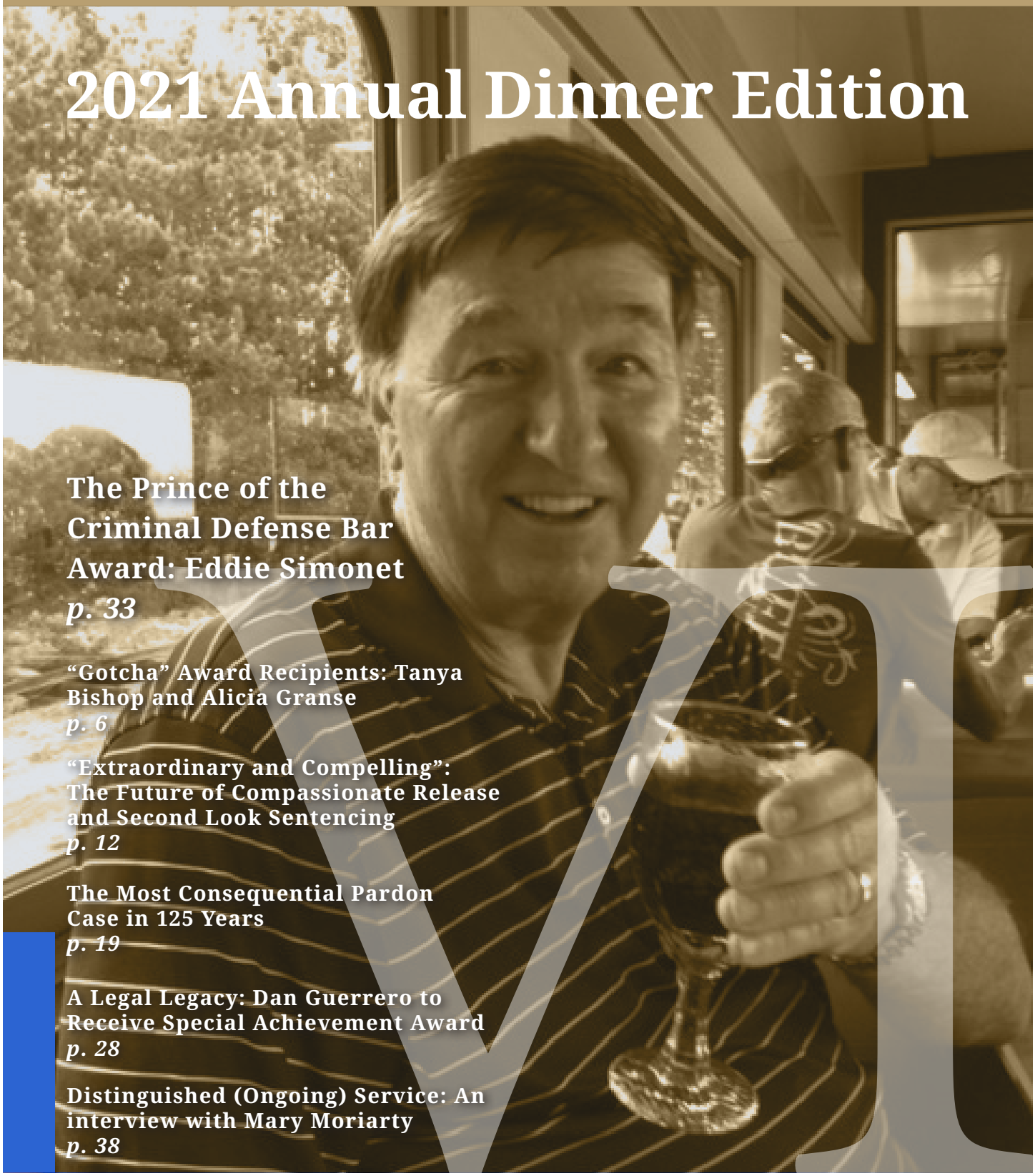
MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

2021 Annual Dinner Edition



Join us for our Annual Dinner & Auction

SATURDAY OCTOBER 2, 2021

The Town & Country Club
300 Mississippi River Boulevard North
St. Paul, MN 55104

5:00 pm Outdoor Cocktail Party
7:00 pm Dinner & Program
8:30 pm Live Band, *Belladiva*

RONALD I. MESHBESHER

DISTINGUISHED SERVICE AWARD RECIPIENT:

Mary Moriarty

SPECIAL ACHIEVEMENT AWARD RECIPIENTS:

Dan Guerrero, Professor Perry Moriarty, Matt DiTullio and Kaitlyn Falk & Rachael Melby

The Myon Burrell Defense Team

&

Andrew Mohring & Keala Ede

Compassionate Release Project

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“GOTCHA” AWARD RECIPIENTS:

Tanya Bishop & Alicia Granse

***

PRINCE OF THE CRIMINAL DEFENSE BAR AWARD RECIPIENT:

Ed Simonett

Stephen Foertsch, Jill Brisbois
Editors

Minnesota Association of Criminal Defense Lawyers
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President, MACDL

Piper Kenney Wold
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VI Magazine is published by MACDL, a Minnesota nonprofit corporation. MACDL works to advance the advocacy skills of MACDL members, inspire and motivate aggressive, ethical, and effective defense for all accused, and connect the criminal defence community in Minnesota.

Articles express the opinion of the conributors and not necessarily that of VI Magazine or MACDL. Headlines and other material outside the body of articles are the responsibility of the Editors. VI Magazine accepts letters and unsolicited manuscripts about the practice of criminal defense or the trial of criminal cases.

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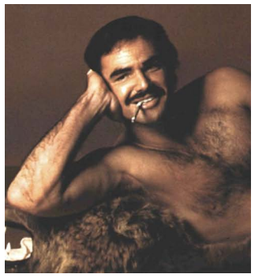
MACDL VI Magazine

Features

President's Column

Ryan Garry, MACDL President



MACDL Members:

The main point of this column. Come to the MACDL Gala on October 2, 2021. It's time to turn off Zoom.

But first some background in this President's column. I first got involved with MACDL many years ago when Aaron Morrison asked if I wanted to be involved with the Challenger (now VI) Magazine. I started working with the committee, pretended I was a reporter, made a bunch of new friends, had a lot of fun. Aaron did a great job editing and publishing the magazine for many years, and we all owe him a big thanks. I took over as editor and ran the magazine for many years, which really, I am quite sure, allowed me to become the longest serving board member in the organization's history (no term expiration for editor of magazine in bylaws), so for me it was a win-win.

Of course, this year has been a challenging year for everyone, including MACDL. For many reasons, but particularly because COVID didn't allow a 2020 annual dinner, which is our organization's main fundraising event, MACDL was in financial trouble. Past president Andy Birrell and the MACDL board spearheaded an effort to establish a one-time payment to be a life member, which successfully allowed MACDL to get back to work. Our membership has grown, as have our committees, which include the CLE, Annual Dinner, Membership, Communications/VI, Legislative, and now the Inclusion Committee and Clemency Project headed up by JaneAnne Murray. This new committee wrote the Amicus brief in the Amreya Shefa Minnesota Supreme Court Case. A description from JaneAnne is in this edition.

This year's annual gala is going to be big. No more Zoom. It's time to party. As you can see from the enclosed gala announcement, we are planning the annual dinner/party on Saturday October 2, 2021, an event that will look much different than our prior get togethers. We will be having an outside happy hour starting at 5:00 p.m., a shorter dinner/auction, less speakers and many more awards. There will be a 10-piece band following dinner so put your party shoes on. It's going to go late. Tables in the front will be "general admission" so to speak ... but if you want to purchase a table in the back, or sponsor the event, please contact myself or Piper.

As you all know, Minnesota Association of Criminal Defense Lawyers (MACDL) is the Minnesota Chapter of the National Association of Criminal Defense Lawyers, which is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers. It is a special organization. Thank you for being a member of MACDL. Your membership is important and valued. It allows us to work hard to advocate for changes in the criminal justice system. But this year its different. To me, it is really about getting together. Getting over this life-changing experience of COVID. It is about seeing each other.

As a member, please join a committee. We could use your help. Not only will you help make a change, you will make good friends, I promise you that. But this year, out of all years, come to the gala. Buy an auction item. Have a drink. Make a fool out of yourself on the dance floor. Let's have some fun together. We deserve it. ■

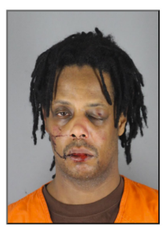
"GOTCHA" AWARD RECIPIENTS: Tanya Bishop & Alicia Granse

Jill Brisbois

Introduction

On December 7, 2019 around 12:20 a.m. Andre Lamar Moore ("Moore") and a passenger in his vehicle were pulled over by two Minneapolis Police Officers, Tony Partyka ("Officer Partyka") and Brandon Knuth ("Officer Knuth"). The officers' reports state Moore failed to signal within 100 feet of a turn. Officer Knuth approached Moore and Officer Partyka approached the passenger side of the vehicle (however Officer Partyka never interacted with the passenger at all). Within 30 seconds of the officers approaching the vehicle, Officer Knuth ordered Moore out of the vehicle.

As Moore reached to unbuckle his seat belt, Officer Partyka yelled that Moore had a gun. He ran to Moore's side of the car and threatened to tase him. Officers then pulled Moore out of the vehicle and threw him face down on ground. Moore was pinned down by Officer Partyka's knee in his back. Officer Partyka also hit Moore 3 to 4 times with elbow blows.



While Moore while he was trapped on the ground several other officers joined Officer Partyka in assaulting him because Officer Partyka called out that he saw a gun. Ultimately, Moore received a substantial bodily injur - a broken nose, a severely bruised eye, and multiple facial lacerations.

The officers then spent about twenty minutes ransacking the car they ripped Moore from looking for the gun Officer Partyka claimed to have seen or other contraband. As they were doing this, a crowd began to gather. Due to "safety concerns" and to get better lighting, they move the vehicle to continue the search. In the end they came up empty and were left with trying to manufacture a driving while impaired charge.

Officer Partyka brought Moore to the Minneapolis breath test unit despite not smelling alcohol on Moore. Officer Partyka convinced the officer operating the DMT machine to conduct a breath search without any field sobriety tests, including a PBT. Moore blew all 000s on the DMT.

Officer Partyka solicited the DMT officer's assistance in getting a search warrant to take Moore's blood. Refreshingly, that officer told him no because there was not probable cause. Officer Partyka called his Sergeant to enlist his help to get the DMT officer to draft a search warrant. Surveillance video shows Officer Partyka handing his phone to the DMT officer so he could speak with the Sergeant. Even after this conversation, the DMT officer still refused to draft a search warrant.

Officer Partyka was left to take Moore to the jail and have him booked in for the predictable crime of Obstructing Legal Process. However, the jail refused to take Moore until he had been seen at a hospital for his injuries.

Three and a half hours after the initial stop, Officer Partyka arrived at HCMC with a search warrant (drafted by the Sergeant) for Moore's blood. While Moore was at HCMC, a needle was jammed into his arm to draw his blood to test for alcohol or illicit drugs, but he did not receive any medical care for the assault he endured at the hands of the police for not signaling his turn within in the appropriate distance.

Moore was brought back to the jail and booked in where he sat for 3 days until a judge set bail at $78 (the equivalent of the court surcharges a person is required to pay if they are convicted of a crime).

On December 19, 2019, Moore appeared out of custody and was appointed an attorney at the Hennepin County Attorney's Office, Alicia Granse.

