd. 3 (footnotes added).

Because Losh entered a plea agreement with the state, was given a stayed sentence which was a dispositional departure, and appealed pursuant to Minn. R. Crim. P. 27.03, subd. 9 as interpreted by this court in *State v. Fields*, 416 N.W.2d 734 (Minn. 1987), the statute applied to her appeal. Because Losh did not violate the terms and conditions of her probation until more than 90 days after the date her sentence was pronounced, under section 244.11, subd. 3, Losh had 90 days after pronouncement of sentence to appeal her sentence. She did not meet that time restriction, and consequently, under the plain language of section 244.11, subd. 3, her appeal is time-barred.

Losh does not argue that her appeal falls outside the scope of section 244.11, subd. 3, or that she has met the statute's requirements. Her principal argument is that section 244.11, subd. 3, is unconstitutional because it violates the separation of powers under the Minnesota Constitution.[6] We review the constitutionality of a statute de novo. *Deegan v. State*, 711 N.W.2d 89, 92 (Minn. 2006). "[D]ue respect for coequal branches of government requires this court to exercise great restraint in considering the constitutionality of statutes particularly when the consideration involves what is a legislative function and what is a judicial function." *State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994). This due respect notwithstanding, "courts have the power to 'determine what is judicial and what is legislative; and if it is a judicial function that the legislative act purports to exercise, [this court] must not hesitate to preserve what is essentially a judicial function.'" *State v. McCoy*, 682 N.W.2d 153, 160 n.7 (Minn. 2004) (alteration in original) (quoting *Sharood v. Hatfield*, 296 Minn. 416, 423, 210 N.W.2d 275, 279 (1973)).

"This court has 'primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters and matters of trial and appellate procedure.'" *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001) (quoting *State v. Olson*, 482 N.W.2d 212, 215 (Minn. 1992)). This authority over procedural matters is derived from the court's inherent judicial powers. *Johnson*, 514 N.W.2d at 553. Consequently, while "[t]he legislature has the power to declare what acts are criminal and to establish the punishment for those acts as part of the substantive law[,] * * * the court regulates the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined." *Lindsey*, 632 N.W.2d at 658 (citation omitted). A statute is procedural, and therefore subject to this court's inherent authority, "'when it neither creates a new cause of action nor deprives [a] defendant of any defense on the merits.'" *Johnson*, 514 N.W.2d at 555 (quoting *Strauch v. Superior Court*, 165 Cal. Rptr. 552 (Cal. Ct. App. 1980)).

This court has previously construed statutes that set time limits for an appeal as procedural. *See In re Welfare of J.R.*, 655 N.W.2d 1, 2-3 (Minn. 2003) (concluding that a rule of juvenile procedure setting time limit for taking an appeal governed instead of a statute setting an identical time limit for taking an appeal). The state argues that the rules of criminal procedure do not preclude the time limit established by section 244.11, subd. 3. But, a statute purporting to govern criminal procedure need not conflict with the rules of procedure in order to violate the separation of powers and be struck down by this court. *See Lindsey*, 632 N.W.2d at 659 (declaring Minn. Stat. § 631.04 (2000) unconstitutional as a violation of the separation of powers despite the absence of a conflicting rule of procedure). Moreover, section 244.11, subd. 3, conflicts with this court's *interpretation* of the rules of criminal procedure in *State v. Fields*. In

Fields, this court interpreted the rules to allow a probationer to move for modification of the sentence at a probation revocation hearing, occurring long after the original sentence was imposed, and to appeal from a denial of that motion.[7] 416 N.W.2d at 736 (citing Minn. R. Crim. P. 27.03, subd. 9). The legislature has attempted to prohibit such an appeal by certain defendants by requiring them to bring a sentencing appeal within 90 days or before they violate probation—whichever deadline passes first. Section 244.11, subd. 3.

Because this court has previously construed statutes setting time limits on taking an appeal as procedural, *see J.R.*, 655 N.W.2d at 3, and because section 244.11, subd. 3, does not create a new cause of action or deprive a defendant of a defense on the merits, the statute unconstitutionally encroaches on a judicial function in violation of the separation of powers under the Minnesota Constitution.

The state argues that the statute does not violate the separation of powers because it is "jurisdictional, not procedural." In addition to this court's implicit rejection of such a distinction in *J.R.*, we have already determined that the legislature may not constitutionally encroach on our appellate jurisdiction. We have "original jurisdiction in such remedial cases as are prescribed by law, and *appellate jurisdiction in all cases*." Minn. Const. art. VI, § 2 (emphasis added). We have interpreted these constitutional provisions to grant us "constitutionally independent authority to review determinations by the other state courts." *State v. Wingo*, 266 N.W.2d 508, 511 (Minn. 1978). Because such authority is granted by the state constitution, the legislature cannot "prohibit or require this court to exercise its appellate jurisdiction." [8] *Id.* at 512. While in the past we have recognized that "the legislature may enact reasonable regulation of the conditions under which this court's jurisdiction shall be invoked," *In re O'Rourke*, 300 Minn. 158, 163, 220 N.W.2d 811, 815 (1974), such regulations are recognized as a matter of comity. *Wingo*, 266 N.W.2d at 512. To the extent section 244.11, subd. 3, purports to limit this court's ability to hear an appeal in certain cases, it violates the separation of powers by encroaching on this court's power to define its appellate jurisdiction.

Despite these constitutional infirmities, this court can acquiesce to section 244.11, subd. 3, as a matter of comity. *See McCoy*, 682 N.W.2d at 160-61 (recognizing a statutory rule of evidence as a matter of comity despite arguable conflict with Minn. R. Evid. 404(b)); *Wingo*, 266 N.W.2d at 512. We decline to do so, in part, based on the policy, previously expressed in *Fields*, 416 N.W.2d at 736, that a defendant who has been placed on probation should not be required to appeal his or her sentence at the time the sentence is pronounced, and that such a requirement would lead to an increase in sentencing appeals. In addition, we are concerned that a recognition of this statute under comity could limit a defendant's ability to obtain relief from an illegal sentence under Minn. R. Crim. P. 27.03, subd. 9, a possibility the state conceded at oral argument. Having determined section 244.11, subd. 3, to be unconstitutional, Losh's appeal is properly before this court.[9]

II.

Losh argues that she is entitled to benefit from the rule in *Blakely v. Washington*. The state argues, and the court of appeals held, that because *Blakely* was released after the period to

file a direct appeal from Losh's conviction had expired, *Blakely* does not apply retroactively to Losh. *Losh*, 694 N.W.2d at 100-01.[10]

In *State v. Shattuck*, pursuant to *Blakely*, we held Section II.D of the Minnesota Sentencing Guidelines to be unconstitutional as applied "insofar as it permits an upward durational departure based on judicial findings." *State v. Shattuck*, 704 N.W.2d 131, 142-43 (Minn. 2005). *Blakely* is a new rule of federal constitutional criminal procedure. *See State v. Houston*, 702 N.W.2d 268, 270, 273 (Minn. 2005). A defendant is entitled to benefit from such a "new rule" if the defendant's case is "pending on direct review" when the rule is announced. *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004) (applying the federal retroactivity framework established by *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), and *Teague v. Lane*, 489 U.S. 288, 310-11 (1989) (plurality opinion)). We have held *Blakely* is a new rule, retroactive to cases pending on direct review but not to cases on collateral review (e.g., a petition for postconviction relief). *Houston*, 702 N.W.2d at 269 (syllabus), 270. Whether Losh can receive any benefit from *Blakely*, therefore, turns on whether her case was "pending on direct review" at the time of the *Blakely* decision.[11]

We have recently addressed the question of when a case is pending on direct review. We held that "a case is pending until such time as the availability of direct appeal has been exhausted, the time for a petition for certiorari has elapsed or a petition for certiorari with the United States Supreme Court has been filed and finally denied." *O'Meara*,679 N.W.2d at 336. O'Meara failed to perfect a direct appeal from the judgment of conviction. *Id.* at 340. We held that O'Meara's conviction became final on the date that his period for direct appeal ended. *Id.*

Like O'Meara, Losh did not perfect an appeal directly from the judgment of conviction. *See* Minn. R. Crim. P. 28.02, subd. 2(1), subd. 4(3) (stating that appeal from final judgment must be taken within 90 days). Under *O'Meara*, Losh's conviction appears to have become final the date her period of direct appeal expired. Losh argues, however, that she is entitled to the benefit of *Blakely* because: (1) for the purposes of determining the retroactive effect of *Blakely*, the *sentence*, not the conviction, must be final, and (2) "direct review" of her *sentence* was pending at the time *Blakely* was decided. Because we conclude that the appeal procedure followed by Losh does not qualify as "direct review" of her sentence, we need not reach the questions of whether "finality of the sentence" (as opposed to "finality of the conviction") is ever the touchstone for determining retroactive effect and whether or not some methods of review of a sentence qualify as "direct review."

Losh argues that she did seek "direct review" of her sentence through the procedure approved by this court in *State v. Fields*. *Fields*, like the present case, involved a defendant whose sentence was both an upward durational departure and a downward dispositional departure. 416 N.W.2d at 735. In that case, we faced the issue of whether a defendant could challenge a durational departure on appeal from the denial of a motion for sentence modification made at a probation revocation hearing. The defendant in *Fields* challenged the durational departure at the probation revocation hearing, the district court reaffirmed the sentence, and the defendant appealed the district court's decision. *Id.* The court of appeals held that the departure issue could only be attacked on a timely direct appeal from the original judgment of conviction or by a postconviction petition. *Id.* We reversed and remanded, holding that Minn. R. Crim. P.

27.03, subd. 9, allowed a defendant to "challenge the departure by a simple motion at the time of the revocation hearing." *Fields*, 416 N.W.2dat 736.

Neither *Fields* nor subsequent decisions by this court interpreting *Fields* have described such a procedure as a "direct appeal" or "direct review." Losh argues that the policy arguments mentioned in *Fields* support her position that an appeal of a sentence pursuant to *Fields* should be considered *direct review* for retroactivity purposes.[12] In *Fields* this court stated that defendants initially placed on probation often have less incentive to appeal the durational departure. *Id.* at 736. *Fields*, however, did not deal with retroactivity and never described an appeal pursuant to Minn. R. Crim. P. 27.03, subd. 9, as a "direct appeal."[13] Moreover, Losh's appeal pursuant to *Fields* and Minn. R. Crim. P. 27.03, subd. 9, was not her first opportunity to appeal her sentence.[14] *See* Minn. R. Crim. P. 28.02, subd. 2(3); 28.05, subd. 1(1) (allowing appeal from sentence to be taken within 90 days of judgment and sentencing). For these reasons, *Fields* does not provide a basis to hold that Losh's conviction was on "direct review" at the time *Blakely* was decided.[15]

III.

Losh also argues that the district court abused its discretion in imposing an upward durational departure. Departures from the presumptive sentence are only justified when substantial and compelling circumstances are present in the record. *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002). When reviewing a district court's decision to depart from the presumptive guideline sentence, we review for abuse of discretion. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). We have established the following rules when reviewing departures:

1. If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.

2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons justify the departure.

3. If the reasons given justify the departure, the departure will be allowed.

4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify the departure, the departure will be affirmed.

5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

McIntosh, 641 N.W.2d at 8 (quoting *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985)).

In determining whether to durationally depart from the guideline sentence, the district court considers "whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime described in the applicable statute." *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002). Losh argues that the district court abused its discretion in imposing an upward durational departure because there were no substantial

aggravating factors justifying the departure. The state argues that, in addition to the aggravating factor cited by the district court at sentencing (vulnerability of the victim), the departure is supported by two additional aggravating factors: (1) particular cruelty and (2) Losh committed the crime as part of a group of three or more persons who all actively participated in the crime. Because sufficient evidence in the record justifies the latter two grounds for departure, we do not reach the question of whether vulnerability of the victim is an appropriate ground for departure in this case.

A basis for an upward departure can be that "[t]he victim was treated with particular cruelty for which the individual offender should be held responsible." Minn. Sent. Guidelines II.D.2.b(2). The state argues that Jenny was treated with particular cruelty because he was left, severely injured, in a secluded location by a swamp. Losh admitted to stopping the vehicle by a "pond or * * * bog" and to driving home after Conger and Jenkins left Jenny by the side of the road. While a "district court may not base an upward durational departure on factors that the legislature has already taken into account in determining the degree or seriousness of the offense," *Shattuck*, 704 N.W.2d at 140, Losh's sentence under the guidelines was based on the fact that Jenny suffered "great bodily harm," not on the fact that Jenny was dumped in a remote and unsafe place. *See* Minn. Stat. § 609.25, subd. 2(2); Minn. Sent. Guidelines V (listing kidnapping with "great bodily harm" as a severity level IX offense and kidnapping with "unsafe release" as a severity level VIII offense). Because the evidence shows that Jenny was released in an unsafe place and this factor was not already taken into account in determining the presumptive sentence, the evidence shows that Jenny was treated with particular cruelty for which Losh should be held responsible.

Another basis for upward departure which the state argues is present in this case is "[t]he offender committed the crime as part of a group of three or more persons who all actively participated in the crime." Minn. Sent. Guidelines II.D.2.b(10). In this case, three people were involved in the kidnapping of Jenny. Losh drove the vehicle; Conger and Jenkins placed Jenny in and removed Jenny from the vehicle. The evidence in this case supports this aggravating factor in light of our prior decision in *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) (holding this aggravating factor to be present where group of four traveled in vehicle to victim's house, defendant shot at house out of the window of the vehicle, and all departed in the vehicle).

In light of the presence of these two aggravating factors, there is sufficient evidence in the record to justify the departure and the district court did not abuse its discretion in imposing an upward durational departure.

Affirmed.

D I S S E N T

HANSON, Justice (dissenting).

Although I agree with the majority's conclusion that Minn. Stat. § 244.11, subd. 3 (2004) is unconstitutional and does not preclude Losh's appeal, I disagree with the majority's conclusion that *Blakely* does not apply to this appeal. The focus of the majority opinion on

"direct review" only addresses one element of the federal test for retroactivity and thus does not provide a complete answer to the issue before us. Because the federal test permits retroactivity of a new rule for the conduct of criminal prosecutions to all cases "pending on direct review *or not yet final*," *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (emphasis added), it is also necessary to determine when Losh's conviction became "final." *Griffith* defines "final" as when the case has "run the full course of appellate review" and "the availability of appeal [has been] exhausted." *Id.* at 321 n.6 and 323. I conclude that Losh's conviction was not final at the time *Blakely* was announced because, under *State v. Fields*, 416 N.W.2d 734, 736 (Minn. 1987), her case had not run the full course of appellate review and her right to direct appeal had not been exhausted. Accordingly, I would reverse the court of appeals and remand the case to the district court for resentencing in light of *Blakely*.

I begin by focusing on the federal law of retroactivity. As we recognized in *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004), the scope of the retroactivity of a new rule of federal constitutional criminal procedure is for the United States Supreme Court to decide under the United States Constitution. In *Griffith*, the court began the process of achieving greater uniformity in its retroactivity determinations by adopting the view of Justice Harlan that "retroactivity must be rethought." *Griffith*, 479 U.S. at 321-23 (quoting *United States v. Johnson*, 457 U.S. 537, 548 (1982)). The Court then expressed approval of Justice Harlan's concept of finality, quoting from his concurring opinion in *Mackey v. United States*, 401 U.S. 667, 679(1971):

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. * * * In truth, the Court's assertion of power to disregard current law in adjudicating cases before us *that have not already run the full course of appellate review*, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Mackey v. United States*, 401 U.S., at 679 (opinion concurring in judgment).

479 U.S. at 323 (emphasis added). The Court defined "final" as follows:

> By "final," we mean a case in which a judgment of conviction has been rendered, *the availability of appeal exhausted*, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. See *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982) (citing *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)).

479 U.S. at 321 n.6 (emphasis added).

In *Teague v. Lane*, 489 U.S. 288, 299-310 (1989), the Court further adopted Justice Harlan's view on the limits of finality, concluding that the new rule need not be retroactively applied to cases on "collateral review." But the Court equated "collateral review" with habeas corpus, quoting Justice Harlan as follows:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Teague, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 682-83).

I take from these cases the understanding that a case is "not yet final" when the availability of appeal has not been exhausted and appellate review has not run its full course. Alternatively, I also take from these cases that "direct review" includes all forms of appellate review that are not considered collateral review. Either way, for Losh, her case was not yet final (because the appeal rights made available in *Fields* had not been exhausted or run their full course) and her case was not on collateral review at the time that *Blakely* was announced.

O'Meara does not lead me to a different conclusion because any comments we made in *O'Meara* about when a case is "final" were dicta and, to the extent they were inconsistent with *Griffith* and *Teague*, they are not controlling. We did say in *O'Meara* that the conviction became final on the date the time for direct appeal expired. 679 N.W.2d. at 340. But that comment was only fact specific to O'Meara's case. O'Meara's sentence had been executed, not stayed, and thus the conviction did become final when the time for direct appeal expired. And because the new rule of criminal procedure that we were dealing with in *O'Meara* had been announced before the time had expired for O'Meara to take direct appeal, that comment was dicta. Further, we fully recognized the broader rule of *Griffith* and *Teague* that "a case is pending until such time as the availability of appeal has been exhausted, the time for a petition for certiorari has elapsed or a petition for certiorari with the Supreme Court has been filed and finally denied." 679 N.W.2d. at 339.

For Losh, the questions under *Griffith* and *Teague* are whether, at the time *Blakely* was announced, (1) the availability of an appeal from Losh's conviction had been exhausted (i.e., appellate review of that conviction had run its course), or (2) Losh's appellate rights already had been relegated to collateral review. I would answer those questions in the negative. I would conclude that the consequence of our ruling in *Fields* is that appellate review of a stayed sentence is not exhausted until the time to appeal from any revocation of the stay has expired and that the appellate review of an order denying a motion to modify a stayed sentence is not collateral review.

Fields decided that a defendant in Losh's position need not file a postconviction petition to obtain review of his sentence, but could appeal directly from the denial of his motion to modify the sentence when his stay of execution is revoked. We held that a postconviction petition was not preferable, and we concluded that a defendant could challenge his departure by a simple motion when his stay was revoked. Our ruling undoubtedly encouraged persons in

Losh's position to forego an immediate appeal and, in my view, provided assurance that they would still be able to receive a full review of their sentences upon revocation. We provided this encouragement and assurance for our own reasons, to avoid the burden on the court system of an "increase in sentencing appeals" that might turn out to be unnecessary. Our ruling in *Fields* necessarily implied that a defendant's right to appellate review of a departure in a stayed sentence would not be exhausted until after revocation of the stay and that such review, when sought after revocation, would not be treated as collateral review. Accordingly, Losh's case meets the criteria of *Griffith* and *Teague* for retroactive application of *Blakely*.

Viewed another way, if we apply the full text of *Griffith*, the definition of finality requires not only that the availability of appeal to our court has been exhausted, but also that the time for a petition for certiorari to the Supreme Court has elapsed or a petition has been denied. *Griffith*, 479 U.S. at 321 n.6. In view of *Fields*, could Losh petition for certiorari to the United States Supreme Court from the decision of the majority that *Blakely* does not apply to Losh's case? I conclude that such a petition would not be time barred and, accordingly, that Losh's appeal is not yet final.

Finally, I address one of the underlying concerns expressed in *Griffith* that "selective application of new rules violates the principle of treating similarly related defendants the same." *Griffith*, 479 U.S. at 323. I would agree that any retroactivity rule will inevitably have some degree of inequity because the line must be drawn somewhere. But I am concerned that the decision of the majority treats a defendant with a stay of execution of her sentence differently from the class of defendants who are perhaps most similarly situated, those who have received a stay of imposition of their sentences. The latter class of defendants would clearly benefit from a new rule of criminal procedure announced after they were convicted but before the time had expired to appeal their sentence after the stay of imposition was revoked and the sentence executed. Thus, two defendants who committed a crime on the same day could have significantly different laws applied to them, depending on whether they received a stay of execution or a stay of imposition. Yet, these two defendants are more similar to each other than they are to a third defendant whose sentence was immediately executed because the former two are essentially on probation until revocation, while the third is in prison.

For all these reasons, I would reverse the court of appeals' decision and hold that *Blakely* applies to Losh's appeal of the departure made in her sentence.

ANDERSON, Paul H., Justice (dissenting).
I join in the dissent of Justice Sam Hanson.

PAGE, Justice (dissenting).
I join in the dissent of Justice Sam Hanson.

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[1] The plea agreement between Losh and the state did not involve a joint sentencing recommendation to the district court or other sentencing agreement.

[2] The applicability and constitutionality of section 244.11, subd. 3, was not initially briefed or argued by the parties. Additional briefing and argument concerning this issue was ordered by this court.

[3] But, "this court has 'inherent authority to [accept] an appeal in the interests of justice even when the filing or service requirements set forth in a rule or statute have not been met.'" *State v. Barrett*, 694 N.W.2d 783, 788 n.4 (Minn. 2005) (alteration in original) (quoting *In re Welfare of J.R.*, 655 N.W.2d 1, 3 (Minn. 2003)).

[4] "The court at any time may correct a sentence not authorized by law. The court may at any time modify a sentence during either a stay of imposition or stay of execution of sentence except that the court may not increase the period of confinement." Minn. R. Crim. P. 27.03, subd. 9.

[5] "Clerical mistakes in judgments, orders, or other parts of the record or errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Minn. R. Crim. P. 27.03, subd. 8.

[6] "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Minn. Const. art. III, § 1.

[7] The state correctly points out, however, that Minn. R. Crim. P. 27.03, subd. 9 does not discuss any appeal from the district court's denial of a motion for sentence modification. *Fields*, in effect, created a new means of appealing a sentence not explicitly provided for in the Rules of Criminal Procedure.

[8] This court has noted a potential exception to this rule in stating that "[i]t may well be that the legislature, in creating a substantive right by statute, may, as an element of that substantive right, circumscribe the adjudication of that right more strictly than in other cases, subject to constitutional requirements of due process." *In re O'Rourke*, 300 Minn. 158, 175 n.11, 220 N.W.2d 811, 821 n.11 (1974). This court has already expressly stated that the right of appeal does not fall within this exception. *Wingo*, 266 N.W.2d at 511 n.7. In addition, the state does not argue that this exception applies in this case.

[9] Losh additionally argues that section 244.11, subd. 3, is unconstitutional on the basis that it violates her constitutional right to appellate review of her sentence. Because we invalidate the statute on the ground that it violates the separation of powers, we need not address this issue here.

[10] Losh argues that because the state, before the court of appeals, conceded that *Blakely* applied to Losh's case, the state has waived this issue. Losh cites no authority supporting this proposition, however, and the authority she does cite indicates that the state cannot be deemed to have waived arguing this issue on appeal. *See State v. Grunig*, 660 N.W.2d 134, 136 (Minn. 2003) (stating waiver rule is administrative rule dictating that appellate courts will not decide

issues that were not raised below). Losh raised the issue of *Blakely*'s retroactive effect below, and the court of appeals addressed it, so the waiver rule is not applicable here.

[11] The dissent draws a distinction between cases that are "pending on direct review" and cases that are "final" based on language in *Griffith v. Kentucky*, 479 U.S. 314 (1987). As we recognized in *O'Meara*, however, "pending on direct review" and "not yet final" are two ways of saying the same thing in federal retroactivity analysis. *See Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still *pending on direct review*. *As to convictions that are already final*, however, the rule applies only in limited circumstances.") (emphasis added) (citation omitted); *O'Meara*, 679 N.W.2d at 339 ("If the conviction is not yet final (i.e., is 'pending') when the Supreme Court announces the rule * * * ."").

[12] In addition, the dissent argues that, under the framework of retroactivity analysis laid out by the Supreme Court, Losh should receive the benefit of *Blakely* in this case because: (1) when *Blakely* was decided Losh's availability of appeal had not been exhausted and (2) Losh could petition to the United States Supreme Court for certiorari from this court's judgment in this case. We initially note that the United States Supreme Court has not yet had to classify state appellate review methods (other than direct appeal from judgment of conviction) as either "direct review" or "collateral review."

We agree that Losh was properly pursuing a *Fields* appeal at the time of *Blakely*'s decision and that this court's decision of a *Fields* appeal is a final judgment from which review by writ of certiorari could be granted. *See* 28 U.S.C. § 1257 (2000). But, the availability of appeal and review by writ of certiorari are not themselves sufficient qualities to make a form of appellate review "direct review" for retroactivity purposes. A postconviction petitioner has the ability to appeal a district court's denial of postconviction relief as well as the opportunity to petition the Supreme Court for a writ of certiorari from a final judgment of this court affirming denial of postconviction relief. *See* 28 U.S.C. § 1257 (2000); Minn. Stat. § 590.06 (2004); *see also Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir. 2001) (holding statute of limitations for federal habeas corpus petition was not tolled during 90-day period during which petitioner could have filed a petition for a writ of certiorari from the denial of state postconviction relief). A state postconviction petition, however, does not qualify as direct review for retroactivity purposes. *See Houston*, 702 N.W.2d at 270.

[13] As discussed earlier, we decline to recognize section 244.11, subd. 3, as a matter of comity based, in part, on the policies expressed in *Fields*. These policies, however, do not impact our analysis regarding whether a *Fields* appeal qualifies as direct review. As a matter of procedure, we have determined that a probationer should not be *required* to appeal his or her sentence within 90 days of pronouncement of that sentence. It does not follow that this individual should be entitled to benefit from all new rules of federal constitutional criminal procedure which arise between the expiration of the direct appeal period pursuant to Minn. R. Crim. P. 28.02, subd. 2(3); 28.05, subd. 1(1) (within 90 days of judgment and sentencing), and the resolution of any eventual appeal pursuant to *Fields*. Contrary to the dissent, we do not read federal law to require a *Fields* appeal to be classified as a direct review, and such a classification runs contrary to the principle of finality underlying the federal retroactivity framework applied by this court in

O'Meara and *Houston*. *See Teague*, 489 U.S. at 309-10; *Houston*, 702 N.W.2d at 270-74; *O'Meara*, 679 N.W.2d at 338-40.

[14] The dissent also argues that our decision treats similarly situated defendants differently by drawing a distinction between a defendant who receives a stay of imposition and a defendant who receives a stay of execution. The dissent is referencing the court of appeals decision in *State v. Beaty*, 696 N.W.2d 406 (Minn. App. 2005). In *Beaty*, the court of appeals held that *Blakely* applied retroactively to a defendant when *Blakely* was decided during the defendant's appeal from a probation revocation proceeding in which the district court vacated a stay of imposition and imposed a sentence. 696 N.W.2d at 408-09, 411. No petition for review was filed regarding this decision and the wisdom of *Beaty* is not before this court.

[15] Because we hold that Losh is not entitled to the retroactive application of *Blakely* on this appeal, we do not reach the issue of whether the rule in *Blakely*, if applied, would entitle Losh to relief.

STATE OF MINNESOTA

IN COURT OF APPEALS

A04-202

In the Matter of the Welfare of:
T.C.J.

Filed December 14, 2004

Affirmed as modified

Lansing, Judge

Hennepin County District Court

File Nos. JX-03-056554, 238043

Leonardo Castro, Fourth District Chief Public Defender, Barbara S. Isaacman, Assistant Public Defender, Suite 200, 317 Second Avenue South, Minneapolis, MN 55401 (for appellant TCJ)

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

Amy Klobuchar, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent State of Minnesota)

Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.*

S Y L L A B U S

A juvenile who is found not guilty of the charge that provides the basis for designating a juvenile proceeding an extended-juvenile-jurisdiction prosecution may not, consistent with equal protection, receive a stayed adult sentence under Minn. Stat. § 260B.130, subd. 4(b) (2002), for a companion charge that would not separately permit designation.