When Granse met Moore, Officer Partyka was not familiar to her… but Moore's story was. In her brief time with the office, Granse had handled several cases where African American men were assaulted by the MPD and charged solely with obstructing legal process.

At their initial meeting, Moore provided Granse a home surveillance video of the night he was brutally assaulted by Partyka and his gang.

Before the next hearing, Granse spent two days indexing 65 body camera, squad, and surveillance videos. At the pretrial hearing, the prosecutor notified Granse she would be dismissing the obstructing legal process charge (without Granse needing to bring any motions). The prosecutor did state they may still charge him with driving while impaired once they got the blood test results back. (To date, Moore has not been charged with driving while impaired). The City of Minneapolis, dismissed the obstructing legal process charge on March 10, 2021.[1]

When Officer Partyka cried wolf on December 7, 2019, he set off a series of events that led to a black man getting seriously injured when all he did not signal within 100 feet of a turn. We will never know the internal response from his colleagues and superiors but what we do know is Officer Partyka's response. At the time Officer Partyka was a *patrol* officer but somehow, he ended up the lead investigator in controlled substance investigation against Moore within months of the December incident.

In December of 2019, Alicia Granse had been a full-time attorney at the Hennepin County Attorney Public Defender's Office for about six months. Alicia was hired by the office after she graduated from the University of Minnesota Law School in the spring of 2019.

Alicia grew up in the Twin Cities and went to Las Angeles to complete her undergraduate degree. She later moved to Santiago Chile where she taught English, designed learning curriculums, and acted as an interpreter and translator.

After spending eight years in Chile, Alicia moved back to Minnesota to attend law school in 2016 after she became deeply concerned by the rhetoric about immigrants in the 2016 election.

Alicia loved her law school experience. She thrived and accomplished incredible results for clients she served at The Advocates for Human Rights as a student in the Detainee Rights Clinic. During her first year of law school, Alicia handled a case for a child that was eventually granted asylum in the United States. As part of her work in the law school clinic, she argued two cases at the 8th Circuit Court of Appeals. One of those cases is now pending a writ of certiorari at the United States Supreme Court.

In her first year of law school, at a Christmas party, Alicia met long-time Hennepin County Public Defender, Nancy Laskaris. Nancy suggested Alicia apply at the office. Alicia began working at the office as a law clerk in the summer after of her first year of law school.

Alicia is now a trial specialist that tries misdemeanor and gross misdemeanor cases from the suburbs that do not resolve through negotiation. In October, she will be moving to a team that specializes in handling felony property and controlled substance cases.

Outside of work, Alicia enjoys reading, boot camp workouts, and is on the MACDL Softball Team.

On February 13, 2021, Partyka, personally swore out an affidavit to obtain a search warrant to search Moore's residence. The warrant was executed by the Minneapolis

[1] Moore's cash bail that he posted was not refunded until September 25, 2020, more than six months after the dismissal.

Tanya Bishop is a veteran criminal defense attorney. Originally from Michigan, she found herself in Minnesota for law school at Hamline University. While in law school, Tanya was a law clerk at the Hennepin County Public Defender's Office. Upon graduation in 2003, she had a job with the public defender's office that ultimately fell through due to a hiring freeze.

Tanya began looking for other public defender jobs around the country. When doing her research, she found that Tampa had a restorative justice program that intrigued her. Unfortunately, the program was not what Tanya hoped. After three years, Tanya left the public defenders office after she was recruited by a former colleague to work in private practice. After several years, Tanya left and opened her own law firm where she proudly offered client's a sliding fee scale and took on contract public defender work.

Tanya's firm offered her financial freedom and the flexibility she needed to raise her daughter and get her to her sports practices. But Tanya's heart was still in Minnesota. Tanya is a musician and artist, and she missed the originality of the local art scene in the twin cities.

Eventually she was able to convince her husband and daughter to move to the Minnesota winters. She accepted a job with the Stearns County Public Defender's Office where she worked for two years. She now has her dream job at the Hennepin County Public Defender's Office. Now she can represent clients without worrying about the business side of law, work with colleagues that share her passion, but still have the flexibility that allows her to parent her daughter (an all-star baseball player).

SWAT team, at Officer Partyka's direction, within 25 minutes of the judge signing it. Within Moore's living space, a large quantity of narcotics and a firearm were found. It was a factually difficult case against Moore, and he was facing a very lengthy period of incarceration if he was convicted.

This time, Moore remained in custody because the bail was set at $80,000. Moore again was represented by the Hennepin County Public Defender's Office, this time working with attorney Tanya Bishop.

In the first meeting, Moore told Bishop that the lead officer that executed the search warrant had beat him up several months earlier. Bishop began investigating the case and immediately noticed red flags. First, the warrant referenced a specific court file number which was unusual in Bishop's experience. When she spoke with the attorney that handled the case referenced in the warrant, it was Granse. Before this conversation, they two did not know each other well.

Bishop asked Granse if she recalled the case and if Partyka beat up Moore. Granse went back, referenced the elaborate index she made, and confirmed that Partyka had assaulted Moore months earlier. The two agreed to team up to get to the bottom of a case that "smelled bad."

Two other pieces of information seemed out of place to them. First, Officer Partyka was a patrol officer at the time and not on the drug task force. Second, Granse noticed something about the header at the top of each page of the police reports.

Based on the wording of the search warrant, Bishop and Granse suspected that the confidential reliable informant ("CRI") referenced in the warrant did not exist. They began by filing a motion to have the court disclose the identity of the CRI or in the alternative, conduct an *in-camera* review of all the discovery regarding the identity, veracity, consistency, and accuracy of the CRI.[2]

The court must consider four factors when determining whether to disclose the identity of a confidential informant: 1) is the informant a material witness; 2) will the informants' testimony be material to the issue of guilt; 3) is the testimony of the officer suspect; and 4) will the informant's testimony disclose entrapment.[3] The four

[2] 27-CR-20-4146, Index No. 17, 18, and 19.

[3] *Syrovatka v. State*, 278 N.W.2d 558, 561-62 (Minn. 1979).

MINNEAPOLIS POLICE DEPARTMENT
GENERAL OFFENSE HARDCOPY
Incident Date 02/13/2020
(MOORE MONEY MOORE PROBLEMS)

factors inform the court's analysis which is a balancing test between the defendant's right to prepare a defense and the public's interest in effective law enforcement.[4] In Bishop's memorandum, she specifically addressed the third factor outlined in *Syrovatka* and explains Partyka's assault on Moore months earlier.

Ultimately, the court granted Bishop and Granse's request to interview Officer Partyka i*n camera*. The judge ordered Officer Partyka appear in his chambers with "the standard case file, the CRI's identity, track record, and any benefits received in exchange for information."[5] Granse believes that Officer Partyka's ill-conceived use of The Notorious B.I.G. lyrics disturbed the court.

The court interviewed Officer Partyka in chambers. Under oath, Officer Partyka told the court he was involved in a traffic stop with Moore, but he primarily dealt with the passenger.[6] Moreover, he was unaware of the outcome of the stop.[7] The officer also testified under oath that the informant was real, was not paid, nor given any other benefit for providing the information. Based on the court's review of the file the officer brought with him and his testimony, it denied any disclosures related to the "CRI."[8]

However, Bishop and Granse now had definitive proof Officer Partyka was lying and persevered in their quest to learn more about the "CRI." The attorneys believed if they could get more information about the CRI and show the CRI did not exist, they would then meet the heavy burden required to get a *Franks* hearing to challenge the veracity of the search warrant.[9] Their primary ammunition became the blatant falsehood that Officer Partyka told to the court. Specifically, that he only dealt with the passenger during the December 7, 2019 traffic stop.

When Bishop brought this lie to the court's attention, the court twice accused Bishop of "sandbagg[ing]" it. It was never clear how the court was sandbagged given that the prior assault by Officer Partyka was one of the reasons cited in the briefing as to why Moore sought an *in-camera* hearing. Nonetheless, the court granted a *Franks* hearing.[10]

Bishop and Granse had a month to prepare for the hearing. Both knew that even if they could show the informant did not exist, they still had a problem because the warrant also included two trash pulls that the court could find established probable cause. So, they began investigating the trash pulls.

[4] *State v. Rambahal*, 751 N.W.2d 84, 90-91 (Minn. 2008).

[5] 27-CR-20-4146, Index No. 27.

[6] *Id.* Index No. 26.

[7] *Id.*

[8] The file consisted of a cover sheet with the informant's biographical information and a summary sheet of information received on various cases but did not include the informant's contract. Index No. 77.

[9] A defendant may attack a facially sufficient warrant if they allege a "deliberate falsehood or...reckless disregard for the truth," by the affiant officer; and "th[e] allegations must be accompanied by an offer of proof." *Franks v. Delaware*, 438 U.S. 154, 171+72 (1978); *State v. Causey*, 257 N.W.2d 288, 292-93 (Minn. 1977). If a defendant establishes by a preponderance of the evidence that the application contains false information, the warrant must be invalidated, and the fruits of the search excluded if: 1) the misstatement of fact is material to the determination of probable cause and 2) the government agent deliberately or recklessly misrepresented or omitted a material fact. *State v. Doyle*, 336 N.W.2d 247 (Minn. 1983).

[10] Bishop candidly shared that she does not think they met the *Franks* threshold because lie was not in the warrant but did not question the gift from the court.

The first trash pull occurred about a week before the warrant was executed. The warrant stated that it was collected from trash cans at Moore's home, a duplex, but did not note any constructive possession documents that were seized. The warrant stated that Officer Partyka brought the items to the Minnesota National Guard Counter Drug Task Force for testing. Both baggies tested positive for methamphetamines.[11] Despite the presumptive test, the attorneys felt strongly that this pull would not establish probable cause for the warrant because there was no direct link to Moore.

The second trash pull occurred within 24 hours of the warrant. The warrant stated, "officers located a one-pound plastic sealed baggie with white powder substance inside of it and numerous plastic baggie tear offs." Unlike the first pull, there was no presumptive testing conducted. However, the warrant stated that they found charging paperwork with the name of Andre Lamar Moore and the relevant address in the trashcan.

The attorneys wanted to confirm that evidence from these trash pulls existed, so they got the court to order they could view the evidence.[12] Long-time investigator from the Hennepin County Public Defender's Office, Brad Michael, went to view and photograph the items seized from the trash pulls. When Bishop and Granse viewed the photographs of the second trash pull they immediately noticed two strange things. First, the baggies appeared to be completely empty with no residue on them. Second, there was mail for the other residents, but the "paperwork" for Moore was a photograph of a computer screen showing the Hennepin County Jail Roster from when he was arrested in December. Bishop and Granse requested that this evidence be brought to the *Franks* hearing so they could view it for themselves.

Days before the hearing, the Hennepin County Attorney's Office interviewed Officers Partyka and Knuth in preparation for the hearing. The prosecutor turned over her notes. The officers now claimed that they stopped Moore's vehicle on December 7, 2019 because Officer Partyka recognized Moore (at midnight) from a parole wanted bulletin. Partyka also claimed to have recovered 50 guns the preceding year.

On the morning of the hearing, Bishop and Granse recall opening the box containing the trash pull evidence. They felt like kids on Christmas morning when they saw for themselves that the bags from the second trash pull were new, clean, and empty bags. At that moment they both knew it was going to be a fun hearing.

Armed with Officer Partyka's prior lie, the empty baggies, and two other aces, Granse kept Partyka on the stand for hours tearing apart his testimony and credibility.[13] Under oath she got him to admit to his role in the December 7, 2019 assault and arrest of Moore. When she questioned Officer Partyka, he was unable to provide any explanation why the plastic baggies were empty.[14] Then she was able to turn to his ridiculous testimony that he recovered 50 guns the prior year. Before the hearing, the attorneys were able to obtain statistics from the City of Minneapolis, specific to Officer Partyka's claims. Officer Partyka was a patrol officer in the 4th Precinct. In 2019, the 4th Precinct recovered 125 guns in 108 traffic stops, only 27 were recovered by Officer Partyka (and only 6 in 2020, as of the date of the hearing on July 16, 2020). Next, they were able to show, the only warrant for Moore in 2019 was from Rice County issued in February (10 months before the stop), not the DOC as Officer Partyka claimed.

Two months after the *Franks* hearing, the court granted Moore's motion to suppress the evidence against him.[15] The court's opinion found that the description of the white powder substance found in the second trash pull was a material misrepresentation. Furthermore, Officer Partyka's credibility was diminished for all the reasons described in this article.

Five days later, the Hennepin County Attorney's Office filed a notice of appeal. Ultimately, they dismissed the appeal, but not before receiving all the transcripts of the proceedings were finalized and filed with the court, all the transcripts of the events described above are available on Minnesota Court Records Online (MCRO).

Bishop and Granse both believe the Hennepin County Attorney's Office withdrew the appeal because the facts and circumstances of this case could have led to an opinion that weakened the *Franks* standard for the government and made it easier for accused people to show the misdeeds of law enforcement and seek suppression of evidence.

Officer Partyka continues to be an officer with Minneapolis Police Department and astonishingly, he has gone unscathed and untouched. Andre Moore filed a complaint against him, but to date, nothing has been done with the complaint.

Moore was released from jail in September 2020. There is no excuse for Officer Partkya's actions. However, there is a silver lining. Moore for the first time in his life is sober, has a job, and has moved out of the Colfax neighborhood where he lived at the time of these incidents. He regularly checks in with Bishop and Granse to proudly share his progress. ■

[11] Bishop contacted the National Guard, and they keep a log of all the testing they conduct. Bishop was able to confirm Officer Partyka brought two bags for testing and they tested positive for methamphetamine.

[12] The Hennepin County Attorney's Office argued there was no basis for the attorneys to view this evidence.

[13] Prior to the hearing, Bishop, an experienced attorney asked her colleague, new to the practice of law, if she wanted to have the pleasure of conducting this much anticipated cross examination. Granse jumped at the chance and recalls this being her second cross examination.

[14] These baggies were particularly suspicious because there was no chain of custody stickers on them. Therefore, no one knew or recalled who collected the baggies from the trash.

[15] MNCIS 27-CR-20-4146, Index No. 47.

About Jill Brisbois

For more than 15 years, attorney Jill Brisbois has provided skillful, fearless representation to Twin Cities clients. She defends clients against a vast spectrum of charges, including sex crimes. Because the Minnesota State Bar Association has certified her in criminal defense, other attorneys throughout the state seek her counsel regarding criminal law, family law, personal injury and other civil matters.

"Extraordinary and Compelling":

The Future of Compassionate Release and Second Look Sentencing

Keala C. Ede, Assistant Federal Defender[1]

438 Months for Two Robberies

In 1994, a young African-American man robbed two Minnesota banks. Just 26 years old, he had little prior experience with the criminal justice system. His longest previous stint in custody was 26 days. Law enforcement described him as having "tendency to be naïve and a follower"; in robbing the banks, he had joined his cousin and one other man.

He went to trial, and lost. The Court sentenced him to 438 months (36.5 years) in federal prison. More than half of that sentence—240 months—had nothing to do with the severity of his crimes. Nor did it reflect his role in the robberies. Instead, the Court was required to impose those twenty years due to a then-existing enhanced mandatory minimum and consecutive sentencing scheme under 18 U.S.C. § 924(c), "Using a Firearm in a Crime of Violence." Specifically, because the government had charged multiple § 924(c) offenses in the same Indictment—so-called "stacked" § 924(c) counts—the Court's hands were tied.

As of 2020, the defendant and his cousin were the only two people sentenced in the District of Minnesota still held in custody due to "stacked" § 924(c) convictions.[2] It is noteworthy, however, that the United States Sentencing Commission has repeatedly reported that Black defendants have received disproportionately high percentages of § 924(c) mandatory minimum sentences throughout the United States, including but not limited to "stacked" § 924(c) sentences. In 1991, the Commission noted that nearly half (48.9%) of all African-American defendants convicted of a § 924(c) offense received a mandatory minimum sentence, as compared to 35.3% of White defendants.[3] The Commission's 2016 statistics showed that this trend had both persisted and worsened over the intervening 25 years: Black defendants accounted for 52.6% of all § 942(c) offenders and 70.5% of offenders convicted of "stacked" § 924(c) counts, far more often than White offenders (15.7% and 6.4%, respectively).[4]

The First Step Act and Compassionate Release

At the end of 2018, Congress passed the First Step Act. Section 403 of the law prevented the imposition of "stacked" § 924(c) sentences charged in the same Indictment, but that amendment only applied prospectively.[5] However, as Andrew Mohring explained in the last issue of VI, section 603 of the First Step Act also created a new judicial remedy for federal defendants to request sentence modifications under 18 U.S.C. § 3582(c): Compassionate Release.[6] Previously, only the Bureau of Prisons ("BOP") could seek such modifications. In order to receive this relief, a defendant has to show the Court that "extraordinary and compelling reasons" warrant a sentence reduction.

What exactly are "extraordinary and compelling reasons"? Section 3582(c) references a Sentencing Guidelines policy statement, U.S.S.G. § 1B1.13, which principally defines such "reasons" in terms of a defendant's medical condition, age, and family circumstances. The Application Notes do allow for one additional category, a so-called "catch-all provision" that broadly envisions "other reasons" for Compassionate Release. But because the Sentencing Commission has lacked a quorum since 2018, § 1B1.13 was not (and still has not been) amended to reflect the changes embodied in the First Step Act. The face of the un-updated policy statement restricts determination of those reasons to the Director of the BOP. And the Notes state that rehabilitation of the defendant *alone* shall not be considered an "extraordinary and compelling" reason. Could things change?

Relief From a "Harsh Sentencing Disparity"

More precisely, the question became: could the Court find that the defendant's youth at the time of the offenses, the fact that his "stacked" § 924(c) are "unusually long" in this District and 120 months longer than what Congress now deems is warranted, *and* his exceptional post-offense rehabilitation are "other" "extraordinary and compelling reasons" to reduce his sentence?

The answer is "yes." In December of 2020, Judge Doty granted Compassionate Release to both the defendant and his cousin. The Court found that, despite the language of the un-updated policy statement, it (and not just the Director of the BOP) had the discretion to consider whether a defendant had established "extraordinary and compelling reasons" under the Guidelines' "catch-all provision." And it ruled that "the changes in sentencing laws combined with his young age at the time of his offense, the fact that he is one of only two defendants from the District of Minnesota still incarcerated due to a stacked § 924(c) sentence, and his exemplary rehabilitative efforts constitute extraordinary

[1] Special thanks to JaneAnne Murray, Principal, Murray Law L.L.C., and co-chair of the National Association of Criminal Defense Lawyers Second Look Taskforce, and Andrew H. Mohring, Partner, Goetz and Eckland P.A., and former Assistant Federal Defender, for their assistance in preparing this article.

[2] In early 2020, the Federal Defender's Office began reviewing gun cases to determine if two 2019 Supreme Court cases (*Rehaif v. United States*, 139 S. Ct. 2191 (2019), and *United States v. Davis*, 139 S. Ct. 2319 (2019)) might apply to afford defendants retroactive relief. It was a significant undertaking. Assistant Federal Defenders examined more than 1,700 18 U.S.C. §§ 922 and 924(c) cases—every such case for which U.S. Probation and Pretrial Services has records in this District. Although that review did not indicate that Rehaif or Davis were helpful in the specific case described above, it did reveal that no other "stacked" § 924(c) sentences were currently holding District of Minnesota defendants in custody.

[3] *See* United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at Table E-5, *available* at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf (pub. Aug. 1991; last visited May 18, 2021); *see also id.* at ii ("The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum [.]").

[4] *See* United States Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* at 24, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf (pub. Mar. 2018; last visited May 18, 2021); *see also id.* at 6 ("Black offenders were convicted of a firearms offense carrying a mandatory minimum more often than any other racial group. . . . Black offenders also generally received longer average sentences for firearms offenses carrying a mandatory minimum penalty than any other racial group.").

[5] *See* First Step Act of 2018, § 403, at 28-29, *available* at https://www.congress.gov/115/bills/s756/BILLS-115s756enr.pdf (last visited May 18, 2021).

[6] *See* Andrew Mohring, *Compassionate Release: COVID-19 and Beyond*, VI, June 2021, at 18-21; see also First Step Act of 2018, § 603, at 46-48, *available at* https://www.congress.gov/115/bills/s756/BILLS-115s756enr.pdf (last visited May 18, 2021)

and compelling reasons warranting relief in his case."[7] On December 11, 2020, more than 26 years after their arrests, Oliver and Reginald Beasley left prison free men.

Nationally, many motions seeking this type of Compassionate Release—*i.e.*, asking Courts to reduce imprisonment terms based on "other" "extraordinary and compelling reasons" outside the text of U.S.S.G. § 1B1.13, such as "stacked" § 924(c) charges, enhanced drug penalties, mandatory Guidelines, statutory life, and other draconian sentences—have already succeeded.[8] Of course, both here in Minnesota and elsewhere, some Courts have declined to afford such relief.[9] Depending on what happens once the Sentencing Commission updates the policy statement—which could be by November of 2022, or even sooner—the window for expansive Compassionate Release may not remain open forever. But another opportunity could one day arise: "Second Look" Sentencing.

"Second Look" Sentencing

In the 2017 Model Penal Code, the American Law Institute ("ALI") approved principles that legislatures should seek to effectuate through enactment of Second Look Legislation. These include authorizing a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment. Under the ALI's proposal, a prisoner's right to apply for sentence modification would recur after first eligibility at intervals not to exceed 10 years.[10]

In 2019, Senator Cory Booker introduced a "Second Look Act" that would allow defendants who have served at least 10 years in prison to petition a federal court for a sentence reduction. Senator Booker's bill would allow Courts to reduce the prison term for a defendant if (1) the imposed prison term was more than 10 years; (2) the defendant has served at least 10 years in custody; and (3) the Court finds that the defendant is not a danger to public safety, is ready for reentry, and the interests of justice warrant a sentence modification. The bill sets forth factors that a Court may consider in reducing a prison term. The bill also creates a rebuttable presumption of release for a defendant who is 50 years of age or older on the date of the petition. But the bill did not advance beyond the Senate's Judiciary Committee.[11]

In 2020, the National Association of Criminal Defense Lawyers ("NACDL") released its own model Second Look Sentencing. Building upon the ALI's 2017 Model Penal Code, the NACDL's proposal is similar to Senator Booker's in seeking Second Look Sentencing for all persons who have served at least 10 years in prison, without regard to the nature of the underlying crime. The process would involve states' departments of correction in identifying eligible individuals and notifying both potential applicants and Courts of the appropriate time for a "Second Look" at defendants' sentences. A hearing would be required, wherein the original sentencing judge, if available, would rule upon the Second Look petition. The NACDL's proposal would further mandate that "Second Look" rights would not be subject to waiver, so that plea bargaining could not be leveraged against subsequent review.[12]

Practical Considerations

It remains to be seen how the Sentencing Commission will amend U.S.S.G. § 1B1.13, and whether Second Look Sentencing will pass at the federal and state levels. In either case, it will be beneficial for criminal defense attorneys to continue the following practices in sentencing advocacy:

(1) identifying and memorializing clients' criminogenic needs in the presentence investigation report ("PSR"), sentencing memoranda, and on the record at the sentencing hearing;

(2) actively encouraging client engagement in custodial rehabilitative programming addressing their criminogenic needs, as that will assist subsequent sentence reduction / resentencing efforts (as well as potentially result in the "earned time credits" now available to some federal defendants under the First Step Act); and

(3) appropriately challenging problematic content in the PSR—such as collateral / "relevant" offense conduct, inaccurate recitations of criminal history, and objectionable allegations of prior violence or escapes—as this will effect defendants' "Prisoner Assessment Tool Targeting Estimated Risk and Need" ("PATTERN") score, which Courts can consider in determining whether to later grant sentence reductions (and the BOP uses to limit eligibility for redeeming "earned time credits").