O P I N I O N

LANSING, Judge

The district court denied certification of TCJ's assault charges and, following designation as an extended-juvenile-jurisdiction (EJJ) prosecution, a jury found TCJ guilty of third-degree assault and not guilty of first-degree assault. On appeal from the third-degree assault conviction, TCJ challenges the jury composition, evidentiary rulings, jury instructions, sufficiency of the evidence, and that part of his disposition that stays an adult sentence. We affirm the district court's rulings and instructions that underlie TCJ's adjudication but, to comport with constitutional requirements, modify the disposition to vacate the stayed adult sentence.

F A C T S

TCJ's assault charges stem from a confrontation between him and a teacher near Park Center High School. TCJ, a seventeen-year-old former student, visited the school with a friend, JH, who was seeking enrollment materials. When TCJ and JH entered the school through a side entrance to the gymnasium, a member of the faculty recognized TCJ and knew that he was not currently a student. The teacher ordered them to leave the school grounds.

The teacher saw TCJ and JH on the school grounds several times that day and each time told them to leave. TCJ and JH failed to comply, and after a final response that the teacher characterized as insubordinate and disrespectful, they suddenly fled through a set of doors, which the teacher stated was off limits to students. The teacher, suspecting wrongdoing, pursued them.

When he caught up with them, they were off school property, and the teacher told them that they must return to the school to deal with the problem "[t]he easy way or the hard way." He then grabbed JH by the shirt. TCJ testified at trial that the teacher mistook JH for a student at the school and repeatedly referred to JH by the wrong name. JH spun from the teacher's grip and out of the shirt, then snatched it away from the teacher, who testified that he was struck across the face with the garment and pushed against a nearby car.

The teacher testified that JH began to choke him, and the teacher, who taught self-defense at the high school, countered by grabbing JH's hands. TCJ testified that the teacher grabbed JH by the throat. According to the teacher, TCJ punched him on the left side of his head, and when he moved to resist, JH began to hit him on the other side of his head. TCJ admitted to hitting the teacher in the face to get him to let go, but he claimed that another student who joined the fray also punched the teacher. The teacher sustained multiple jaw fractures, bruises, and abrasions, and lost several teeth. He testified that, despite his knowledge of self-defense techniques, he did not retaliate. TCJ testified that, despite JH's being choked, neither he nor JH sustained injuries from the altercation. Several other witnesses corroborated aspects of the testimony of each of the principal participants.

TCJ's age and the gravity of the first-degree-assault charge resulted in a presumptive certification to the district court. The district court determined that TCJ had presented evidence that overcame the presumption and designated the proceeding an EJJ prosecution. The jury acquitted TCJ of first-degree assault but found him guilty of third-degree assault. TCJ appeals both the conviction and the sentence.

I S S U E S

I. Did the district court err in allocating or permitting peremptory challenges in the composition of the jury?

II. Did the district court abuse its discretion and deny TCJ a fair trial by excluding evidence of state policies and school policies and records?

III. Did the jury instructions violate TCJ's right to due process and a fair trial?

IV. Is the evidence sufficient to support TCJ's conviction for third-degree assault?

V. Did the district court err by sentencing TCJ to a stayed adult sentence?

A N A L Y S I S

I

TCJ presents two arguments on the composition of the jury. First, he asserts that the district court abused its discretion by improperly dividing the peremptory challenges to the venire between TCJ and his co-defendant. Second, he asserts that the district court erred in allowing the state to use a peremptory challenge to strike the only African-American member of the venire.

A defendant's right to peremptory challenges is necessary to ensure the impartiality of the trial process, and denial of that right is reversible error regardless of whether the denial was prejudicial. *State v. Reiners,* 644 N.W.2d 118, 126 (Minn. App. 2002) (citing *Lewis v. United States,* 146 U.S. 370, 378, 13 S. Ct. 136, 139 (1892)), *aff'd* 664 N.W.2d 826 (Minn. 2003). We review de novo the district court's interpretation of the criminal rules of procedure. *State v. Nerz*, 587 N.W.2d 23, 24-25 (Minn. 1998).

A criminal defendant in Minnesota is entitled to five peremptory challenges when selecting the trial jury for an offense not punishable by life imprisonment. Minn. R. Crim. P. 26.02, subd. 6. But "[i]f there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly, and in that event the state's peremptory challenges shall be correspondingly increased." *Id.* The district court offered TCJ and his codefendant the choice of three peremptory challenges each or five to be exercised jointly.

TCJ argues that the court's ruling denied him due process and contends that each defendant should have been granted five challenges. TCJ's position is inconsistent with precedent stating that "peremptory challenges belong to a 'side,' not an individual." *State v. Greenleaf*, 591 N.W.2d 488, 501 n.6 (Minn. 1999). And the rules of statutory construction require that courts "give a reasonable and sensible construction to criminal statutes." *State v. Murphy*, 545 N.W.2d 909, 916 (1996). Under TCJ's interpretation, a "side" would be entitled to more peremptory challenges in a joint trial than in an individual trial. While the district court

may have had discretion to grant the requested challenges, we find no reasonable basis for an interpretation of the rules that required it to do so. Therefore, we reject TCJ's claim that the court's failure to grant him five challenges was an abuse of discretion.

TCJ's argument on the state's use of its peremptory challenge to strike the only African-American venire person raises an issue on a *Batson* ruling, which we review for clear error. *State v. McDonough*, 631 N.W.2d 373, 385 (Minn. 2001) (citing *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986)). Whether racial discrimination in the exercise of a peremptory challenge has been shown is "an essentially factual determination" dependent largely on evaluations of credibility. *State v. James*, 520 N.W.2d 399, 403 (Minn. 1994) (quotation omitted). The district court determines whether a peremptory strike is improper by conducting a three-step process in which: (1) the defendant must make a prima facie case that the prosecution's challenge was racially motivated; (2) if the prima facia case is made, the prosecution bears the burden of articulating a race-neutral explanation for the strike; and (3) the district court determines whether the defendant has proved purposeful discrimination by the prosecution. *Batson*, 476 U.S. at 97-98, 106 S. Ct. at 1723-24.

The district court found that TCJ and his codefendant had presented a prima facie case of racial motivation. After extensively questioning counsel, the district court concluded that several of the reasons proffered by the state—including the claim by the potential juror that he could not be objective toward police testimony and that police "picked on good kids" and "let the bad ones do what they will"—were race neutral, not pretextual. The district court properly analyzed the state's peremptory challenge using the steps outlined in *Batson* and found no discrimination, and we discern no clear error.

II

TCJ's evidentiary challenges relate to the district court's refusal to allow evidence of state and school policies on the use of force by a teacher and a disciplinary report on the student with whom the teacher had allegedly confused JH. Rulings on evidence are committed to the district court's sound judgment and will not be reversed on appeal absent an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The appellant has the burden of establishing that the district court abused its discretion and thereby prejudiced the outcome of the case. *Id.* TCJ contends that the exclusion of this evidence by the district court prevented him from presenting his theory of self-defense because the teacher was acting beyond the scope of his authority and was the first aggressor in the assault. The court, after a comprehensive discussion on the record, determined that the evidence on policy and school records was not relevant.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Minn. R. Evid. 401. TCJ's attorney argued that the previous disciplinary report was relevant to show "a pertinent trait of character" of the teacher. This trait, according to the attorney's argument, would trigger a heightened sense of irritation with an individual who was brazenly disobeying him after a previous incident. The court rejected this theory, stating that TCJ had not yet shown "that the [teacher] believed that he was chasing" the previously disciplined student, and the report indicated "no use of force or inappropriate behavior" by the teacher in the previous incident.

Lack of relevance was also the district court's basis for excluding evidence of state and school policies on the use of force. The court identified the essential issue as the actions occurring at the point of conflict and whether those actions were in self-defense. TCJ's attorney renewed the attempt to introduce this evidence in response to the state's attempt to prove that the teacher had acted within his authority. The district court again rejected the evidence, stating that the school policies did not specifically permit or prohibit any of the teacher's conduct that was in evidence.

School policies may have had some relevance to an assessment of the teacher's motive in pursuing TCJ and JH and his attempt to bring them back to the school. But the district court extensively considered on the record whether that assessment was of consequence to the charged offenses and concluded that it was not. Evidence that is "marginally relevant or poses an undue risk of . . . confusion of the issues" may be excluded in the court's discretion. *State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003) (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 2146 (1986)). The record indicates that the district court properly and thoroughly considered the relevance and utility of the evidence in question, and we find no abuse of discretion.

III

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Instructions must be reviewed in their entirety to determine whether the district court fairly and adequately explained the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). The focus of the analysis on appeal is whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). Failure to request specific jury instructions or to object to the instructions ordinarily waives the right to appeal unless the instructions contain plain error affecting substantial rights. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998).

TCJ asserts multiple errors in the district court's instructions to the jury: that the court's instruction on aiding and abetting the assault amounted to an amendment of the complaint against which he was unable to defend; that the district court failed to instruct the jury on his theory that the intervening student caused the great or substantial bodily harm of which TCJ was accused; that he was entitled to a specific instruction on defense of another; that he was entitled to an instruction on the lesser included offense of fifth-degree assault; that he was entitled to a jury instruction on the theory that the teacher was acting beyond his authority; and that he was entitled to a "reasonableness" instruction tailored to his age and level of maturity.

We have reviewed these arguments under the applicable standards and can discern no error. The district court diligently managed the solicitation and provision of jury instructions, and the charge as a whole conveyed a clear and correct understanding of the law of the case. *See Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn.1986) (specifying that charge taken in its entirety should correctly state the law and not assume existence of facts in controversy). The district court did not abuse its discretion in its instructions to the jury.

IV

In determining whether the evidence is sufficient to support a conviction, we conduct a careful review of the record to ascertain whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow a jury to reach the verdict being appealed. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury believed the prosecution's witnesses and rejected contrary evidence, particularly when resolution of the issues depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

TCJ asserts that the verdict is not factually supported because the evidence did not show that his blows caused the teacher's broken jaw and it was instead more likely that the student who intervened caused the injury. He further asserts that the record does not support the conclusion that he acted in concert with the intervening student. Yet TCJ testified that he struck the teacher multiple times, and that he fled together with JH and the intervening student, whom he characterized as a friend. Several witnesses corroborated the state's account, testifying that two or three assailants attacked the teacher. Furthermore, TCJ testified that the intervening student hit the teacher twice on the left side of the face only, but the teacher suffered fractures on both sides of his jaw. Clearly, the record supports an inference that TCJ's use of force against the teacher caused substantial bodily harm.

TCJ also argues that his claim that he was protecting his friend is "a complete defense" to the charge. This argument relies largely on his statement that "[t]here is no question from the testimony that [the teacher] was the first aggressor" and that the teacher first assaulted JH. This argument mischaracterizes the record because the testimony of the teacher did not include an admission that he assaulted TCJ. The facts indisputably show that the teacher initiated contact with JH, but a number of witnesses testified that the teacher did not fight back.

Because of the abundance of factual support in the record for the jury's verdict, we reject TCJ's claim that the evidence is insufficient as a matter of law to support a verdict of guilty beyond a reasonable doubt.

V

Finally, TCJ challenges the district court's decision to sentence him under the extended-juvenile-jurisdiction procedure in Minn. Stat. § 260B.130, subd. 4(a) (2002), which requires the imposition of a stayed adult criminal sentence in addition to a juvenile disposition under Minn. Stat. § 260B.198 (2002). TCJ maintains that he should have been sentenced only to a juvenile disposition as provided by section 260B.130, subdivision 4(b). But that provision is limited to "a child prosecuted as an extended jurisdiction juvenile after designation *by the prosecutor*" who is convicted of an offense that would not, on its own, have justified an EJJ prosecution. (Emphasis added.) As the state indicated in its brief, TCJ's assault proceedings were designated as extended jurisdiction juvenile *by the juvenile court* after the prosecution unsuccessfully sought his certification to district court as an adult under Minn. Stat. § 260B.125 (2002). TCJ argues that the district court's application of the EJJ statute violated his right to equal protection under the law. While TCJ did not fully articulate this constitutional challenge at trial, we may consider issues not addressed by the district court when the interests of justice so require. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989).

We begin by reviewing the procedural aspects of this case that led to the prosecution of TCJ under the EJJ statute. In its delinquency petition, the state charged TCJ with two counts of assault: third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2002), and first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2002). Because the first-degree-assault charge satisfied the presumptive-certification requirement of the adult certification statute, Minn. Stat. § 260B.125, subd. 3(2), as "an offense that would result in a presumptive commitment to prison under the sentencing guidelines and applicable statutes," the state moved for district court "certification" to try TCJ as an adult. Following an order establishing probable cause for the presumptive offense and subsequent extensive briefing and a hearing, the juvenile court found that TCJ had overcome the presumption of adult certification and granted TCJ's motion that the proceeding "be designated an extended juvenile jurisdiction case." *See also* Minn. R. Juv. Delinq. P. 18.06, subd. 5 ("If the juvenile court does not order certification in a presumptive certification case, the court shall designate the proceeding an extended jurisdiction juvenile prosecution."); Minn. Stat. § 260B.125, subd. 8 (stating same).

TCJ's case proceeded under Minn. Stat. § 260B.130, which governs EJJ prosecutions. A decision to prosecute a juvenile in the district court under the laws and procedures controlling adult criminal violations is termed a "certification"; the equivalent process under the EJJ statute is termed "designation." Minn. Stat. § 260B.130, subd. 1. Although TCJ's case defaulted to EJJ upon the district court's designation, the EJJ process can also be instigated by the prosecutor under the same standard as the adult certification process if "the child is alleged to have committed an offense for which the sentencing guidelines and applicable statutes presume a commitment to prison." *Id.*, subd. 1(2). Unlike the adult certification statute, under which the prosecution proceeds "as if the jurisdiction of the juvenile court had never attached," Minn. Stat. § 260B.125, subd. 7, the EJJ statute contains a provision to distinguish between those offenses that justify the extended jurisdiction and other offenses with which the defendant may have been charged.