Such practices will not only assist in effective sentencing advocacy today, but could also prove fruitful for any Compassionate Release or "Second Look" motions down the line.

The Future: A Coming Iconoclasm of Determinate Sentencing?

Inherent in every Compassionate Release motion is the judicial reconsideration of a previously-imposed sentence. The enactment of "Second Look" legislation would make such reconsideration explicit, untethered to the "extraordinary and compelling reasons" standard, and would establish formal protocols for Judges to revisit a prison term they imposed at least 10 years earlier. Taken together, Compassionate Release and potential "Second Look" motions are emblematic of decreasing deference to the principle of determinate sentencing, long considered foundational to criminal justice, both federally and in many states. If properly implemented, these tools will not only offer opportunities for prisoners, counsel, and Courts to mitigate

[7] *See United States v. Beasley*, No. 4:94-cr-00127-DSD-DTS, ECF No. 463 at 14 (D. Minn. Dec. 2, 2020) (Doty, J.).

[8] *See, e.g., United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020) (affirming several District Court decisions granting Compassionate Release to defendants who had received "stacked" § 924(c) sentences); *see also United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (holding that "the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release"); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) (same); *United States v. Jones*, 980 F.3d 1098, 1108-11 (6th Cir. 2020) (same); *United States v. Gunn*, 980 F.3d 1178, 1179-81 (7th Cir. 2020) (same); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (same); *United States v. Maumau*, 993 F.3d 821, 836-37 (10th Cir. 2021) (same, and affirming grant of Compassionate Release for defendant subject to "stacked" § 924(c) sentence); *United States v. Long*, No. 20-3064, 2021 WL 1972245, at *1, *11 (D.C. Cir. May 18, 2021) (disagreeing with *United States v. Bryant*, No. 19-14267, 2021 WL 1827158, (11th Cir. May 7, 2021) (see *infra* at footnote 9) and, "like seven other circuits, hold[ing] that [the] policy statement is not applicable to compassionate release motions filed by defendants").

[9] *See United States v. Logan*, No. 97-cr-00099-PJS-RLE-3, 2021 WL 1221481 (D. Minn. Apr. 1, 2021) (D. Minn. Apr. 1, 2021) (Schiltz, J.) (ruling that there currently is no policy statement that is "applicable" to compassionate-release motions filed by defendants, but nevertheless denying a Compassionate Release motion notwithstanding the defendant's arguments as to his pre-*United States v. Booker*, 543 U.S. 220 (2005) and pre-*Apprendi v. New Jersey*, 530 U.S. 466 (2000) sentencing under mandatory Sentencing Guidelines, his youth at the time of the offense, subsequent rehabilitation, and other factors); *United States v. Bryant*, No. 19-14267, 2021 WL 1827158, at *6-*13, *16 (11th Cir. May 7, 2021) ("hold[ing] that 1B1.13 is an applicable policy statement that governs all motions under Section 3582(c)(1)(A)[,]" that "district courts may not reduce a sentence under Section 3582(c)(1)(A) unless a reduction would be consistent with 1B1.13[,]" and affirming the District Court's denial of a Compassionate Release motion seeking relief from a "stacked" § 924(c) sentence).

[10] The ALI Adviser, *Modification of Long Term Prison Sentences, available at* http://thealiadviser.org/sentencing/modification-of-long-term-prison-sentences/ (pub. Mar. 27, 2019; last visited May 18, 2021).

[11] Congress.gov, S.2146 – *Second Look Act of 2019, available at* https://www.congress.gov/bill/116th-congress/senate-bill/2146 (last visited May 18, 2021).

[12] Murray et al., *Second Look = Second Chance: The NACDL Model "Second Look" Legislation* at 4-7, *available at* https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-the-nacdl-model-second-look-legislation.pdf (last visited May 18, 2021); *see also NACDL, NACDL Model "Second Look" Legislation: Second Look Sentencing Act, available at* https://www.nacdl.org/getattachment/4b6c1a49-f5e9-4db8-974b-a90110a6c429/nacdl-model-second-look-legislation.pdf (last visited May 18, 2021).

unjust sentences in individual cases, but could also allow a greater reckoning with the systemic injustice currently at the forefront of our national dialogue. ■

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MACDL WEIGHS IN ON THE MOST CONSEQUENTIAL PARDON CASE IN 125 YEARS

JaneAnne Murray[1]

One hundred and twenty-five years ago, the Minnesota electorate voted to modify the Governor's then plenary pardon power to require that it be exercised "in conjunction with" a Board of Pardons, composed of the Governor, the Attorney General and the Chief Justice of the Minnesota Supreme Court. Today, pardon applicant Amreya Shefa awaits the outcome of a case before the Supreme of Court of Minnesota that will decide what these apparently collegial and modest words "in conjunction with" mean. Do they mandate, as the Minnesota legislature decided in 1897, one year after the constitutional amendment, that the governor's pardon power be subject to a unanimous vote from the three-member Board of Pardons, or do they require something less stringent – at the very least no more than a majority vote of the three Pardon Board members? The issue has profound ramifications for Ms. Shefa, whose pardon application garnered a 2-1 vote and who believes that she faces almost certain death if not granted a pardon that will save her from deportation. But it also impacts the thousands of pardon and commutation applicants in this state for whom the Governor's clemency power is the only meaningful opportunity for relief from disproportionately long sentences or who suffer life-limiting collateral consequences because of their prior conviction.

Background

In December 2013, Amreya Shefa had been raped and abused by her husband one time too much. She stabbed him 30 times, causing his death. She was charged with murder, and after a bench trial, a judge in Hennepin County convicted her of manslaughter. While acknowledging that Ms. Shefa was the victim of abuse, the court reasoned that Ms. Shefa had "exceed[ed] the degree of force required to defend herself."[2] Ms. Shefa was sentenced to seven years in prison. She served her sentence in full. Upon completion of her sentence and because of her manslaughter conviction, Ms. Shefa was held by immigration authorities to be deported to her home country where she feared her husband's family – which had vowed a blood revenge – would kill her.

The Binger Center for New Americans at the University of Minnesota Law School (the "BCNA") assumed Ms. Shefa's representation in immigration court. Seeing few paths to Ms. Shefa's freedom, the BCNA filed for clemency for Ms. Shefa on the grounds that hers, if ever one existed, was a case of "unfortunate guilt"[3] that should be mitigated through a pardon. A pardon would save her from deportation.

On June 12, 2020, the Minnesota Board of Pardons voted

[1] JaneAnne Murray is a member of the MACDL board, and director of the Clemency Project at the University of Minnesota Law School. In connection with the drafting of the MACDL amicus, MACDL acknowledges the invaluable research and analysis of Scott Dewey, J.D., Ph.D., a historian at the Law School's library, Ingrid Hofeldt, a J.D. Candidate at the Law School, and Margaret Colgate Love, Executive Director of the Collateral Consequences Resource Center.

[2] 1/23/2015 Decision of Hon. Judge Elizabeth Cutter at 18, ¶ 12.

[3] The Federalist No. 74 (Alexander Hamilton).

2-1 in favor of granting the pardon (with Governor Walz and Attorney General Ellison in favor of the pardon and Chief Justice Lorie Gildea opposed). Because the statutes implementing the constitutional pardon power provided that the Board of Pardons, alone, exercised the power, and also required a unanimous vote of board members, Ms. Shefa's pardon application was denied.[4] She then proceeded to challenge the constitutionality of this unanimity requirement in district court in Ramsey County.

Judge Laura Nelson's Decision

Judge Laura Nelson ruled on Ms. Shefa's motion on April 20, 2020. The court concluded, "[t]he plain language of art. V, § 7 names the Governor separate and apart from the Board of Pardons, of which he is a member. Based on this plain language, and applying the canon against surplusage, the Governor has some pardon power or duty separate or apart from the Board of Pardons."[5] Accordingly, the district court ruled that the challenged statutes—"which give pardon power to the 'Board of Pardons' alone"—are unconstitutional.[6] The district court declined to "address the argument that the correct interpretation of [the pardon provision of the Minnesota Constitution] would require that a pardon be effective if the Governor and one other member of the Board . . . voted yes."[7]

Supreme Court Grants Request for Accelerated Review

Chief Justice Gildea and Attorney General Ellison appealed Judge Nelson's decision and Justice Gildea sought accelerated review, a motion that was granted by the Supreme Court on July 20, 2021. As Ms. Shefa's potential deportation looms, briefing was ordered to occur within a seven-week window and argument is scheduled for September 15, 2021.

MACDL's Amicus Brief

The scope of the pardon power is an issue with unique resonance for MACDL. As criminal defense lawyers, we are painfully familiar with the harshness and injustice endemic in our criminal legal system, its pervasive racial and economic disparities, and the limited availability of judicial "second look" mechanisms after a conviction is final. Clemency, even if exercised sporadically, is a powerful statement against cruel laws and prosecution practices, and a reaffirmation of the humanity principle that those in the crosshairs of the criminal legal system are capable (and, in the right circumstances, deserving) of redemption.

MACDL also has a more specific interest. We recently inaugurated a clemency project in collaboration with ("in conjunction with," if you will) NACDL to recruit and train volunteer lawyers to represent applicants for state clemency in Minnesota. Given that this process has been shamefully parsimonious in this state over the last several decades (only two commutations in 30 years, and a pardon rate that is overshadowed by many other states), MACDL has a direct interest in seeing an invigoration of the clemency process in Minnesota.

Mindful of the Supreme Court's admonition for amici not to duplicate arguments in this case, MACDL's amicus brief focused on a discrete issue: the meaning of the word "board" in the amendment presented to the 1896 electorate. Whereas previously the Governor had unfettered pardon discretion in cases that did not involve impeachment, the proposed constitutional amendment required them to work in conjunction with a "board." But nothing in the text of the amendment or indeed in its legislative history put the electorate on notice that in implementing legislation to be enacted the next year, this singular and personal act of executive empathy would be subject to a *unanimous* vote of all Pardon Board members – and thus a potential veto by one member.

We opened our amicus brief by highlighting the uniquely personal nature of an act of clemency – it is an act of empathy by an individual leader towards a human being deserving of mercy. This quality was preserved by the 1896 electorate when it chose to continue to enumerate the pardon power as one of the *governor's* constitutional powers. We then analyzed the nature of "boards" in early American life, and the electorate's likely understanding of the term as one founded on the republican principle of one-person-one-vote and majority rule. We concluded with an analysis of all other nine constitutional pardon boards established in other states by 1896 – none of which required unanimity of all members of the board before a pardon could issue, and in fact eight of which explicitly permitted a vote on a majority basis. In short, the available evidence from the historical record indicates that the 1896 electorate would have interpreted the "in conjunction with [a board]" language to mean something Minnesotans today understand well: a collegial process where the discursive obligation encourages compromise, but if the parties cannot agree, a majority vote prevails and no one person has a veto power.

1. The 1896 Electorate Privileged the Governor

Minnesota's constitutional pardon provision, as amended by the Minnesota electorate in 1896, squarely grants the pardon power to the Governor. As the language of the amendment presented to the electorate back then stated:

> . . . *he [the governor] shall have power*, in conjunction with the board of pardons, of which the governor shall be ex officio a member, and the other members of which shall consist of the attorney general of the State of Minnesota and the chief justice of the supreme court of the State of Minnesota, and whose powers and duties shall be defined and regulated by law, *to grant reprieves and pardons after conviction for offenses against the State, except in cases of impeachment.*

See Minn. Const. Art. V § 4 (as amended in 1896) (enumerating the powers of the governor) (emphasis added).[8] While this power is exercised "in conjunction with" the Board of Pardons, it remains a power that the Governor exercises in their individual capacity. This was in keeping both with the practice at the time in almost all of the states and with the humanity principles underlying the power itself.

As Alexander Hamilton observed in opposing an "advice and consent" procedure for its counterpart in the federal constitution (and upon which the Minnesota constitutional provision was based), "one [person] appears to be a more eligible dispenser of the mercy of government, than a body of [people]."[9] Hamilton's views were echoed in those of federalist and future Supreme Court Justice James Iredell, who similarly advocated that the power to be merciful be reposed in one individual: "and where could it be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people?"[10]

The Supreme Court later acknowledged in interpreting the federal constitutional pardon provision, that the pardon power was "the 'private . . . act' of the executive magistrate;"[11] in other words, the pardon provision, while "a part of the Constitutional scheme,"[12] was specifically designed to be a *human* decision with limited restraints.

[4] *See* Minn. Stat. §§ 638.01; 638.02.

[5] Decision of the Hon. Laura E. Nelson, entered in this case at the district court level on April 20, 2021, at 11.

[6] *Id.*

[7] *Id.*

[8] Although the pardon power was later moved to its own dedicated section (Art. V. § 7), this was done for clarity purposes and had no legal effect. *See City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 159 (Minn. 2017).

[9] The Federalist No. 74 (Alexander Hamilton).

[10] *See Address by James Iredell, North Carolina Ratifying Convention* (July 28, 1788) reprinted in 4 The Founders Constitution 17-18 (P. Kurland & R. Lerner ed. 1987) (emphasis added).

[11] *Burdick v. United States*, 236 U.S. 79, 90 (1915) (emphasis added).

[12] *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Holmes, J.).

II. Nothing in the 1896 Amendment Required Unanimity

While the Minnesota electorate chose in 1896 to amend the Governor's previous plenary pardon power with a requirement that it be exercised "in conjunction with" the new Board of Pardons, nothing in the proposed amendment put the electorate on notice that this change might subject the Governor's power to a unanimity requirement. To the contrary, boards were ubiquitous in early America in all walks of life – religious, educational, governmental and business – and early Americans were fully familiar with their traditional mode of operation, in keeping with prevailing republican norms: one person, one vote and majority rule.

A. Boards in Early America Operated by Majority Rule

Relying on invaluable research and analysis from Scott Dewey, J.D., Ph.D, a historian at the University of Minnesota Law School, MACDL argued that the Minnesota electorate understood the word "board" in the phrase "board of pardons" to mean a group of individuals who operated on a majority-vote basis – underscored by a study of how boards – whether corporate, school, church, municipal – operated at the turn of the 20th Century.

The post-Revolutionary United States inherited English law and legal culture and generally remained close to them, including with regard to public and private corporations and similar institutions. Thus, the First Bank of the United States, established in 1791, was patterned after the Bank of England and similarly borrowed the term "director;" whereas the latter institution had 24 directors on its board, the former added a twenty-fifth member as a potential tie-breaker in votes.[13]

Towering figures of early American law reaffirmed the general default rule that corporate and other boards governed by majority rule. Chancellor Kent in his *Commentaries* discussed majority rule in the context of corporations as follows:

> The same principle prevails in these incorporated societies as in the community at large, and the acts of the majority, in cases within the charter powers, bind the whole. *The majority here means the major part of those who are present at a regular corporate meeting.* There is a distinction taken between a corporate act, to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act; but in the former a majority of the definite body must be present, and then a majority of the quorum may decide.[14]

Chief Justice Lemuel Shaw in a Massachusetts Supreme Court opinion, in the context of considering the validity of a transaction made by directors of an insolvent manufacturing corporation, noted:

> In ordinary cases, when there is no other express provision, a majority of the whole number of an aggregate body who may act together constitute a quorum, and a majority of those present may decide any question upon which they can act.[15]

The republican roots of board voting and decision-making deepened further in the United States throughout the nineteenth century. Already from an early date, New York State established by law the general default rule of majority rule on boards in its Revised Statutes: "that when any power or duty is confided by law to three or more persons, it may be performed by a majority of such persons, upon a meeting of all, unless special provision is otherwise made."[16] New York's revised 1890 Corporation Law similarly established majority rule by quorum as a general default: "When the corporate powers of any corporation are to be exercised by any particular body or number of persons, a majority of such body or persons, if it be not otherwise provided by law, shall be a quorum; and every decision of a majority of such persons duly assembled as a board, shall be valid as a corporate act."[17]

In the same vein, the Rhode Island Supreme Court reiterated the principle of majority vote in the context of commissioners appointed to partition an estate:

> We do not think the report of the commissioners was invalid merely because it was not unanimous. *We think the true rule is, that where three or more persons are charged with a judicial or quasi judicial function under an authority derived*, not from the parties in interest merely, but *from a law or statute of the state*, though all must hear and deliberate together, *a majority may decide, unless it is otherwise provided*. The counsel for the defendants admit that this is a rule when the power to be exercised is of a public nature[.]"[18]

A leading treatise throughout the nineteenth century on American corporation law similarly emphasized, "Corporations are subject to the emphatically republican principle (supposing that charter to be silent), that the whole are bound by the acts of the majority, when those acts are conformable to the articles of the constitution."[19]

As a result, already by the early 1800s if not even sooner in America, it was generally understood regarding corporations that "[t]he board would usually have the authority, by majority rule, to write the corporation's bylaws, and generally run the firm."[20] From back then through the present, "American corporation statutes [have] provide[d], ... that a corporation shall be managed by or under the direction of its board of directors," which has become a "universal norm in American corporate law" as well as the "prevailing model of corporate governance around the world."[21] "The second concept underlying th[is] board-centered model of corporate governance is that a group composed of peers acting together makes the decisions"[22] – by one person, one vote majority rule unless otherwise clearly specified.

B. No State Board of Pardons in 1896 Required Unanimity

With invaluable research and analysis from Margaret Colgate Love, former U.S. Pardon Attorney and the nation's leading expert on pardons, MACDL's brief next pointed out that no state board of pardons in 1896 required unanimity.

Critically, the majority-rule requirement was included explicitly in eight of the nine constitutional pardon boards created by other states prior to Minnesota's amendment of Article V of its Constitution in 1896; only one other state's constitution, South Dakota's, was silent on this point. Like Minnesota, all nine of these state constitutional pardon boards were composed of high-level government officials. And while the operation and structure of these boards differed from the Minnesota one, in no state was the vote

13 Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 Hofstra L. Rev. 89, 110 (2004).

14 Eden Francis Thompson, An Abridgment of Kent's Commentaries on American Law 134-135 (1886) (emphasis added).

15 *Sargent v. Webster,* 13 Mass. 497 (Mass. Sup. Jud. Ct., 1847) (emphasis added).

16 *In re Fourth Avenue*, 11 Abb.Pr. 189 (NYS Sup. Ct. Gen'l Term, 1854) (adding further, "This was a familiar principle of law, known to those who framed the present Constitution, and long before adopted, as it was found necessary and beneficial in practice, and it had never been complained of. It cannot be supposed that the framers of the Constitution intended to repeal it in this case, by a covert means[.]"); *see also, e.g., People ex rel. Hawes v. Walker*, 2 Abb.Pr. 421, 23 Barb. 304 (NYS Sup. Ct., 1856); *People ex rel. Andrews v. Fitch*, 9 A.D. 439, 441; 41 N.Y.S. 349, 351 (N.Y.S. Sup. Ct., App. Div., 1896); *People ex rel. Crawford v. Lothrop*, 3 Colo. 428, 453 (Colo. Sup. Ct., 1877) ("In the case of a corporation, if a corporate act is to be done, by a definite body, as by a board of directors or trustees, where the charter and by-laws are silent, a majority, at least, must be present to constitute a quorum, but a majority of that quorum may do the act."); *Schofield v. Village of Hudson*, 56 Ill. App. 191, 193 (Ill. App. Ct. 1894).

17 New York State General Corporation Law, L. 1890, p. 1063, c. 563, § 17 (effective May 1, 1891).

18 Townsend v. Hazard, 9 R.I. 436, 442 (R.I. Sup. Ct., 1870) (emphasis added).

19 Joseph K. Angell & Samuel Ames, Treatise on the Law of Private Corporations Aggregate 534, Chap. XIV, § 499 (1882); see also *id.* at 537, § 501.

20 Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. Econ. Hist. 645, 652 (Sept. 2008).

21 Gevurtz, *Historical and Political Origins of the Corporate Board of Directors*, at 92.

22 *Id.* at 94.

of one member alone permitted to veto a pardon grant of the governor.[23] These were the models before the people of Minnesota when it adopted its pardon board in 1896.

Nevada Florida, Idaho and Utah, followed a model first established by New Jersey before the Civil War: removing the pardon power from the governor and vesting it in a pardon board, of which the governor was one member. In these state constitutions, governors had no power to pardon apart from their membership on the pardon board.

In all five of these state boards, cases were decided by majority vote, and in four state boards the governor had to be part of the majority.[24] Importantly, while a pardon could only be granted by majority vote, a pardon could not be denied by the negative vote of a single board member (unless that negative vote was the governor's).

The other four states with constitutional pardon boards – Pennsylvania, Louisiana, Montana and South Dakota – established what have been called "gatekeeper" boards:[25] the governor alone remained responsible for granting pardons, but controls were imposed on the governor's actions through a separate board. These boards, which were usually composed of high officials but did not include the governor, had to approve a pardon before it could be granted by the governor. In three of the boards, a majority vote was explicitly specified. In one, South Dakota, the voting procedure was not specified, but a leading treatise on the operation of state pardon boards published in 1922 indicates that South Dakota did not operate on a unanimity basis.[26] Thus, even under this gatekeeper model, the negative vote of a single member of the board was not sufficient to veto a governor's pardon decision.

In short, explicitly in eight of the nine states that had established constitutional pardon boards before the Minnesota amendment of 1896; and implicitly in the ninth state, South Dakota, a pardon could issue only if authorized by a pardon board majority. In none of them, however, could a single member of the board other than the governor (if on the board), or a board minority, stop a pardon from being issued.

These were all the models of constitutional pardon boards available for consideration by constitutional reformers in Minnesota in the late 1800s and the Minnesota electorate when it voted in 1896 to add a pardon board to the provision situating responsibility for pardoning in the governor personally. At that time, Americans knew well how boards and majority voting worked. The establishment of boards and the utilization of majority voting were both in keeping with America's culture of republican institutions and practices that had evolved since the American Revolution, and, indeed, even before, during colonial times. One-person-one vote and majority voting had become ingrained in the whole culture.