Subdivision 4 of the EJJ statute governs the disposition of offenses. Subpart (a) of the subdivision requires the court to impose a bifurcated sentence following a guilty plea or finding of guilt: first, the child is given a juvenile disposition under Minn. Stat. § 260B.198; and second, the child receives "an adult criminal sentence, the execution of which shall be 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(a). But subpart (b) qualifies the second part of the bifurcated process: if the child is convicted as an EJJ of an offense for which the sentencing guidelines and applicable statures *do not* presume a commitment to prison, then the court shall order only the juvenile disposition.

The provision is sensible and fair because it recognizes that the absence of guilt for the offense that increased the degree of seriousness in the child's prosecution should correspondingly permit the punishment for the nontriggering offenses to revert to the juvenile system. That result would apply to all EJJ prosecutions but for the phrase "after designation by the prosecutor in the delinquency petition" in subpart (b). We read this language to require a disparately more severe sentence for every EJJ conviction that results from the juvenile court's rejection of adult certification. In other words, under a literal reading of the EJJ statute, if TCJ's trial and conviction had followed a decision by the state to forego the adult-certification process

and a successful motion to designate his offense as an EJJ proceeding, he would only be subject to a juvenile disposition for the third-degree assault conviction. But because the state chose a more stringent approach of seeking adult certification—a decision entirely within the state's discretion and a choice which the court rejected—the statute mandates a stayed adult sentence for the third-degree assault *after the very same trial*. We find this result inconsistent with the protections afforded TCJ under the United States and Minnesota constitutions.

The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, "No [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Article I, Section 2, of the Minnesota Constitution provides, "[n]o member of this [s]tate 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." While all similarly situated persons shall be treated alike, "only invidious discrimination is deemed constitutionally offensive." *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000) (quotation omitted).

Minnesota law presumes that all statutes are constitutional and should be declared unconstitutional only if it is established beyond a reasonable doubt that they violate a constitutional provision. *Id.* at 73. Unless a constitutional challenge to the statute involves a suspect classification or a fundamental right, we review the challenge using a rational-basis standard under both the state and federal constitutions, and the statute will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Id.* at 74. TCJ argues summarily that the imposition of a stayed adult sentence has deprived him of his liberty, a fundamental right, but he provides no legal support for this argument. We are not convinced that a fundamental right to liberty is affected when a stayed sentence is imposed concurrently with a juvenile sentence that already requires TCJ's commitment to a juvenile facility, and we thus examine the statute under the rational-basis standard. *Cf. Taylor v. Lieffort*, 568 N.W.2d 456, 458 (Minn. App. 1997) (stating that alteration of a discretionary release date does not constitute impairment of a protected liberty interest).

We are guided in this equal-protection analysis by the Minnesota Supreme Court's recent holding that the classification imposed by another subdivision of the EJJ statute could not withstand a rational-basis test. In *State v. Garcia*, 683 N.W.2d 294 (Minn. 2004), the court applied the following test:

> (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.

Id. at 299 (quoting *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991)). TCJ argues that separate sentencing of "identically situated juveniles" is a manifestly arbitrary distinction which this court must find unconstitutional.

We agree. We perceive no rational basis linking this classification to the underlying purpose of the statute, which provides the juvenile courts with a means to retain jurisdiction to try juveniles for adult crimes and thus serve public safety. *See* Minn. Stat. § 260B.130, subd. 2 (requiring a showing of "clear and convincing evidence that designating the proceeding an extended jurisdiction juvenile prosecution serves public safety"). There is no evident connection between: (1) juveniles who were originally subjected to the adult certification process but who are not convicted of the presumptive offense, and (2) a sentencing provision that subjects them to harsher punishment than others not convicted of a presumptive offense simply because the first group arrived in an EJJ court through the adult-certification route. We are convinced that, as written, the statute inevitably overweights the prosecutor's discretion as an influence on the juvenile's sentence. This result, while clearly in violation of a juvenile's right to equal protection under the law, appears to have due process implications as well. If prosecutorial empowerment was the legislature's purpose in drafting subdivision 4 of the EJJ statute, it is not a purpose which "the state can legitimately attempt to achieve." Therefore, we hold that Minn. Stat. § 260B.130, subd. 4(b) is unconstitutional, and we vacate that part of TCJ's disposition that stays an adult sentence.

D E C I S I O N

We affirm the district court's judgment on the challenges to TCJ's conviction of third-degree assault. But we hold that the imposition of a stayed adult sentence on a juvenile defendant violates his right to equal protection, and we modify the disposition to vacate the stayed adult sentence.

Affirmed as modified.

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[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

STATE OF MINNESOTA

IN COURT OF APPEALS

A04-2321

Clara L. Schmidt, as mother and natural guardian
of Angelia R. Schmidt and Melissa L. Schmidt, minors,
and Clara L. Schmidt, individually,

Respondents,

vs.

City of Columbia Heights,

Appellant.

Filed May 24, 2005

Affirmed

Halbrooks, Judge

Anoka County District Court

File No. C1-03-11622

Cort C. Holten, Janet Waller, Jeffrey D. Bores, Chestnut & Cambronne, P.A., 3700 Campbell Mithun Tower, 222 South 9th Street, Minneapolis, MN 55402 (for respondents)

Brian H. Gaviglio, League of Minnesota Cities, 145 University Avenue West, St. Paul, MN 55103 (for appellant)

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

S Y L L A B U S

Minn. Stat. § 299A.465, subd. 1 (2004), requires the employer of a public-safety officer who is disabled in the line of duty to continue to pay health-care benefits for the dependents of that officer until the officer reaches the age of 65. When the officer dies prior to attaining the age of 65, the statute requires the employer to continue to pay health-care benefits for the officer's dependents until the 65th anniversary of the officer's birth.

O P I N I O N

HALBROOKS, Judge

Richard Schmidt retired from the Columbia Heights police department after suffering a disabling injury in the line of duty. When Officer Schmidt later died of causes unrelated to his injury, appellant City of Columbia Heights (city) notified his family that it would no longer pay its contribution toward their health-care benefits. Respondents Clara L. Schmidt and her minor children, Angelia [1] and Melissa (collectively, the Schmidts) sued, arguing that Minn. Stat. § 299A.465, subd. 1 (2004), which requires the employer of a police officer or firefighter who is disabled in the line of duty to continue to contribute to the health-care coverage for the officer's or firefighter's dependents "until the officer or firefighter reaches the age of 65," obligated the city to pay its contribution until the date on which Officer Schmidt would have turned 65. The district court granted respondents' motion for summary judgment.

The city challenges the district court's grant of summary judgment, arguing that the plain meaning of the phrase "reaches the age of 65" conditions the payment on the officer still being alive. Because we conclude that such a reading would produce an unreasonable result and thwart the intent of the legislature, we affirm.

FACTS

The material facts in this case were stipulated to by the parties and are not in dispute. Richard Schmidt began employment with the Columbia Heights police department in 1969 and was continuously employed full time as a police officer until March 24, 2000. During the course of his employment with the city, Officer Schmidt suffered a disabling injury on May 15, 1999. As a result of that injury, Schmidt applied to the Public Employees Retirement Association of Minnesota (PERA) for early retirement and disability benefits pursuant to Minn. Stat. § 353.656, subd. 1 (2004). His application was approved, and Officer Schmidt notified the city that he would be retiring.

After receiving notice of Officer Schmidt's retirement, the city notified him that it would continue paying its contribution for his family health coverage, which included Officer Schmidt's wife and two minor daughters, pursuant to Minn. Stat. § 299A.465, subd. 1 (2002).[2] The city paid its contribution for the health benefits provided to Officer Schmidt and his dependents through September 30, 2003.

On September 16, 2003, Officer Schmidt died from causes unrelated to his disability retirement. On September 24, the city notified the Schmidts that due to Officer Schmidt's death, the city's contribution toward their health benefits would terminate and that if the Schmidts wanted to continue coverage pursuant to Minn. Stat. § 62A.146 (2004) and the Consolidated Budget Reconciliation Act (COBRA), they would be required to pay the premium for family coverage.

The Schmidts subsequently filed a declaratory-judgment action, alleging that the city had violated Minn. Stat. § 299A.465, subd. 1, by failing to continue its contribution toward their health-care coverage. The parties stipulated to the facts, and both the city and the Schmidts moved for summary judgment. The district court filed an order granting the Schmidts' motion and denying that of the city on August 24, 2004. Summary judgment in favor of the Schmidts was entered on August 30. An amended order was filed on September 1 to correct clerical errors

and an amended summary judgment was entered on September 13. In its order, the district court reserved the issue of arrearages. The parties subsequently stipulated to the amount of arrearages, and the district court filed an order on October 13, 2004, awarding the Schmidts the stipulated amount of $5,781.25. Final judgment was entered on November 2, 2004. This appeal follows.[3]

ISSUE

Does Minn. Stat. § 299A.465, subd. 1 (2004), require the employer of a public safety officer who is disabled in the line of duty to continue to pay health-care benefits for the dependents of that officer when the officer dies of causes unrelated to his or her disability prior to reaching the age of 65?

ANALYSIS

The parties have stipulated to the facts in this case. The only issue before us is the proper interpretation and application of Minn. Stat. § 299A.465 (2004). "On an appeal from summary judgment, when the facts are stipulated, [this court] review[s] de novo whether the [district] court erred in its application of the law." *Sprint Spectrum LP v. Comm'r of Revenue*, 676 N.W.2d 656, 658 (Minn. 2004). Statutory construction is a question of law, which we review de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). This action presents an issue of first impression: whether Minn. Stat. § 299A.465, subd. 1(c), requires the employer of a public-safety officer who is disabled in the line of duty to continue to pay health-care benefits for the dependents [4] of that officer when the officer dies of causes unrelated to his or her disability prior to reaching the age of 65.

Our primary objective in interpreting a statute is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2004). When interpreting a statute, we first determine whether the statutory language, on its face, is ambiguous. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute is ambiguous when its language is "subject to more than one reasonable interpretation." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation omitted). If the legislative intent "is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning." *Am. Tower*, 636 N.W.2d at 312; *see also* Minn. Stat. § 645.16. But if a statute is reasonably susceptible of more than one meaning, we apply principles of statutory construction to determine the legislature's intent. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002). In construing a statute, we are guided by the premise that "[t]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable" and "intends the entire statute to be effective and certain." Minn.Stat. § 645.17(1)-(2) (2004).

The statute at issue here provides:

> The employer is responsible for the continued payment of the employer's contribution for coverage of the officer or firefighter and, if applicable, the officer's or firefighter's dependents. Coverage *must* continue for the officer or firefighter

> and, if applicable, the officer's or firefighter's dependents until the officer or firefighter *reaches the age of 65*. However, coverage for dependents does not have to be continued after the person is no longer a dependent.

Minn. Stat. § 299A.465, subd. 1(c) (emphasis added).

At oral argument, the city contended that language in other, related statutes demonstrates that if the legislature had intended the city's contribution to continue after the officer or firefighter's death, it could have explicitly so required.[5] We first note that this argument was mentioned only in passing to the district court with a general reference to chapter 353 in the city's reply brief.[6] The city did not cite to any specific statutory language, nor is there any indication in the record that this argument was developed for the district court. Therefore, the argument might reasonably be considered to be waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts will generally not consider matters not argued and considered by the district court). But even if the argument is not deemed to be waived, the statutes cited by the city equally support the counterargument: if the legislature had intended the contribution requirement to expire upon the death of an officer, it could have explicitly stated so. *See* Minn. Stat. § 471.61, subd. 2b(c) (2004) (providing that voluntary continuation of group health insurance to a former employee's dependents need not be extended "after the death of the former employee"). But because no such language was included by the legislature, we are left to discern the legislative intent expressed in the phrase "reaches the age of 65."

As the district court noted:

> The statute lists only two circumstances that relieve the employer of its duty to provide coverage to dependents. One circumstance is the loss of dependency status under Minn. Stat. § 62L.02, [subd.] 11 [(2004)], which is inapplicable under the facts of this case. The other circumstance that relieves the employer of its duty to cover an officer's dependents occurs when the officer reaches the age of 65. The statute is silent regarding whether the employer's responsibility to continue payment for the dependent's coverage ceases following an officer's death prior to reaching the age of 65.

(Citation omitted.)

The city argues that the statutory language is "clear and unambiguous," and that "[t]he word 'reaches' means the officer must still be living." The district court disagreed and concluded that the statutory language may be read to "require coverage until the 65th anniversary of an officer's [birth]." Accordingly, the district court held that the city was obligated to pay benefits until "Officer Schmidt *would have* turned 65." (Emphasis added.)

Accepting the city's interpretation would lead to an unreasonable result. If an officer must be living in order to "reach" age 65, such an event can never occur whenever an officer who has been disabled in the line of duty dies before turning 65. As the district court correctly

observed, pursuant to the statute, an employer's obligation to pay for benefits ends only when the officer reaches age 65 or the beneficiary loses dependency status. Consequently, an employer of a disabled officer who died before turning 65 would be required to pay for the health coverage of the officer's dependents until such time as those individuals no longer have dependent status, regardless of the officer's age at the time of disability or death because the officer could never "reach" age 65.

But there is another reasonable interpretation of the statutory language—that espoused by the district court. One reaches the age of 65 on the 65th anniversary of one's birth. Accordingly, it is reasonable to interpret the statute as requiring employers to pay for health benefits until the 65th anniversary of the officer's birth—when the officer "would have" turned 65. This interpretation has the added advantage of certainty for both the employer and the officer's family. An officer's birthdate remains constant and provides a clear and definite point of reference regardless of his or her age at death.[7]

This interpretation would also effectuate the intent of the legislature. Police officers and firefighters work in hazardous conditions to protect the property and safety of the public. The special nature of their sacrifice and contribution has been elsewhere recognized by the legislature. *See* Minn. Stat. § 353.63 (2004) (noting that police officers and firefighters deserve special consideration due to the hazardous character of their work). One purpose of Minn. Stat. § 299A.465, subd. 1, is to provide continued health coverage for the dependents of officers who are disabled in the line of duty. To rescind such coverage because the officer dies prior to his or her 65th birthday would frustrate this purpose and create an additional burden for those who have just lost a family member.

The statute mandates continued coverage for "the officer . . . *and*, if applicable, the officer's . . . dependents." Minn. Stat. § 299A.465, subd. 1(c) (emphasis added). The city argues that "[b]ecause the statute requires an employer contribution for *both* the officer and dependents, the provision is conjunctive. Accordingly, the [c]ity is not required to continue paying the employer's portion just for [the Schmidts], if the disabled officer is no longer living." (Emphasis in original.) The city thus focuses on the word "and," suggesting that if it is no longer required to pay for both Officer Schmidt *and* his dependents (because the officer is no longer alive), it is not required to pay for just his dependents' coverage.

Despite the city's contention to the contrary, "and" and "or" are often ambiguous and open to multiple interpretations. *See Am. Family*, 616 N.W.2d at 281 n.4 (noting the risk inherent in the use of conjunctions). The city reads the statute as requiring joint coverage or no coverage. But as the supreme court has noted, "and" can be read either jointly or severally. *Id.* Here, the intent of the legislature is best carried out by applying the several meaning of the term.

The city also contends that interpreting the statute to require payment of health benefits to an injured officer's dependents under this subdivision until the officer would have turned 65 erases the statutory distinction between "dependents of an officer disabled in the line of duty [and] dependents of an officer killed in the line of duty." The city correctly points out that the legislature has chosen to distinguish between these two groups in the provision of health benefits. Employers are required to provide health benefits for the dependents of officers

disabled in the line of duty until "the *officer* . . . reaches the age of 65." Minn. Stat. § 299A.465, subd. 1(c) (emphasis added). In contrast, for dependents of officers killed in the line of duty, "[c]overage must continue . . . for the period of time that the *person* is a dependent up to the age of 65." Minn. Stat. § 299A.465, subd. 2(c) (emphasis added). Thus, the benchmark for a member of the first group is the age of the officer, but the benchmark for a member of the second group is the age of the dependent. Contrary to the city's assertion, interpreting subdivision 1(c) to require payment until the 65th anniversary of the officer's birth would not conflate these distinct points of reference.

The city further argues that such a reading of the statute "contravenes the legislative intent to balance the need to provide health benefits for disabled officers and dependents with the need to protect the thinly-stretched budgets of the state's political subdivisions against rapidly rising health insurance costs." We note that the statute is silent regarding budgetary impacts on political subdivisions. Moreover, requiring the city to pay dependent health-care benefits until Officer Schmidt would have turned 65 does not impose on the city any obligations it would not have had if Officer Schmidt had not died. In fact, because the city no longer needs to pay benefits for Officer Schmidt, it has less financial responsibility than it would have if he had lived.

Minn. Stat. § 299A.465, subd. 1(c), requires that employers continue to contribute to the health coverage of the dependents of an officer who is disabled in the line of duty until that officer "reaches the age of 65." The intention of the legislature is best effectuated by reading this language to require contribution until the 65th anniversary of the officer's birth.

D E C I S I O N

Because holding otherwise would produce an unreasonable result and thwart the intent of the legislature, we conclude that when an officer who is disabled in the line of duty dies prior to attaining age 65, Minn. Stat. § 299A.465, subd. 1(c) (2004), requires the officer's employer to continue to contribute to the health coverage of the officer's dependents until the 65th anniversary of the officer's birth. We therefore affirm the decision of the district court.

Affirmed.

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[1] This child's actual name is unclear. The title of appellant's brief refers to her as "Angelia," as does the original summons and complaint. Respondents' motion for summary judgment refers to her as "Angela." The title of respondents' brief refers to her as "Angeline."

[2] The 2004 version of the statute is the same in all relevant aspects. Accordingly, the remainder of this opinion will cite to the 2004 statute.

[3] The city initially appealed from the August 30, 2004 summary judgment. By order, this court dismissed the appeal as taken from a nonappealable partial adjudication because the August judgment reserved the issue of arrearages. *Schmidt v. City of Columbia Heights*, No. A04-1795

(Minn. App. Oct. 29, 2004) (order). The current appeal is from the judgment entered November 2, 2004.

[4] The city does not dispute the fact that respondents meet the statutory definition of dependents. *See* Minn. Stat. § 62L.02, subd. 11 (2004) (defining "dependent" for the purposes of Minn. Stat. § 299A.465).

[5] In support of this argument, the city relies on two statutes: Minn. Stat. § 353.656 (2004) and Minn. Stat. § 471.61 (2004). Minn. Stat. § 363.656, subd. 6a(a), states that "[i]f a member who is receiving a disability benefit . . . dies before attaining age 65 . . ., the surviving spouse shall receive a survivor benefit . . . ." Minn. Stat. § 471.61, subd. 2b(c), provides that employers are not required to extend voluntary continuation of group insurance to a former employee's dependents "after the death of the former employee."

[6] In its reply brief, the city simply stated that "under the PERA statute [Minn. Stat. ch 353], the rights of the surviving spouse and dependent children are expressly articulated."

[7] It is, of course, possible that the officer's date of birth may be subject to dispute and thus uncertain. But in such a case, the date on which the officer turned 65 would be in contention even if the officer was still living.

STATE OF MINNESOTA

IN COURT OF APPEALS

A04-833

Block 25 Committee, et al.,

Respondents,

vs.

City of Walker,

Appellant.

Filed January 4, 2005

Reversed

Stoneburner, Judge

Cass County District Court

File No. C2031236

Thomas L. Fabel, Lindquist & Vennum, P.L.L.P., Suite 4200, 80 South Eighth Street, Minneapolis, MN 55402 (for respondents)

Jon K. Iverson, Paul D. Reuvers, Iverson Reuvers, L.L.C., 9321 Ensign Avenue South, Bloomington, MN 55438 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.*

S Y L L A B U S

Minn. Stat. § 340A.702(6) (2002), which makes it a gross misdemeanor to sell intoxicating liquor within 1,000 feet of a state hospital, training school, reformatory, prison, or other institution under the supervision and control, in whole or in part, of the Commissioner of Human Services or the Commissioner of Corrections, does not apply to sales within 1,000 feet of a county jail.

O P I N I O N

STONEBURNER, Judge

The district court granted a declaratory judgment and injunction to respondents, prohibiting the relocation of appellant City of Walker's municipal liquor store to a historic building located within 1,000 feet of the Cass County jail, concluding that Minn. Stat. § 340A.702(6) (2002), makes the sale of liquor from that location illegal. Because we construe the statute to apply only to state institutions and not to county jails, we reverse.

F A C T S

Respondents, an organization of Walker-area citizens and several of its individual members, sought a declaratory judgment from the district court that Minn. Stat. § 340A.702(6) (2002), criminalizes liquor sales within 1,000 feet of a county jail and an injunction prohibiting appellant City of Walker from expending taxpayer funds to move its municipal liquor store to a historic building located within 1,000 feet of the Cass County jail. The district court granted summary judgment to respondents, finding that Minn. Stat. § 340A.702(6), applies to the Cass County jail, and therefore prohibits the use of the proposed relocation site as a liquor store and the expenditure of taxpayers' funds for the relocation. This appeal followed.

I S S U E S

Does Minn. Stat. § 340A.702(6) (2002), criminalize liquor sales within 1,000 feet of a county jail?

A N A L Y S I S

"On appeal from a summary judgment based on the application of statutory language to undisputed facts, we exercise independent review to determine whether the district court erred in applying the statute." *Occhino v. Grover*, 640 N.W.2d 357, 359 (Minn. App. 2002). "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. Nelson*, 671 N.W.2d 586, 589 (Minn. App. 2003). "If, on its face and as applied to the facts, a statute's meaning is plain, judicial construction is neither necessary nor proper." *Occhino*, 640 N.W.2d at 359.

Minn. Stat. § 340A.702(6) (2002) provides:

> It is a gross misdemeanor: . . . to sell or otherwise dispose of intoxicating liquor within 1,000 feet of a state hospital, training school, reformatory, prison, or other institution under the supervision and control, in whole or in part, of the commissioner of human services or the commissioner of corrections;

The district court framed the issue as whether the Commissioner of Corrections exercises "supervision and control, in whole or in part," over the Cass County jail. The district court concluded that the licensing, inspection, and regulation powers that the commissioner exercises over county jails constitute "supervision and control," and a plain reading of the statute makes it applicable to county jails.

While we agree with the district court's conclusion that the Department of Corrections, in part, exercises supervision and control over county jails, that conclusion is not dispositive of the issue of the application of the statute to sales within 1,000 feet of a county jail. Whether a county jail is an "other institution" within the meaning of Minn. Stat. § 340A.702(6), must also be determined. Appellant argues that the statute only applies to state institutions but concedes that the words of the statute are ambiguous on this point. We agree.

If the statutory language has more than one reasonable interpretation, it is ambiguous. *Occhino*, 640 N.W.2d at 360. In construing statutes, "words and phrases are construed according to rules of grammar and according to the common and approved usage and general words are construed to be restricted in their meaning by preceding particular words." Minn. Stat. § 645.08(1), (3) (2002). Under the rules of grammar, the adjective "state" could be read to modify only "hospital," or could be read to modify the entire list of institutions that follow, including "other institution." The statute is therefore ambiguous regarding what institutions fall within its ambit.

"[C]ourts resolve ambiguity by looking to legislative intent, agency interpretation, and principles of continuity, which include consistency with laws on the same or similar subjects." *Occhino* at 360 (citing Minn. Stat. § 645.16). Although both parties have speculated about the legislative intent of Minn. Stat. § 340A.702(6), the record does not contain evidence or argument about the legislative history of the statute. Our own research indicates that in 1967, when the current law was enacted,[1] the legislature simultaneously repealed a similar provision,[2] which provided:

> Any person who shall sell or dispose of any intoxicating liquor . . . .within 1,000 feet of any of the following named state institutions: The St. Peter state hospital for the insane, the Rochester state hospital for the insane, the Fergus Falls state hospital for the insane, the first state asylum for the insane at Anoka, the second state asylum for the insane at Hastings, the state training school at Red Wing, the Minnesota home school for girls at Sauk Center, the state reformatory at St. Cloud, the state prison at Stillwater, the state public school at Owatonna, the state sanatorium for consumptives at Walker, the hospital for crippled and deformed children at St. Paul, and the state hospital for inebriates at Willmar, shall be guilty of a gross misdemeanor . . . .

Minn. Stat. § 624.703 (1965) (repealed 1967). In that statute, as in Minn. Stat. § 340A.702(6), all of the specifically named institutions are state institutions. The change in the wording of the statute appears to have been designed to eliminate the need to separately list each institution and to define in a more generic manner the set of institutions covered by the statute. Retention of the adjective "state" in the new version appears to carry forward what was formerly a clear limitation of the application of the statute to state institutions. And nothing in the wording of section 340A.702(6) expresses an intent to expand the criminalization of the prohibited acts to

county institutions. Insofar as we can determine legislative intent and continuity, these factors weigh in favor of appellant's argument that the statute applies only to state institutions.

Regarding agency interpretation and consistency with similar laws, appellant presented evidence to the district court of a letter from the Cass County Attorney declining to interpret section 340A.702(6) as applying to the county jail, and an affidavit attesting to the fact that at least four establishments licensed for on-sale liquor sales are located within 1,000 feet of the Cass County jail despite Minn. Stat. § 340A.412, subd. 4(a)(5) (2002), which prohibits licensing of intoxicating liquor sales "within 1,000 feet of a state hospital, training school, reformatory, prison, or other institution under the supervision or control, in whole or in part, of the commissioner of human services or the commissioner of corrections. . ." [3] The record is devoid of evidence of any prosecutions under Minn. Stat. § 340A.702(6), or any denial of licenses to non-municipal establishments under the identical provisions of Minn. Stat. § 340A.412, subd. 4(a)(5), for sales in proximity to a county jail, indicating that neither law has been interpreted by the licensing authority or by county attorneys to apply to county jails. Appellant argues that to embrace respondents' construction of the statute would lead to absurd or unreasonable results, asserting that the state is riddled with liquor establishments located within 1,000 feet of institutions under the partial control of the Commissioner of Human Services or the Commissioner of Corrections, given the broad licensing authority of those departments. Despite the absence of support in the record for the assertion of the number of existing liquor establishments located within 1,000 feet of county jails, there is sufficient evidence to conclude that in the City of Walker alone the construction of the statute urged by respondents would have significant consequences. And the consequences of a particular interpretation is a factor to be considered by the court in ascertaining the legislative intent.[4]

Additionally, construction of the statute to criminalize the conduct of the city makes the city a potential criminal defendant. And "where doubt exists as to legislative intent of a penal statute, doubts must be resolved in favor of the defendant." *State v. Serstock*, 402 N.W.2d 514, 516 (Minn. 1987).

D E C I S I O N

Minn. Stat. § 340.702(6) (2002), is ambiguous regarding whether it applies to sales within 1,000 feet of a county jail, which indisputably is supervised or controlled in part by the Commissioner of Corrections. Applying the principles of statutory construction, we conclude that the statute refers only to sales within 1,000 feet of a state institution, and the statute does not apply to prohibit liquor sales within 1,000 feet of a county jail.

Reversed.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] The legislature enacted Minn. Stat. § 340.14, subd. 3, in 1967. In 1985, the provision was moved from section 340.14, subdivision 3, to section 340A.702(6).

[2] Minn. Stat. § 645.16(5) (2002) specifically directs us to ascertain the intention of the legislature by considering, among other matters, "the former law, if any, including other laws upon the same or similar subjects."

[3] Because municipal liquor stores are established through the provisions of Minn. Stat. § 340A.601, no license is involved in the operation of a municipal liquor store.