The adoption the following year in 1897 of the statute conditioning the governor's power to pardon on the agreement of the other two board members imported hard legal limits on the governor's power into a constitutional scheme that by its terms did not provide any. Significantly, the unanimity rule imposed stricter limits on the governor's power to approve a pardon than those applicable to his counterparts in any of the nine other board states, where majority rule governed the board's operations. That is, in eight of the other nine board states whose examples were before the Minnesota legislature in 1897 (and, again, implicitly in the ninth), a governor could never be held hostage by the refusal of a single board member to approve a pardon. Not only was Minnesota's statutory unanimity unauthorized by the constitutional language, it resulted in giving Minnesota's governor less authority to pardon than the governor in any of the other board states.

It was also, as noted above, antithetical to the republican foundations of American civic and business life. And it was antithetical to the spirit animating the concept of executive pardon power in general: to give effect to feelings of empathy and mercy towards a fellow "human creature."[27]

Conclusion

Clemency was designed to be the "fail safe" of our criminal legal system.[28] But in 1897, when the Minnesota legislature enacted legislation to implement the 1896 constitutional amendment, its decision to grant a veto power to any one member of the Board of Pardons engaged in an unconstitutional usurpation of the governor's clemency power. The result of this power grab has been decades of parsimonious use of an important check on unduly punitive criminal laws and practices. MACDL's amicus brief urges the Supreme Court to restore the Governor's constitutional clemency power to one that reflects the humanity principles underlying the decision of early Minnesotans to continue to repose it individually in their governor, supported by a Board of Pardons created in the republican tradition. ■

[23] In the eight states that expressly established majority rule on their pardon boards, this was explicit; in South Dakota, this relationship arguably was implicit, in light of the long-established American tradition of majority rule on boards and commissions described in section 2, *supra*. *See also* Christen Jensen, The Pardoning Power in the United States 16 (Chicago University Press 1922) ("Pardoning Power") (listing Minnesota and two states that formed pardon boards after Minnesota, North Dakota and Connecticut, as the only ones requiring unanimous action, and thus, implicitly that South Dakota only required at most a majority vote).

[24] The one state that did not require the governor to be part of the approving majority was Idaho. Note that while a pardon might be granted in Idaho without the governor's approval, a pardon supported by the governor could not be denied by the vote of a single board member, as would be the case with a valid unanimity requirement.

[25] *See* Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. St. Thomas L.J. 730, 746 (2012).

[26] *See* Pardoning Power at 16 (listing Minnesota and two states that formed pardon boards after Minnesota, North Dakota and Connecticut, as the ones requiring unanimous action, and not including South Dakota in this list).

[27] *See* Federalist No. 74.

[28] *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (clemency is the "fail safe" of our system).

Legislative Update

Dan Koewler and Ryan Else

After inactive COVID-influenced sessions of the past few years, MACDL's legislative efforts bore fruits during the 2021 session at the Minnesota Legislature. These bills were the result of multiple years of coalition building, negotiations with opposing stakeholders, and effective lobbying by MACDL's lobbyists from Hylden Advocacy. Areas of important reforms from the 2021 session include reforms to fines and fees, DUI administrative laws, forfeiture procedures, and sentences available to veterans whose offense is the product of a service-related condition. Since these changes have not yet been published to the Revisor's website, all but the veterans sentencing bill can be found in House File 63.[1] This article seeks to introduce the opportunities these bills present for criminal defense attorneys and their clients.

Fines and fees reform is a perennial issue at the legislature as stakeholders like MACDL try to lessen the disproportionate impact of the criminal justice system on economically disadvantaged populations. Minn. Stat. 357.021, subdivision 6 was amended to make the criminal surcharge waivable upon a showing of indigency or undue hardship. The court may also order community service in lieu of the surcharge.

Plate impoundment for DUIs was reformed through amendments to Minn. Stats. 169A.55 and 169A.60. Special registration plates, commonly called "whiskey plates," are a significant concern for our clients. The law now allows the whiskey plates to be replaced with regular registration plates upon participation in the ignition interlock program under section 171.306 and payment of $100 fee. Additionally, drivers are no longer required to provide a SR-22 certificate from their auto insurer to enter the ignition interlock program. Another significant change is that interlock participants that are canceled as Inimical to Public Safety are no longer immediately re-canceled for a positive alcohol test and are instead simply reset to the beginning of their program.

One part of MACDL's legislative agenda for many years was civil asset forfeiture reform. This has been a top priority since 2019 when MACDL joined a working group to address the State's problematic forfeiture practices. In partnership with multiple organizations, including the ACLU and the County Attorney's Association, MACDL drafted a comprehensive forfeiture reform package that was ultimately signed by Governor Walz. Starting in 2021, we should see over a 70% reduction in property and cash seizures by law enforcement, as cash forfeitures will be prohibited for values of less than $1,500 and DWI vehicle forfeitures will be restricted to offenders with at least 2 prior qualified convictions. Further Due Process protections will make it easier for innocent owners to reclaim their property (such as eliminating the need for innocent owners to serve and file forfeiture petitions) while also making it easier for vehicle owners to secure return of their vehicle in exchange for enrolling in the Ignition Interlock program (with no need to post a bond).

Veterans sentencing practices have been another priority for MACDL's legislative committee since the State Board of Public Defense withdrew their defenders from the veterans treatment courts in 2017 due to disparate and insufficient sentencing benefits to the participants. This threatened the existence of the specialty courts and presented an opportunity to establish new practices that will hopefully inspire future reforms in support of therapeutic or restorative justice sentencing procedures for defendants who are not veterans. Minn. Stat. 609.1056 is a new law that provides a "shall" directive to the court to grant a stay of adjudication in offenses up to severity level 7 felonies if the defendant can show the offense is the result of a condition that stems from military service. This bill also authorizes the court to use this process to establish that the defendant is particularly amenable to probation for more serious offense. Probation will require the defendant to participate in treatment for the condition and, to earn the full dismissal, show they benefited from the treatment to a degree that assures the court they will not be an ongoing public safety risk. This procedure will require defense attorneys to advocate for the veteran's eligibility due to the need to show a connection between the offense and the service-related condition, as well as at the end of supervision to show benefits the treatment.

MACDL is excited about these successes following multiple years of advocacy at the capitol by our members and lobbyists. This session's passage of the laws cited above largely clears the legislative agenda MACDL has been operating on since 2019. If members have ideas for future legislative efforts, please email the Legislative Committee Chair Ryan Else at ryan@brockhunterlaw.com. ■

About Dan Koewler

Born and raised in the small town of Sleepy Eye, MN, Dan Koewler has been defending DWI clients since he started practicing in 2008. His dedication and commitment to DWI defense has earned him a solid reputation as a top-notch defense lawyer in Minnesota, leading to many requests to hear him speak on DWI-related topics and to author highly-valued resources regarding DWI defense.

About Ryan Else

Ryan Else is an attorney for the Law Office of Brockton D. Hunter, PA, Legislative Chair for MACDL, and Policy Attorney for The Veterans Defense Project. He is a proud father, husband, veteran, and criminal defense lawyer.

[1] Available at https://www.revisor.mn.gov/bills/text.php?number=HF63&type=bill&version=2&session=ls92&session_year=2021&session_number=1.

A Legal Legacy

Dan Guerrero to Receive Special Achievement Award

Lisa Lodin Peralta

"He deserved so much better from our so-called 'system of justice.'"

So Dan Guerrero was willing to dig in and see what, if anything, he could do for Myon Burrell in the Tyesha Edwards murder case.1 With a Minnesota Supreme Court opinion upholding the murder conviction in 2015 following post-conviction proceedings, the case was long past dead in most any other lawyer's point of view.[2]

The Defense Team

But when Myon's family came to Dan's office so convinced that Myon was in prison for a crime he didn't commit, Dan agreed to look at all of it and see if there was anything he could do. This dedication to the Burrell defense, which continues today, is the reason Dan will receive a Special Achievement Award at the 2021 annual dinner.

Other members of the Burrell defense team are also receiving the award. Perry Moriearty, an assistant professor at the University of Minnesota Law School and co-director of the Child Advocacy and Juvenile Justice Clinic, worked on the case along with two law students, Matt DiTullio and Kaitlyn Falk. Rachael Melby was a law clerk and investigator for Dan at Meshbesher & Spence.

Trials, Tribulations, Relief

If you read the last issue of *VI*, you were likely intrigued by Dan's first-hand account of some of the trials (literally) and tribulations of the defense of Myon Burrell.[3] As defense attorneys, any of us would be daunted by the finality of multiple appeals and the hurdles of *Knaffla* and statutory time limits.[4] For those who didn't read that article, or any newspaper in December 2020, here is what happened last year: Myon Burrell was released from prison after 18 years, his sentence having been commuted to 20 years from life in prison-plus-plus.[5]

Dan took on this case with the caveat that he did not know if they would be able to go forward in district court. There was slogging effort by a defense team. They spent four and a half years making prison visits, interviewing witnesses, pouring through discovery, trial transcripts, court pleadings and investigators' reports. At times, however, nothing was progressing. They met repeatedly to strategize on overcoming the *Knaffla* and time bars.

As to the relief that ultimately came, Dan cites to good fortune in this case as well.

Advocates Pile On

Dan freely gives credit to Associated Press reporter Robin McDowell. While the defense team dug in, so too did McDowell, and she published an article in February 2020 raising questions about the case.[6] Now, there came out new alibi witnesses. And jailhouse snitches recanted.

Also during 2020, Senator Amy Klobuchar's campaign for the presidency opened her up for questions and criticism of her role in Myon's prosecution as then-Hennepin County Attorney.[7] Under pressure, she called for an investigation into the case.[8]

So that happened. An independent national panel of highly regarded experts convened in July 2020 to examine Myon's conviction and sentence.[9] (Seriously, when does that happen? Think about all of the exonerations in the last years – did such panels convene and issue reports in those cases?) Among the myriad of tasks, the panel interviewed Dan.[10]

Myon's family continued to advocate for him as well, Dan said, putting together Myon's application for a pardon.

Then came the release of the independent report, in December 2020, with two main findings: (1) no fundamental goal of sentencing was served by Myon's continued incarceration; and (2) the panel had "serious concerns" about the integrity of the conviction and believed that further investigation could yield evidence of actual innocence or due process issues.[11]

One week after the release of the report, the Pardon Board met and granted a reduced sentence. Following a proposal by Gov. Tim Walz, Myon's sentence was commuted to 20 years in prison; at the time he had served 18 years, and the board approved a plan that he would serve the remainder of the sentence under supervised release. That same night, Myon finally went home.[12]

1 On November 22, 2002, 11-year-old Tyesha Edwards was shot to death while sitting in the dining room of her home on Chicago Avenue South in Minneapolis. The intended victim was Timothy Oliver, a 17-year-old who was standing in front of the house next door. A bullet passed through Oliver's pant leg, but he was unharmed. Report of the Independent Panel to Examine the Conviction and Sentence of Myon Burrell at 1-2 (December 2020), https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/2020-12-02-burrell-report-master.pdf.

2 In 2015, Burrell was sentenced for the murder of Edwards for the third time following years of postconviction proceedings. *See Burrell v. State*, 858 N.W.2d 779, 783-84 (setting forth history of trials, appeals and postconviction proceedings).