[4] Although not briefed by the parties, a question was raised at oral argument about whether limiting application of the statute to state institutions would violate Minn. Stat. § 645.16 (2002), which requires that every law be construed, if possible, to give effect to all its provisions, because there is no evidence in the record that any state institutions exist that are supervised or controlled only in part by the Commissioner of Human Services or the Commissioner of Corrections. Because the current codification of the statute appears to have been drafted to include new institutions within the intended category as they are created, without having to continually amend the statute to name specific institutions, we do not find this lack of evidence fatal to appellants' argued construction.

STATE OF MINNESOTA

IN SUPREME COURT

A05-24

Court of Appeals

Hanson, J.
Dissenting, Anderson, G. Barry, J.
Took no part, Gildea, J.

Daniel Deegan,

Appellant,

Filed: March 23, 2006

v.

Office of Appellate Courts

State of Minnesota,

Respondent.

S Y L L A B U S

1. A 2003 amendment to Minn. Stat. § 590.05 (2004), which permits the state public defender to decline representation of indigent postconviction petitioners who pleaded guilty, received the presumptive sentence or less, and did not pursue a direct appeal, violates the petitioner's right to the assistance of counsel under the Minnesota Constitution.

2. The version of Minn. Stat. § 590.05 that existed immediately before the 2003 amendment is revived.

Reversed and remanded.

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

O P I N I O N

HANSON, Justice.

We review the question of whether Minn. Stat. § 590.05 (2004) violates the United States or Minnesota Constitutions because it provides that a petitioner who pleaded guilty, received no greater than the presumptive sentence, and did not pursue a direct appeal is not entitled to

representation by the state public defender in a postconviction petition if the state public defender reviews the case and determines that there is no basis to appeal the conviction or sentence. Specifically, our review focuses on the 2003 amendment to section 590.05, which added the following:

> If, however, the person pled guilty and received a presumptive sentence or a downward departure in sentence, and the state public defender reviewed the person's case and determined that there was no basis for an appeal of the conviction or of the sentence, then the state public defender may decline to represent the person in a postconviction remedy case.

Act of May 28, 2003, ch. 2, art. 3, § 2, 2003 Minn. Laws 1st Spec. Sess. 1400, 1401.

Appellant Daniel Deegan argues that the Minnesota Constitution ensures the right to one appellate review of a criminal conviction—through either a direct appeal or postconviction petition—and that the right to counsel is also constitutionally required because counsel is necessary for the review to be meaningful. In the alternative, Deegan argues that section 590.05 as amended violates the Equal Protection Clause of the United States Constitution because there is no rational basis to provide counsel to indigent postconviction petitioners who either went to trial, or pleaded guilty and received upward departures, but deny counsel to indigent postconviction petitioners who pleaded guilty and received the presumptive sentence or less. The district court and court of appeals held, on the basis of *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that there is no constitutional right to counsel for a postconviction proceeding. We reverse.

On March 13, 1999, Daniel Deegan, K.B. and S.M. were drinking together at the Red Lion Bar. F.A.W. was also at the Red Lion Bar that night. F.A.W. left the bar with S.M., Deegan and K.B. "to go get high." F.A.W.'s body was discovered the following day at a construction site. Deegan, K.B. and S.M. were each indicted for first-degree premeditated murder and first-degree murder while committing kidnapping. K.B. went to trial and was convicted on both counts.[1] Deegan entered guilty pleas to second-degree murder and kidnapping just before jury selection was to begin in his own trial.[2]

In exchange for his guilty pleas to second-degree murder and kidnapping, Deegan received a 360-month sentence for second-degree murder—a downward durational departure from the presumptive sentence of 386 months. The court did not impose a sentence for kidnapping because the offense was part of the same behavioral incident. Deegan was represented by two public defenders through his guilty pleas on November 28, 2000, and at sentencing.

Deegan did not pursue a direct appeal. In October 2003, Deegan requested the assistance of the state public defender in filing a petition for postconviction relief. The state public defender informed Deegan that counsel would not be appointed. Acting pro se, Deegan filed a petition for postconviction relief along with a motion for appointment of counsel.

After receiving a letter from the state public defender, explaining that the state public defender was declining to represent Deegan because Deegan pleaded guilty and received less than the presumptive sentence, the district court denied Deegan's motion for appointment of counsel on the basis of *Finley*, 481 U.S. at 557 (holding that there is no Fourteenth Amendment right to counsel for a state postconviction action) and section 590.05. The court also denied Deegan's petition for postconviction relief.

Deegan appealed the denial of his petition to the court of appeals. Deegan filed a motion for the court of appeals to accept his papers "as is," which the court denied. The order denying Deegan's motion to accept nonconforming papers noted that because Deegan had not pursued a direct appeal or previous postconviction petition, "[Deegan's] eligibility for representation by the State Public Defender's Office is unclear." A copy of this order was sent to the state public defender. The state public defender wrote to the court of appeals, providing the same explanation given to the district court: under section 590.05, as amended, Deegan was not entitled to representation by the state public defender. Deegan then filed with the court of appeals a motion for appointment of counsel, a second motion to accept nonconforming appeal papers, and a memorandum explaining his inability to submit papers conforming to the rules of criminal and appellate procedure.[3] The court of appeals granted Deegan's second motion for acceptance of nonconforming appeal papers, but denied his motion for appointed counsel on the same basis as the district court.

Deegan filed a petition for review of the court of appeals' denial of his motion for appointment of counsel. We granted Deegan's petition to review the constitutionality of the 2003 amendment to section 590.05. We review the constitutionality of a statute de novo. *State v. Benniefield*, 678 N.W.2d 42, 45 (Minn. 2004). A person claiming a statute is unconstitutional bears the burden of showing that the statute is unconstitutional beyond a reasonable doubt. *Id*. Unless a fundamental right or suspect class is involved, statutes are presumed to be constitutional. *Id*.

I.

A. Minnesota's Postconviction Remedy

We begin our analysis with an overview of the postconviction remedy. The substance of Minnesota's postconviction remedy has been fashioned over the last four decades by judicial decisions that express our understanding of the United States Supreme Court's decision in *Case v. Nebraska*, 381 U.S. 336 (1965), and interpret the Minnesota Postconviction Remedy Act.

In the 1960s, when federal courts were experiencing dramatic increases in habeas filings, the Supreme Court granted certiorari to decide whether the Fourteenth Amendment requires states to provide state prisoners with "some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Case v. Nebraska*, 381 U.S. at 337; Christopher Flood, *Closing the Circle: Case v. Nebraska and the Future of Habeas Reform*, 27 N.Y.U. Rev. L. & Soc. Change 633, 634 (2001-02). But the Court never issued a decision on the issue for which it granted certiorari because, in the intervening months, the Nebraska legislature enacted a statute providing a state postconviction remedy. *Case*, 381 U.S. at

337. The Court remanded the matter to the Nebraska Supreme Court for reconsideration in light of the newly enacted statute. *Id*. Because of the procedural posture of that decision, and because subsequent Supreme Court decisions have not revisited the issue directly, it is not clear whether the federal constitution requires states to provide state prisoners with some judicial review processes for claimed violations of the federal constitution.

Lacking clear direction from the Supreme Court, the Minnesota legislature nevertheless enacted the Postconviction Remedy Act in 1967. As originally enacted, this statute provided:

> Except at a time when direct appellate relief is available, a person convicted of a crime, who claims that the conviction was obtained, or that the sentence or other disposition made violated his rights under the constitution or laws of the United States or of the state, may commence a proceeding to secure relief therefrom * * *.

Minn. Stat. § 590.01, subd. 1 (1967). Nine years later, we noted that the Postconviction Remedy Act was enacted "as a legislative response to the United States Supreme Court's pronouncement in *Case v. Nebraska*." *State v. Knaffla*, 309 Minn. 246, 251, 243 N.W.2d 737, 740 (1976). We said that the "implication" of *Case v. Nebraska* was that "a convicted defendant is entitled to at least one state corrective process to determine a claim of violation of Federal constitutional rights." *Id*. We also observed that the Postconviction Remedy Act provides broader grounds for relief than is required by *Case v. Nebraska* because the Postconviction Remedy Act provides relief from state law violations in addition to federal and state constitutional violations. *Id* We concluded that "[t]he salient feature of Minn. St. c. 590 in coordination with *Case v. Nebraska*, *supra*, is that a convicted defendant is entitled to at least one right of review by an appellate or postconviction court." *Id.* at 251, 243 N.W.2d at 740-41.

In *Knaffla*, we considered the scope of postconviction relief available in Minnesota in two circumstances: where the petitioner did pursue a direct appeal and where the petitioner did not pursue a direct appeal. Where a postconviction petitioner has first taken a direct appeal, we held that all claims raised—or known but not raised—are barred from further consideration in a postconviction action. *Id.* at 252, 243 N.W.2d at 741.

> Two exceptions to the *Knaffla* rule allow for postconviction relief despite the fact that the claims could have been raised on direct appeal: (1) where a novel legal issue is presented; or (2) where the interests of fairness and justice require relief. To justify a hearing on a novel legal issue, the claim must be so novel that its legal basis was not reasonably available to counsel at the time the direct appeal was taken.

Powers v. State, 688 N.W.2d 559, 561 (Minn. 2004) (internal citations omitted). "Claims decided in the interests of justice require that the claims have substantive merit," *id.*, and "that the defendant did not deliberately and inexcusably fail to raise the issue on direct appeal," *Fox v. State*, 474 N.W.2d 821, 825 (Minn. 1991). Because these exceptions are quite narrow, the grounds for postconviction relief are substantially limited once a direct appeal has been taken.

But where a postconviction petitioner did not take a direct appeal from the conviction, but seeks review of a claimed violation of the United States or Minnesota Constitutions or of state law for the first time by a postconviction petition (hereinafter referred to as a "first review by postconviction proceeding"), we held that a postconviction petitioner is entitled to raise nearly the same breadth of claims that could have been brought in a direct appeal, so long as the postconviction claims are in compliance with the procedural requirements of the Postconviction Remedy Act. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. There are no specific limitations in the Postconviction Remedy Act for first review by postconviction proceeding. *See* Minn. Stat. § 590.01-.04 (2004). Thus, a first review by postconviction proceeding is substantially similar in scope to a direct appeal.

Postconviction remedies in other jurisdictions appear to be more limited. In contrast to Minnesota's broad right of review in a first review by postconviction proceeding, in federal postconviction proceedings (section 2255 actions) and in many states' postconviction proceedings, the failure to pursue a direct appeal bars all claims that were known and should have been raised on direct appeal, absent cause for failing to raise the issue previously and resulting prejudice. *E.g.*, *United States v. Pipitone*, 67 F.3d 34, 38-39 (2d Cir. 1995) (holding that failure to take a direct appeal bars claims in a section 2255 proceeding that could have been raised on direct appeal); *Worthen v. Meachum*, 842 F.2d 1179, 1181 (10th Cir. 1988) ("Under Oklahoma law, post-conviction relief is not available to a defendant who has not perfected a timely direct appeal unless he articulates special circumstances showing 'sufficient reason' for his failure."), *overruled on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991); *Coplen v. State*, 766 S.W.2d 612, 613 (Ark. 1989) (holding that when petitioner did not pursue a timely direct appeal, no relief was available because the postconviction remedy is "not meant to be a substitute for direct appeal and is not designed for review of a mere error that occurred at trial"); *Thomas v. State*, 316 N.W.2d 182, 184 (Iowa 1981) ("[F]ailure to appeal bars relief in a postconviction action as to factual and legal contentions which were known at the time of the original trial court proceeding but which petitioner inexcusably failed to pursue on appeal."); *State v. Osborne*, 124 P.3d 1085, 1088 (Mont. 2005) (holding that when petitioner did not pursue direct appeal, postconviction claim was barred because "[t]he plain language of these provisions establishes that the courts lack any authority to consider * * * or decide * * * legal and factual issues that could reasonably have been raised on direct appeal if an adequate remedy of appeal was available to the petitioner"); *State v. Perry*, 681 N.W.2d 729, 735 (Neb. 2004) (holding that when petitioner's direct appeal was dismissed for failure to meet a procedural deadline, "[a] motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal").[4]

Deegan suggests that Minnesota's provision of broad review in a first review by postconviction proceeding derives from the right to at least one review of a criminal conviction that is guaranteed by the Minnesota Constitution. Whatever the federal constitutional requirements may be for postconviction remedies, they do not appear to be as broad as the grounds for relief available in Minnesota for a first review by postconviction proceeding. We infer this conclusion from the longstanding lack of such grounds for relief in federal postconviction proceedings and similar proceedings in other states, and the Supreme Court's pronouncement in *Finley* that "[s]tates have no obligation to provide [postconviction] relief." *Finley*, 481 U.S. at 557.

It is true that state constitutions are "a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). As a general rule we favor uniformity with the federal constitution, but our state constitution may in some narrow circumstances provide greater protection for individual rights based on "language, concerns, and traditions unique to Minnesota." *Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005) (citing *State v. Harris*, 590 N.W.2d 90, 97-98 (Minn. 1999)). Because a first review by postconviction proceeding in Minnesota is substantially similar to a direct appeal, and appears to differ from first review by postconviction proceedings in other jurisdictions, it may well be that the right to one review—through either direct appeal or postconviction proceeding—is a "tradition unique to Minnesota." And because traditions unique to Minnesota may reflect a guarantee in the Minnesota Constitution, the right to one review of a criminal conviction may arguably be grounded in the Minnesota Constitution. But, because the resolution of that question is not necessary to our ultimate holding in this case, we defer until another day the question of whether the right to one review of a criminal conviction, which is recognized in *Knaffla*, is derived from the Minnesota Constitution.[5]

B. The Right to Counsel under the United States Constitution

Deegan argues that Minnesota's first review by postconviction proceeding is more akin to a direct appeal as of right than to other postconviction proceedings. This argument suggests that a Minnesota petitioner, proceeding on a first review by postconviction proceeding, may be entitled, under the United States Constitution, to the same right to counsel afforded to defendants on direct appeal as of right.