3 Dan Guerrero, "Untying the Knot, the Unconventional Way," *VI*, Spring 2021, at 12-16. Burrell, tried as an adult despite being 16 at the time of the incident, was convicted by a jury in 2003 of first-degree murder, attempted murder, and other charges. First sentenced to life in prison-*plus* (i.e., more on top of that) … conviction overturned … bench trial … again convicted of first-degree murder and attempted murder … sentenced to life in prison plus 60 months and a consecutive 186 months … postconviction petition denied … sentence vacated for life sentence (with parole eligibility after 30 years) plus twelve months, plus a consecutive 180 months. Panel Report at 1-2.

4 *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (claims raised on direct appeal from a conviction, as well as all claims known but not raised, are barred in a subsequent petition for postconviction relief); Minn. Stat. § 590.01, subd. 4 (setting time limits).

5 Will Wright, "Minnesota Releases Myon Burrell, Man Given Life Sentence After a Murder," New York Times, Dec. 15, 2020, https://www.nytimes.com/2020/12/15/us/myon-burrell-released-commuted.html.

6 Robin McDowell, "Amy Klobuchar helped jail teen for life, but case was flawed," Associated Press, January 28, 2020, https://apnews.com/article/shootings-minnesota-ap-top-news-amy-klobuchar-weekend-reads-115076e2bd194cfa7560cb4642ab8038.

7 *Id.;* Wright, *supra*.

8 Panel Report at 2.

9 *Id.*

10 *Id.* at 3.

11 Panel Report at 4, 5-7.

12 Wright, *supra*.

The Case Continues

For a moment, Dan tells me, he thought he could retire: he'd been part of the release of an innocent person from prison! But Dan hasn't stopped. There is more to the story.

Many people would be content, happy even, with that result. But think about it. Myon was not exonerated. "I don't feel he received justice," Dan said. "Especially not until his name is cleared for a crime he did not commit."

Dan and his team had worked for years to put together a persuasive petition for post-conviction relief. The work had to continue.

In October 2020, AG Ellison had announced the formation of Minnesota's first-ever Conviction Review Unit – which would operate in a partnership with the Great Northern Innocence Project (formerly Innocence Project of Minnesota).[13] At Myon's pardon hearing in December, Dan said, AG Ellison encouraged Myon to apply to the Conviction Review Unit.

The Charter of the Conviction Review Unit was approved on June 23, 2021.[14] On June 28, 2021, Dan submitted Myon's application for review. Two of those involved in the independent national panel – remember them? – are now members of the Conviction Review Unit Advisory Board.[15]

In addition, Dan plans to file for postconviction relief before January 2022 – which would be two years from when the new alibi witnesses were discovered.

A Legacy in the Law

Dan's dedication to justice can be viewed as "following in the footsteps of" (or "along" the footsteps of, as the case may be) his family: at the age of 29, his dad was an Indiana state court judge[16]; he has two uncles that are lawyers; a brother is a lawyer; a brother-in-law is a judge; a cousin is a judge.

But Dan has followed his own path. He obtained a B.A. and his J.D. from the University of Minnesota. He is a partner at Meshbesher & Spence, having spent his entire career (32 years) there. He has focused that career on a criminal defense practice that includes more than 80 trials.

Dan said that he is "really happy for Myon and his family. They believed in him, stood behind him all these years and fought hard for his release." But obviously, so did Dan.

Digging in to decipher Dan's role among all of these pieces was fascinating for me, as well as a study in humility. There is no doubt but that Dan is the glue that has been holding all of these pieces together for five years – and he'll be sticking with it to the end.

[13] "Minnesota awarded federal grant to review legal cases for people believed to be innocent," The Office of Minnesota Attorney General Keith Ellison, Oct. 8, 2020, https://www.ag.state.mn.us/Office/Communications/2020/10/08_ConvictionReviewUnit.asp.

[14] Charter, Minnesota Conviction Review Unit, The Office of Minnesota Attorney General Keith Ellison, https://www.ag.state.mn.us/Office/CRU/Charter.pdf.

[15] Conviction Review Unit – Advisory Board, The Office of Minnesota Attorney General Keith Ellison, https://www.ag.state.mn.us/Office/CRU/AdvisoryBoard.asp. Laura Niridier, who served as an advisor to the independent panel, is a Clinical Associate Professor of Law and Co-Director of the Center on Wrongful Convictions at Northwestern Pritzker School of Law in Chicago. *Id.* Mark Osler, one of the panelists, is the Robert and Marion Short Professor of Law at the University of St. Thomas, and a former federal prosecutor. *Id.*

[16] The Minnesota Hispanic Bar Association has named an award after Dan's father, Manuel Guerrero: the Manuel Guerrero Courage in Leadership Award. [cite to: https://minnhba.org/awards/] The MHBA states that, as a criminal defense attorney, "Manuel taught us about courage, compassion and leadership by sometimes taking the more difficult path. Manuel was unfazed by the controversy and public opinion that surrounded some of the high profile cases he took on. His focus was always on reaching out to the accused and providing them with zealous representation and the feeling that they were not alone." *Id.*

Whenever Dan retires, perhaps when Myon is fully exonerated (because we know, fingers crossed, that it will happen), or a later point in time, Dan will leave his own legacy. Congratulations to Dan, and the entire Burrell defense team, for an honor well deserved. ■

About Lisa Lodin Peralta

As the owner of Peralta Appellate Law, Lisa Lodin Peralta is a lawyer with over 25 years of experience in appellate practice. She provides legal services directly to clients in the Minnesota state courts and federal courts in the areas of criminal law, family law, civil law and immigration law. She also counsels with other attorneys by consulting on appellate advocacy, conducting legal research, and writing briefs and memoranda in appellate and district court matters. She previously worked in the appellate advocacy group at Robins Kaplan and clerked at the Michigan and Minnesota Courts of Appeals.

PRINCE OF THE CRIMINAL DEFENSE BAR AWARD:

Eddie Simonet

Jill Brisbois and Rebecca Waxse

This year, MACDL is posthumously honoring a pillar of the Stillwater, Minnesota criminal defense community, Ed "Eddie" Simonet.

We all know the feeling of walking into a courthouse for the first time, and discretely searching for a friendly face to ask about the judge, prosecutor, or the unusual "rules" of the county. In Stillwater, you did not need to look far because Eddie found you. He always sought out a new face, introduced himself and made sure to introduce you to the judge, clerk, court reporter, prosecutor, and let you in on the insider knowledge that came with practicing law in the same community for 46 years. Former criminal defense attorney, Marc Berris shared this familiar reflection about Eddie:

> *I have a vivid recollection of the very first time I met him. It was sometime in late 1994 and I was just a baby lawyer making my very first appearance in Washington County. I must have had that "I don't even know where to stand" look on my face and Ed came over, extended his hand, introduced himself, and asked me if I was a new lawyer. When I confessed that I was and that it was my first time in the county, he pulled me aside and told me, "You don't want to settle your case today. Come back on one of these days (showing me his calendar) when Smitty Eggleston will be on the bench instead." As I would come to learn, that was terrific advice. Every time I saw Ed after that he never failed to remember my name, never failed to greet me warmly and with a smile just as if we were long lost friends, and never failed to impress me as someone who represented everything that can be good about the legal system.*

My first experience with Eddie was not at the Washington County Courthouse but was the result of accidentally sending him an email. My first year as a public defender in Anoka County, I was put in charge of collecting money at Christmas for staff gifts. I accidentally sent an email district wide rather than to the attorneys in Anoka requesting contributions. I immediately sent out an email correcting the mistake. But Eddie sent me a check anyway. When I called him to remind him of the error, he insisted that I cash the check and that he contributes to the gifts for staff in a different county than where he practiced. When I told my colleagues about it, no one was surprised and said "that's Eddie!"

Eddie's favorite icebreaker for new attorneys or judges was to bring them out onto the golf course with him and introduce the people to the people in the city he lived in his entire life. Chief Public Defender William Ward wrote,

> *When I came on board, Ed and I spoke briefly then he said "let's golf together in a few months". True to his word, he invited me to play in Stillwater where I learned about him, his practice – apart from PD work – and all of the people he knew. Ed was very helpful to me in connecting me to individuals when I needed help. Because I was an "outsider", few wanted to get to know me; Ed facilitated*

introductions and helped me out in that area for the first few years as I got acclimated. Ed was really "good people".

Beyond making introductions, Eddie was a mentor to many.

Eric Thole, one of Eddie's many mentees wrote the following about him:

Small town lawyering is different than practicing in the big city. Eddie was a proud Stillwater HS alum (1967) and he used his community connections to both get clients and properly service them. I followed in Eddie's footsteps as I too was a Stillwater HS alum (1984), and I adopted many of Eddie's principles. Here are a few Eddisms:

Make sure Mr. Green arrives before the work begins.

When you beat up a cop on the stand, make sure they later know not to take it personally.

Take time with the new lawyers, the day will come when you'll need them.

Sam Surface was one of the attorneys that Eddie took time with. Sam said,

When I went out on my own, outside of my parents themselves, there was nobody more integral and supportive of me building a practice mere blocks from his office. He would check in, he was always available for advice, he offered to make his long-time assistant Roberta to me if I was in a pinch and he sent me my first referral client. He also went out of his way to encourage me to throw my hat in the ring for a part-time public defender contract – despite having handled only one criminal case in my entire career. Well, because he vouched for me and told the powers that be that he'd bring me along, I was awarded the same contract he had which I still work to this day. I would have never been hired without Eddie's support and said support is a clear example as to how highly others held him in regard.

Eddie ran a general law practice in the neighborhood where he lived. This allowed him to devote his extra time to his clients. His wife Anne described Eddie's devotion to his clients with pride. She talked about Eddie going back to the office several nights a week after meeting his family obligations at home and working every Saturday. All his clients had his phone number. Because of Eddie's nature, his clients took full advantage of the privilege calling him anytime. Anne believes the best technological advancement was the cell phone because it meant his clients no longer called their home phone looking for their trusted advisor and friend.

Eddie went above and beyond for his clients. Rebecca Waxse, described a time last year during the pandemic, he learned that an attorney in Rochester had information that would help his client on a felony case. Rather than calling the attorney on the phone to speak to them, he drove down to Rochester to bring the attorney to lunch to meet in person and thank them for their help.

One of Eddie's specialties was criminal defense. He was a part-time public defender with the Tenth Judicial District for 46 years and a life-long member of the MACDL. **At the time of his passing, he was the longest serving public defender in the state of Minnesota.** Out of law school, Eddie's mentors, Smitty Eagleston and Jack Walsh, suggested he take on a public defender contract. He loved his work as a public defender and his clients never forgot him. Anne believes this is because Eddie never passed judgement nor demeaned his clients. A client could tell him they "only had 2 beers" and Eddie always found a way to spin it without discrediting his client. Eddie's wife felt he found a profession that was suited to his demeanor. She described Eddie's mind as always racing and he thrived handling six cases at a time rather than one big project. In addition to his private practice and public defender work, Eddie was also the Washington County Examiner of Titles from 1998 to his death on December 15, 2020. Criminal defense attorney, Travis Schwantes, reflected on his time working with Eddie,

I worked with Eddie Simonet for ten years about ten years ago. I've been in three offices since then, but the first thing I hang up in a new place is a letter from him that he wrote after I left Minnesota. I admired him so much, especially his humility, hard work, and heart. It's comforting to see his signature every day.

He loved his community, his family, and his friends. At the courthouse, people called him "Fast Eddie" because of how many clients he protected successfully. He was only able to do that because of his work ethic, his thoughtfulness, and his intelligence. I feel like all of us courthouse attorneys are striving to be more like Eddie every day we go to work.