Deegan acknowledges that there is no right to counsel in "collateral review" proceedings under the Equal Protection or Due Process Clauses of the United States Constitution. *Finley*, 481 U.S. at 555-57. In *Finley*, the Court held that the right to counsel in state proceedings "extends to the first appeal of right, and no further." *Id.* at 555. The Court's rationale for guaranteeing the right to counsel in a first appeal as of right but not in a "collateral review," postconviction petition is that (1) postconviction proceedings are even more removed from trial than direct discretionary review, for which the right to counsel is not guaranteed, (2) postconviction proceedings are considered civil in nature, (3) states are not required to provide postconviction remedies, and (4) when states do provide this remedy, the Due Process Clause does not require the provision of counsel as well. *Finley*, 481 U.S. at 556-57. Deegan contends that in Minnesota, a first review by postconviction proceeding is not a "collateral review," as described in *Finley*, but is similar to a direct appeal and should be governed by the decision of the Supreme Court in *Douglas v. California*, 372 U.S. 353, 357-58 (1963). In *Douglas*, the Court reasoned that absent a constitutional right to counsel in an appeal as of right, indigent appellants would not have the same access to counsel as appellants with the financial means to retain private counsel. *Douglas*, 372 U.S. at 355. The *Douglas* Court concluded that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357 (emphasis added).

Although *Douglas* was expressly limited to a direct appeal, *id.* at 356 ("We are dealing only with the first appeal, granted as a matter of right to rich and poor alike * * *."), it may well

be that the Supreme Court would extend the rationale of *Douglas* to hold that Minnesota's unique procedure for first review by postconviction proceeding qualifies as a "direct appeal as of right" under *Finley* and *Douglas*. This conclusion finds some support in the Supreme Court's recent decision in *Halbert v. Michigan*, __ U.S.__, 125 S. Ct. 2582 (2005). In *Halbert*, the Court held that the Due Process and Equal Protection Clauses of the United States Constitution require appointment of counsel for indigent defendants seeking leave to obtain first tier, error-correcting review in the Michigan Court of Appeals, even though the first-tier appeal is discretionary, not as of right. *Id.* at 2592. Under *Knaffla*, Deegan's right to review is greater than the defendant's right in *Halbert* because it is as of right, not discretionary.

Ultimately, we are hesitant to predict how the Supreme Court would view Minnesota's postconviction remedy in the context of a first review by postconviction proceeding. Accordingly, we defer the question of whether the United States Constitution guarantees the right to counsel for an indigent defendant's first review by postconviction proceeding in Minnesota.

C. The Right to Counsel under the Minnesota Constitution

We next address whether the Minnesota Constitution guarantees the right to counsel for a first review by postconviction proceeding, irrespective of whether this right to counsel is protected by the United States Constitution. Although we have not determined whether the right to one review in a first review by postconviction proceeding is guaranteed by the Minnesota Constitution, this is not a prerequisite to a constitutional guarantee of the right to counsel in that proceeding. As we have seen in *Douglas* and *Halbert*, the right to counsel on appeal may be constitutionally guaranteed even where the right to appellate review is not. *See Douglas*, 372 U.S. at 355-56; *Halbert*, 125 S. Ct. at 2586-87. Having determined by examination of Minnesota statutes and case law that a criminal defendant in Minnesota has the right to one review of his or her conviction, the question before us is whether the Minnesota Constitution requires the assistance of counsel to make that one review meaningful.

Until 2003, a defendant seeking a first review by postconviction proceeding was provided the assistance of counsel by section 590.05. And the right to counsel in a direct appeal as of right has always been grounded in the United States Constitution. *See Douglas*, 372 U.S. at 357-58 (citing U.S. Const. amend. XIV). Thus, we have not previously needed to answer the question of whether the right to counsel for one review is required by our state constitution.

Section 590.05 was originally enacted in 1967 as part of the Postconviction Remedy Act.

For over two decades, this statute provided representation by the state public defender for all postconviction petitioners who were financially unable to obtain counsel. Minn. Stat. § 590.05 (1990). A 1991 amendment excluded the appointment of counsel to petitioners who had already had a direct appeal. Act of June 4, 1991, ch. 345, art. 3, § 1, 1991 Minn. Laws 2575, 2684. The 2003 amendment, the one at issue in this case, further restricted representation by the state public defender of a subset of postconviction petitioners who had not pursued a direct appeal: those who had pleaded guilty and received no greater than the presumptive sentence. Act of May 28, 2003, ch. 2, art. 3, § 2, 2003 Minn. Laws 1st Spec. Sess. 1400, 1401. The 1991

amendment continued the assurance that a defendant would have assistance of counsel for at least one review. The 2003 amendment eliminates that assurance for a subset of postconviction petitioners.

We have previously demonstrated a willingness to interpret the right to counsel under the Minnesota Constitution independently of the United States Constitution. In *Friedman v. Commissioner of Public Safety* we held that "because of Minnesota's lengthy and historic recognition of human rights, human dignity, and the procedural protection for the rights of the criminally accused," implied consent procedures are a critical stage of criminal proceedings to which the right to counsel attaches. 473 N.W.2d 828, 836 (Minn. 1991) (citing Minn. Const. art. I, §6 ("The accused shall enjoy the right * * * to have the assistance of counsel in his defense.")). And in *State v. Risk* we held that because Minnesota has a "long tradition of assuring the right to counsel," the Minnesota Constitution requires police to cease interrogating an accused who has made an ambiguous or equivocal statement that could be construed as invoking the right to counsel. 598 N.W.2d 642, 648-49 (Minn. 1999). Although these cases address the right to counsel for defendants during the investigative stages of a criminal proceeding, which are not at issue here, they demonstrate our view, under the Minnesota Constitution, that a defendant's access to the other protections afforded in criminal proceedings cannot be meaningful without the assistance of counsel.

We are also persuaded by the rationale underlying the Supreme Court's *Douglas* decision that the quality of a defendant's one review as of right of a criminal conviction should not hinge on whether a person can pay for the assistance of counsel. *Douglas*, 372 U.S. at 355-56. As the Court noted, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358. Although we recognize the salutary purpose of the 2003 amendment—to direct the limited public defender resources to the cases that will likely present the greatest need—we nevertheless conclude that the 2003 amendment deprives some defendants of meaningful access to one review of a criminal conviction, in violation of their right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution. We hold that a defendant's right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding. We therefore hold that section 590.05, as amended by Act of May 28, 2003, ch. 2, art. 3, § 2, 2003 Minn. Laws 1st Spec. Sess. 1400, 1401, is unconstitutional.[6]

II.

Having determined that section 590.05 as amended in 2003 is unconstitutional, we turn to the question of the appropriate remedy. When a court determines that a law is unconstitutional, it must invalidate only as much of the law as is necessary to eliminate the unconstitutionality. *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005) (citing *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 836 (Minn. 2002)). Minnesota Statutes § 645.20 (2004) provides that a court may sever any unconstitutional provision from a statute and leave the remaining language intact, unless the legislature has specified that the provision is not severable or it is apparent that the legislature would not have enacted the remaining provisions without those that are to be severed. *See also Chapman*, 651 N.W. 2d at 835-36.

We have previously held that if an amendment is unconstitutional, only the amendment is severed and any previous version found constitutional remains in full force and effect. *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 349 (Minn. 2005). There is no constitutional challenge to section 590.05 as it existed before the 2003 amendment. We hold that the 2003 amendment to Minn. Stat. § 590.05 (2004) is severed and the version that existed immediately prior to the 2003 amendment is revived.

Accordingly, we reverse the decision of the court of appeals denying Deegan's motion for the appointment of counsel and remand to the district court for appointment of counsel and postconviction proceedings consistent with this opinion.

Reversed and remanded.

GILDEA, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

D I S S E N T

ANDERSON, G. Barry, Justice (dissenting).

The majority strikes down Minn. Stat. § 590.05 (2004) on the basis that Article I, § 6 of the Minnesota Constitution guarantees a convicted defendant appointed counsel on a petition for postconviction relief when that petition is the first review of the conviction. Because I do not read the Minnesota Constitution to include this right, I respectfully dissent.

As the majority notes, when interpreting our state constitution, we generally favor uniformity with the federal constitution and do not independently apply the Minnesota Constitution absent "language, concerns, and traditions unique to Minnesota." *Kahn v. Griffin*, 701 N.W.2d 815, 824 (Minn. 2005). Because the "tradition" of providing counsel on postconviction review—and indeed of providing "a right to one review" when a petitioner has not taken a direct appeal—is of statutory origin, the right to counsel on a postconviction petition does not meet this stringent standard.

As acknowledged by the majority, Minnesota's history of providing appointed counsel to postconviction petitioners who have not pursued a direct appeal has always been based on statute. In addition, while the majority states that "the right to one review of a criminal conviction may arguably be grounded in the Minnesota Constitution," there is strong evidence that the right to appeal is itself statutory. This court recently stated that "a convicted defendant does not have a constitutional right to appeal under either the United States Constitution or Minnesota Constitution." *Spann v. State*, 704 N.W.2d 486, 491 (Minn. 2005). While "a convicted defendant is entitled to at least one right of review by an appellate or postconviction court," *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), the majority acknowledges that *Knaffla*, while it interpreted the Postconviction Remedy Act, did not reference the Minnesota Constitution.

Looking beyond these statutory guarantees, there is little additional basis for the conclusion that the Minnesota Constitution guarantees the right the majority finds today. The majority reads our prior decisions in *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991), and *State v. Risk*, 598 N.W.2d 642 (Minn. 1999), as support for the view that "a defendant's access to the other protections afforded in criminal proceedings cannot be meaningful without the assistance of counsel." While this may be true as a matter of policy, I do not agree that these two decisions, which the majority acknowledges dealt with investigative stages of criminal proceedings, create a "tradition" warranting reading the Minnesota Constitution to guarantee the right to counsel in a postconviction proceeding.

Finally, the majority finds support for its holding in the reasoning of *Douglas v. California*, 372 U.S. 353 (1968). As the majority notes, however, *Douglas* dealt with appointment of counsel on *direct appeal*—a factor that appears to have been significant in the Supreme Court's decision. *See id.* at 356-57 ("But where the merits of *the one and only appeal an indigent has as of right* are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.") (emphasis added). The case before this court today does not involve a situation in which a defendant is forced to undertake his *only appeal as of right* without the benefit of counsel. Deegan had the opportunity to appeal his conviction and sentence with the benefit of counsel via a direct appeal, an opportunity he chose not to pursue.

As a matter of policy, there is more than a little room to criticize the legislative decision to give the public defender discretion to decline representation to defendants in the procedural posture found here. The number of defendants affected by this amendment is small, the budgetary import insignificant, and the importance of counsel in an effective appeal is obvious.

But neither traditions based in statute nor poor policy choices by the legislature are sufficient to make an entitlement to counsel constitutionally mandated. Accordingly, I respectfully dissent.

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[1] A more comprehensive statement of the facts underlying this case can be found in our opinion affirming K.B.'s conviction, *State v. Budreau*, 641 N.W.2d 919 (Minn. 2002).

[2] S.M. also pleaded guilty to second-degree murder and kidnapping.

[3] Deegan explained that he was confined to disciplinary segregation where he had no access to a typewriter or word processor, that the prison commissary did not sell 8-½ x 11 inch paper, and that he could not afford to buy enough paper to submit the required number of copies.

[4] It is difficult to determine with certainty the breadth of the issues that may be raised in a first review by postconviction proceeding in other states. First review by postconviction proceedings are far less common than postconviction proceedings that follow a direct appeal. Moreover, many opinions holding that issues are barred for failure to raise them in a direct appeal do not specify whether a direct appeal was pursued. *See, e.g.*, *Simmons v. State*, 215

S.E.2d 883, 885 (S.C. 1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.") (internal citations omitted).

[5] We note, as counter arguments, that we have previously held that the right to pursue a *direct appeal* of a criminal conviction is not required by the Minnesota Constitution. *Spann v. State*, 704 N.W.2d 486, 491 (Minn. 2005). Moreover, our decision in *Knaffla* referenced the Postconviction Remedy Act and our understanding of the requirements of *Case v. Nebraska*, but not the Minnesota Constitution.

[6] We do not reach Deegan's argument that Minn. Stat. § 590.05 violates the federal or state Equal Protection Clauses because there is no rational basis to provide counsel to indigent postconviction petitioners who either went to trial, or pleaded guilty and received upward departures, but deny counsel to indigent postconviction petitioners who pleaded guilty and received the presumptive sentence or less.

STATE OF MINNESOTA

IN COURT OF APPEALS

A04-1518

State of Minnesota,

Appellant,

vs.

Jessica Rae White,

Respondent.

Filed March 1, 2005

Affirmed

Toussaint, Chief Judge

Dissent

Shumaker, Judge

Hennepin County District Court

File No. 04034029

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

Jay M. Heffern, Minneapolis City Attorney, Karen A. Swedenburg Herland, Assistant City Attorney, 300 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402 (for appellant)

Barbara S. Isaacman, Assistant Public Defender, 317 Second Avenue South, Suite 200, Minneapolis, MN 55401 (for respondent)

Considered and decided by Toussaint, Chief Judge; Randall, Judge; and Shumaker, Judge.

S Y L L A B U S

The interior of a vehicle traveling on a public street is not a "public place" for purposes of the gross-misdemeanor prostitution statute.

O P I N I O N

TOUSSAINT, Chief Judge

This appeal is from a pretrial order dismissing a charge of gross-misdemeanor prostitution, committed in a public place, under Minn. Stat. § 609.324, subd. 2 (2002). We affirm.

F A C T S

The complaint alleges that on May 25, 2004, at about 1:00 a.m., undercover Officer Willis was driving an unmarked vehicle at 31st Street and 5th Avenue South in Minneapolis. Officer Willis saw respondent Jessica Rae White standing by the street and pulled his car over to the curb. White walked to the car and entered it "without invitation" from the officer. As Officer Willis drove, White first sought assurance that he was not a police officer and then asked Officer Willis what he wanted to do. After they negotiated an exchange of oral sex for $30, Officer Willis signaled other officers, who arrested White.

White moved to dismiss the complaint for lack of probable cause, arguing that the interior of Officer Willis's car was not a "public place" as required by the statute under which she was charged. The district court granted the motion to dismiss, and the state filed this appeal.

I S S U E

Is the inside of a motor vehicle traveling on a public street a "public place" for purposes of the gross-misdemeanor prostitution statute?

A N A L Y S I S

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). Respondent White, however, argues that because this is a pretrial appeal by the state, the district court must be affirmed unless the state shows its decision was clearly erroneous. *See State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *review dismissed* (Minn. June 22, 2001). We conclude that under either standard of review the district court's order must be affirmed.

The statute White was charged with violating applies to anyone who "solicits or accepts a solicitation to engage for hire in sexual penetration or sexual contact while in a public place . . . ." Minn. Stat. § 609.324, subd. 2 (2002). For purposes of the prostitution statutes, "public place" is defined as:

> a *public street* or sidewalk, a pedestrian skyway system . . . , a hotel, motel, or other place of public accommodation, or a place of public accommodation, or a place licensed to sell intoxicating liquor, wine, nonintoxicating malt beverages, or food.

Minn. Stat. § 609.321, subd. 12 (2002) (emphasis added).

The district court concluded that the statute is ambiguous, and that the intent behind the statute was "to protect citizens from being unwitting witnesses to the agreement that constitutes the criminal conduct." Therefore, it concluded, the term "public place" should be interpreted to refer to areas "where the public is likely to be present."

A statute is ambiguous if it is subject to more than one reasonable interpretation. *See State v. Collins*, 580 N.W.2d 36, 41 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). The prostitution statute defines "public place" only in terms of various examples, such as streets, sidewalks, skyways, hotels, motels, and restaurants. Minn. Stat. § 609.321, subd. 12. The definition includes other places of "public accommodation," *id.*, but that term does not necessarily incorporate into the statute all places that might be considered "public." *See generally* Minn. Stat. § 363A.03, subd. 34 (Supp. 2003) (defining "place of public accommodation" for purposes of Minnesota Human Rights Act); *Wayne v. Mastershield, Inc.*, 597 N.W.2d 917, 922 (Minn. App. 1999) (holding apartment complex was not "place of public accommodation" under Minnesota Human Rights Act), *review denied* (Minn. Oct. 21, 1999).

As to some of the locations listed in the statutory definition, such as a "pedestrian skyway system," a motel, or a licensed establishment, the statutory definition of "public place" may be unambiguous. But the primary use of a "public street" is as a place dedicated to the movement of vehicles in which the occupants have some expectation of privacy. *See generally State v. Wiegand*, 645 N.W.2d 125, 131 (Minn. 2002) (holding that search, even of automobile, is substantial invasion of privacy). Thus, much of what occurs on a "public street" is not "public" in the usual sense of the word. We conclude that the district court properly determined that the definition of "public place," as extended to a "public street," is ambiguous.

The district court cited the rule of lenity applied when construing statutes that define criminal offenses. A penal statute must be strictly construed in favor of the defendant, although that does not require the court to adopt the narrowest possible interpretation. *State v. Zacher*, 504 N.W.2d 468, 473 (Minn. 1993). The district court concluded that the statutory definition of "public place" could not be construed, consistent with the rule of lenity, as applying to the interior of a motor vehicle traveling on a public street. We agree.

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 district court concluded that the intent behind this gross-misdemeanor prostitution statute was to further discourage the solicitation and negotiation of prostitution in open view of the public. Although the statute does not include a statement of purpose or intent, this intent can be readily inferred from the definition of "public place," which explicitly includes hotels, motels, establishments licensed to sell alcohol or food, and other places of "public accommodation," where prostitution might be visibly solicited. Minn. Stat. § 609.321, subd. 12. And, as illustrated by the citizen complaints that prompted Officer Willis's undercover operation here, it is the publicly visible nature of much prostitution activity that prompts criminal enforcement.

The state cites *State v. Stevenson*, 656 N.W.2d 235 (Minn. 2003), as it did in the district court, in support of its argument that White's conduct occurred in a "public place." In *Stevenson*, the defendant was convicted of indecent exposure and attempted fifth-degree criminal sexual conduct for masturbating while sitting in a motor vehicle parked facing a playground area. *Id.* at 237. The indecent exposure statute required that the act occur in "any public place." *Id.* at 240 (quoting Minn. Stat. § 617.23, subd. 1 (2000)). Referring to its decision in *State v. Peery*, 224 Minn. 346, 28 N.W.2d 851 (1947), the supreme court held that "[o]ur concept of public was not based on the privacy expectations of the defendant but on the likelihood that the conduct would be witnessed by others." *Id.* at 241. The *Stevenson* court, applying *Peery*, held that, given the location of the defendant's vehicle, which was parked next to a public sidewalk by a beach, it was so likely that the defendant's act would be observed by others that the defendant, it could be reasonably presumed, intended for it to be observed. *Id.*

As the district court noted, *Stevenson* did not involve a statutory definition of "public place." Because the statute also required proof of "deliberate intent of being indecent," the supreme court's analysis looked to the defendant's intent to be observed. But here, there is no need to look to White's intent to determine the scope of the term "public place." The issue is whether that part of the "public street" occupied by the vehicle inside which White was sitting was a "public place."

The state cites another case interpreting the term "public place," *State v. DeLegge*, 390 N.W.2d 10 (Minn. App. 1986). In *DeLegge*, a weapons-possession case, this court noted that "public place" "is a relative term and what may be a public place for one purpose may not be a public place for another purpose." *Id.* at 11-12 (citation omitted). This court stated:

> Because indecent exposure laws are intended to protect innocent people from being exposed to offensive sexual behavior, "public place" in indecent exposure cases has been interpreted broadly to include areas that can easily be seen by pedestrians.

Id. at 12 (citation omitted). The court concluded that because the private driveway on which DeLegge's car was parked, with a loaded gun inside, was close to the road and other areas "where people regularly walk," it should be considered a "public place." *Id.*

Like *Stevenson*, *DeLegge* did not involve a statutory definition of "public place." And it involved a unique statutory purpose – reducing the risk to innocent passersby from the discharge of a weapon. *See id.* This statutory purpose is quite different from the purpose of the gross-misdemeanor prostitution statute, which is to reduce the amount of prostitution visible to the public. It is obvious that members of the public may be threatened by the discharge of a weapon that is not visible to them. Thus, we conclude that *DeLegge* does not compel the conclusion that the interior of a motor vehicle is a "public place" for purposes of the gross-misdemeanor prostitution statute.

The district court also rejected the state's argument that because the legislature in the vehicle-forfeiture and drivers-license statutes recognized that prostitution, or the solicitation of prostitutes, occurs in motor vehicles, the term "public place" should be read broadly to include

the interior of automobiles. A motor vehicle is subject to forfeiture if used in the commission of a prostitution offense. Minn. Stat. § 609.5312, subd. 3(a) (2002). A person who uses a motor vehicle while patronizing a prostitute may also have the conviction noted on his driving record. Minn. Stat. § 609.324, subd. 5 (2002). But these provisions, while recognizing that motor vehicles are used, particularly by patrons of prostitutes, to commit the offense, do not necessarily indicate a legislative intent that solicitation of prostitution inside a motor vehicle should be punished more severely than solicitation in other locations. Had the legislature so intended, it could have defined as a gross-misdemeanor offense the solicitation of prostitution in a motor vehicle. Instead, the legislature defined "public place" to include only the "public street," and left to inference or argument the extension of "public street" to the vehicles located on it. This court cannot supply that which the legislature overlooks or purposely omits. *See State v. Jones*, 587 N.W.2d 854, 856 (Minn. App. 1999), *review denied* (Minn. Mar. 16, 1999).[1]

The district court construed "public place" in the gross-misdemeanor prostitution statute as not extending to the interior of a moving vehicle on a public street. That is the most reasonable construction of the term, as well as the one most in accord with the intent of the statute and the one that follows the rule of lenity. Thus, the district court did not clearly err in dismissing the complaint.

D E C I S I O N

The district court properly construed the term "public place" as not including the interior of a motor vehicle traveling on a "public street," and therefore did not clearly err in dismissing the complaint.

Affirmed.

SHUMAKER, Judge (dissenting)

I respectfully dissent.

Under Minn. Stat. § 609.324, subd. 2 (2002), it is a gross misdemeanor to solicit, accept, hire, or engage in prostitution in a "public place." Minn. Stat. § 609.321, subd. 12 (2002), defines "public place" to mean a public street, a public sidewalk, a pedestrian skyway, a hotel, a motel, a bar, a restaurant, a public accommodation, or a place of public accommodation.

The undisputed facts show that a plainclothes police officer driving an unmarked car picked up a prostitute, respondent White, in a public area and, as the two drove in the officer's car, White offered sexual services for money. Upon the officer's signal to other officers, White was arrested and charged with gross-misdemeanor prostitution.

Granting White's motion to dismiss the charge for lack of probable cause, the district court ruled that White's offer to engage in sex for money did not occur in a public place because she and the officer were inside the officer's car. Concluding that the statute defining "public place" as applied to "public street" is ambiguous, the district court held that the meaning of "public place" is a place in which the public is likely to be present and that the purpose of the statute is "to protect

citizens from being unwitting witnesses to the agreement that constitutes the criminal conduct." Thus, according to the district court, it is the visible act of prostitution at which the statute is aimed. The majority agrees and both hold that the rule of lenity compels the result that they reach.

Preliminarily, as we explained in *State v. Collins*, the purpose of the rule of lenity "is to ensure that 'criminal statutes will provide fair warning concerning conduct considered illegal.'" 580 N.W. 2d 36, 41 (Minn. App. 1998) (quoting *Liparota v. United* States, 471 U.S. 419, 427, 105 S. Ct. 2084, 2089 (1985)), *review denied* (Minn. July 16, 1998). The district court and the majority appear to believe that the rule of lenity requires the narrowest possible reading of a criminal statute so as to benefit a defendant. But the rule does not require that. Rather, it requires only that reading which may be said to give "fair warning" of the conduct subject to penalty. Thus, a broad statute, such as we have here, might nevertheless satisfy lenity if it can be reasonably said that the statute, despite its breadth, gives fair warning of the illegal conduct. I believe the statute in question gives that warning and that the majority's interpretation renders the statute unrealistic in its practical application to a significant societal problem.

The legislature has chosen to make prostitution a crime. Minn. Stat. § 609.324, subd. 3 (2002). If the prostitution occurs in certain public places, the legislature has chosen to make it a more serious crime. *Id.*, subd. 2. The district court and the majority suggest that the legislature's aim in enhancing the penalty for public prostitution is to protect members of the public from seeing or hearing the transaction of prostitution services. Implicit in this ruling is the notion that the legislature did not intend the more serious penalty for prostitution conducted discreetly and out of the sight and earshot of the law-abiding public. This is the logical extension of the district court's and majority's reasoning.

Under this reasoning, the legislature has turned its gross-misdemeanor eyes and ears away from the salaciously dressed prostitute who comes to a public area solely to engage in prostitution, stands provocatively on a street corner, waves at passing cars in hopes of getting some to stop, and then, when one does stop, leans through the car window and whispers the offer of sex for money.

I think the district court and the majority have adopted an ingenuous approach to the intent of the statute. Noting the breadth of the definition of "public place," I suggest that the legislature did not intend to restrict the enhanced penalty to only overt communication audible enough to be overheard by passersby. Rather, I urge that the purpose of the definition is to discourage prostitutes from coming at all to places in which the public is frequently found. The places listed in the definition are places prostitutes are most likely to be found because those also are places customers are likely to be found. The purpose of the statute is to curtail prostitution and not merely to cause it to become unobtrusive to the public.

The district court's and majority's reading of the meaning of "public street" is untenably selective and forces a similar selective reading of the other places defined as public. The district court and the majority have engrafted onto "public street" an exception for a prostitution transaction that takes place in the relatively private interior of a motor vehicle on a public street. To be consistent, the majority must then read exceptions into hotel, motel, bar, and restaurant. Thus, prostitution is subject to the enhanced penalty if it takes place in a hotel or motel, unless it occurs in private rooms out of the view and earshot of the public. And acts of prostitution will incur the

enhanced penalty if they happen in bars and restaurants, unless they take place in those quiet corner tables in the backs of the rooms or in booths screened a bit from the public.

The majority's reading also forces the predicament of how to apply the statute to a public accommodation, such as a taxicab or a public bus, when it is on a public street. Although the statute expressly includes "public accommodation" within its purview, the majority's approach virtually writes that definition out of the statute if the public accommodation is on a public street.

The majority suggests that had the legislature intended to include within the gross-misdemeanor sanction the interiors of motor vehicles on public streets, it could have said so. But considering the breadth of the prohibition—that these acts cannot be done *anywhere* in streets or motels or bars—it is more likely that the legislature would have provided an exception for places of privacy found within larger public settings, had it intended to exclude certain areas from the reach of the statute.

Finally, I think it reasonable to conclude that the legislature intended the term "street" as both literal and figurative. The hue and cry that we must "rid our *streets* of crime," or the thought that we can keep children from getting into trouble by "keeping them off the s*treets*," surely are not intended to refer only literally to actual streets.

White's act of prostitution occurred on a public street, albeit within a car. But if the legislature's goal is to curtail prostitution in public, as I believe it is, then the majority's decision fails to give effect to that goal, and I would reverse.

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[1] "Public place" is defined in Black's Law Dictionary, and that definition has been cited in a weapons-possession case. *See State v. Hicks*, 583 N.W.2d 757, 760 (Minn. App. 1998), *review denied* (Minn. Oct. 20, 1998). But, as discussed above, the statute at issue here defines "public place" in terms of specific locations. And the ambiguity here arises not from the term "public place" itself, but the inclusion of "public street" within the statutory definition of that term.