As I worked on this tribute to Eddie, it struck me how people remarked about the personal letters and cards they received from him over the years. Former public defender and now Judge Pam King shared a wonderful story about him,

With my office in Rochester, my opportunities to work with or interact with Ed were limited. But with Ed, it wasn't about quantity it was about quality. The time I remember most is when I received a handwritten thank you card in the mail, from Ed. I was so surprised. I had no idea what would warrant such graciousness.

Ed had called to talk to me about a forensic issue. At the time, I described part of my job with the Public Defender Trial Team as being like the "Butterball Hotline Lady at Thanksgiving." As the description suggests, I took a lot of calls from lawyers all over Minnesota. Helping Ed was just a normal activity. What made this so different was Ed's gracious recognition of my contribution. He had taken the time to mail a handwritten note and include a gas card. He included a gas card because he knew I was traveling around the state.

For me, this embodies exactly who Ed was. Ed valued everyone he came into contact with and made sure they too knew how valuable they were. Telling someone you appreciate them is such a simple thing and yet far too uncommon. Ed treated it like I treated giving advice on forensic issues; just a normal activity. That made him special.

Eddie's generosity was his defining trait. Intertwined in that generosity, everyone described Eddie's love of the law and intellectual curiosity. Once he left law school and started practicing law, he did not stop learning. Eddie loved the law. He was a staple at CLEs and trainings, always having far more credits than required by the bar. Even if a topic was not in his practice area, but Eddie thought it sounded interesting, he would sign up and attend the CLE. When Anne cleaned out his office, Eddie still had all the blue three ring binders (with his annotated post-its) from the CLEs he attended over the years. Rebecca Waxse, recalled that after every CLE, he would share the materials with everyone to they could benefit from his experience.

Rebecca recalled another time when she and Eddie were handling a criminal case together and they needed to preserve the testimony of a dying witness through a deposition. After the deposition, Eddie insisted on taking the witness out to lunch but needed to leave before the witness got his pecan pie. Eddie left a blank check with Rebecca. Rebecca tried to explain to him that the restaurant would not take his check and she would pay for the lunch. Eddie responded, of course they will, it is me. Of course the restaurant accepted Eddie's check.

Eddie passed away suddenly in December of 2020 (unrelated to COVID-19). On a "normal" Saturday, Eddie spent the day working in the office, went to deliver mail to other attorneys, and drop off Christmas gifts for friends. He developed sudden stomach pains. Anne brought him to the hospital where he underwent several colon surgeries before passing away.

When Eddie passed, Anne and Sam Surface were left with the painful task of closing Eddie's law practice. Sam remarked,

The amount of kind and appreciative words, and genuine sadness, I have heard from his current and former clients has been remarkable. Everyone reading this article knows full well the client issues that present themselves over time in a practice dominated by criminal and family law cases; things don't always go smoothly. Regardless of whatever those issues may have been for Eddie, the stories of universal high regard, and the genuine connections he

made with clients and opposing counsel over the years, has been incredibly gratifying to hear. Those sentiments often mirror my own direct experience with Eddie. He was incredibly giving to colleague and client alike and was thought of as a friend by almost everyone who he came into contact with. He is deeply missed and there will never been another one like him.

Anne shredded and recycled files dating back to 1974. While the offers to help her were numerous, she took on the project herself because her husband helped so many people and families in the community of Stillwater and she wanted to protect Eddie's legacy by ensuring the privacy of the community he devoted his life to. Eddie was Stillwater's attorney. Judges, prosecutors, opposing counsel all referred their friends and family to him. Washington County Attorney, Pete Orput, wrote,

Ed Simonet was, in my mind, perhaps one of the most honorable advocates for his clients. I have trusted Ed for many years as his word is his bond. The legal community lost a fine advocate upon his passing. (Indeed, Ed did my divorce for me and refused to charge me a dime. Despite his generosity, I paid him for his valuable time but I had a hard time getting him to accept it)

Eddie's legacy is not for a specific case he handled over the years but for the way he practiced law. He believed that the best advocacy and negotiations came from the personal relationships that you built and maintained. Kevin Mueller, one of Eddie's former "adversaries" exactly described Eddie's legacy,

My office was truly saddened by Ed's passing. "Eddie" seemed to be among the last guard of true gentlemen lawyers, where his word was his bond and everyone knew it. Ed treated everyone in the Courthouse with the utmost respect, from the Chief Judge to the custodian. When Ed walked into a courtroom, he always greeted you by name, as if you were the only lawyer he dealt with. Ed was beloved by everyone in the courthouse, as well as in the Stillwater community in general. The legal community in the Twin Cities is deceptively small and you are what your reputation says you are. Eddie's reputation was beyond reproach. I have never heard anyone say anything negativ about Ed. That is not the norm, especially in the lega profession wherein people joke about 1000 lawyers at th bottom of the sea being a good start. That joke is certainl not about Ed Simonet. Finally, I didn't have many case with Ed, but he was the type of defense lawyer that coul do battle in the courtroom and then go for a beer with hi adversary. That type of approach to courthouse advocac is becoming less and less common in our profession. It i something that I will carry with me. Ed leaves us all wit a very heavy heart. He has already been, and always wil be, missed. ■

Edward W. Simonet

May 2, 1949 – December 15, 2020

The Prince of the Criminal Defense Bar

Distinguished (Ongoing) Service:

An interview with Mary Moriarty, the 2021 recipient of MACDL's Ronald I. Meshbesher Distinguished Service Award

On Saturday, October 2, MACDL members will gather to eat, drink, raise money, and be generally merry at the Annual Dinner. Every year, MACDL honors an exemplary criminal defense practitioner for a lifetime of achievement and devotion to the practice of criminal defense. The award formerly known as the Distinguished Service Award has been aptly renamed the Ronald I. Meshbesher Distinguished Service Award. Past recipients include some of the most influential criminal defense practitioners in Minnesota.

This year's recipient is Mary Moriarty, a student of cross-examination since age 10, a trial lawyer's trial lawyer, a passionate public defense advocate, and professor of law, whose client-focused approach made the Hennepin County Public Defender's Office one of the best in the nation, sat down with MACDL to talk about her career, the award, and, of course, shared a war story or two.

MACDL:

Walk me through your career.

Mary:

I grew up in New Ulm, which is in Southern Minnesota. My dad was a part-time public defender, part-time private lawyer.

When I was very young, we would do errands. I'm dating myself here. My dad had his cassette tapes of Irving Younger. He would pop in the 10 Commandments of Cross-Examination or the Rules of Evidence. So I'm a child, and I knew about evidence. I knew about evidence and cross-examination when I was probably 10.

I really didn't want to go to law school. I wanted to be a journalist. I went to Macalester, then somehow, I ended up majoring in political science and history. I was like, "What am I going to do with these things?" I thought, I'll take the LSAT, I'll apply to law school.

Once I knew I was going to law school, I knew I wanted to be in a courtroom, and I knew that public defense was really what I wanted to do. I clerked for the Hennepin County Public Defender's Office. Actually, when I was at Macalester, I did an internship there, because at that time, they had an internship program where people, volunteers, could get college credit to do investigations on misdemeanors. I would go out and talk to witnesses. I did that. I worked the first couple of summers for my dad doing public defender type of stuff.

...

But I knew I was going to be a public defender. I ended up writing an article for the Journal of Law and Inequality on the ex parte statute, where defense can go to the judge to get funds for experts. At the time the max was 300 bucks. I wrote an article about how that was insufficient. I interviewed Judge Kevin Burke, and he took the article to the Legislature, and he got it changed to a thousand bucks.

Then he called and asked if I wanted to work for him. I hadn't really thought about clerking, but at the time he was Chief Judge, and it was a wonderful opportunity. I got to meet everybody. He was really great about having me sit in chambers and listen to how people negotiated, sit in court, watch. It was a really good experience.

I did that for just short of a year then I went to the [Hennepin County] Public Defender's Office. I spent my whole career there.

It must have been my first year that an experienced lawyer asked me if I wanted to take this fifth-degree possession case. And at that time we did everything. We didn't have divisions, so you did everything. I said, "Sure, I'd love to do it." I looked at the case and I saw three different issues. I wrote memos on each of the issues, I had the hearing, and I questioned the cop. My motion to suppress was denied. I felt so strongly about the case. I asked us to keep it in-house.

And so the appellate people took my case and argued to the Court of Appeals, and then it went to the Minnesota Supreme Court. I think the Court of Appeals upheld the District Court, and then the Supreme Court reversed. And then the State actually petitioned to the United States Supreme Court, and it was accepted. The case was Minnesota v. Dickerson and it was a unanimous decision for the defense. It became the "plain-feel" doctrine.

...

MACDL:

Give us a good war story. One of your favorites.

Mary:

Oh, one of my favorites was I had a client who was accused of strangling somebody, and the woman had some interesting markings on her neck. And when my client was arrested, he had a broken rosary in his pocket. And so the cops took the rosary to the medical examiner and they said, "Could she have been wearing this around her neck when she was choked?" And he said, "Yeah."

And so despite the fact that my name is Mary Frances, and I was baptized Catholic, I am not Catholic. And I really didn't know much of anything about rosaries, but fortunately my cousin was getting married. She's Catholic, and I was sitting at the head table next to the priest at the dinner. And I said, "I have this case and I'm trying to figure out. So could you tell me what a rosary is for?"

And so he tells me it was me what they're for. And as I learned more about them... you don't wear them! And he tells me that and I say, "Would you like to be an expert witness in my trial?" And he was just thrilled about the idea. He said he had to get permission from the diocese to do it. But he came and he was an expert witness and the prosecution had kind of backed down by then, but I still wasn't sure.

So I called him as a witness and he was talking about the trials and tribulations that you're thinking about when praying with the rosary and I, we hadn't prepared this, but I remember just thinking, "What could go wrong?" I said, "So what might be one of the trials and tribulations that one might meditate and think about?" And he said, "The trial of Jesus Christ." I remember looking out the corner of my eye, and I was thinking, it really doesn't get any better than this, because the prosecutor was over there, his head in his hands. Like I was just, like, this is just great.

...

And so, I have really good experience trying cases, really good success trying cases. But I started to feel like, is this all there is? And I was doing everything by myself. I was kind of a lone wolf, I guess I would describe myself.

...

So I started teaching with some excellent people, all over the country. And I was teaching with them and I was learning this entirely different way to try cases. It was extremely client-centered, and my experience at the Public Defender's Office—and I know some other people had different experiences—but people who mentored me would say things like, "Well, this job would be a lot better if you didn't have clients." It was a very lawyer-centered kind of thing. And I'm here at Public Defender Services, and I'm meeting all these people, who were talking about being client-centered, and they had training. And I was teaching, and doing all this training for people. And I mean, I'm thinking, we don't have training in our office. We don't have this feeling of we're a team kind of thing. I ended up teaching all over the place. But I started

to think, I wanted something better for our office. I wanted us to be client-centered, I want to train. And that's why I applied to be Chief. And that was my goal when I was Chief: to change the culture. There were certainly people who were client-centered, but as an office, we were not. And that was certainly reflected in the community. People thinking of us as public pretenders...

...

We have really, really great people we recruited from all over—the people who want to be public defenders, and they're doing great impact litigation. That's what I miss the most about the office.

I remember this moment. It was a Friday afternoon. I knew one of our lawyers had a verdict and I was afraid nobody would be there. And so I wanted to be there just so he wouldn't be alone. And I got there a little later, and there were 12 of our lawyers there.

They had been dropping in and the client was acquitted and the client started walking out, looked at everybody. He was so happy. And he said, "I just felt like I had a team here." That was one of my favorite moments.

That really is what was fulfilling. I went that time where I was just going to be a trial lawyer, all of that. And that just wasn't fulfilling anymore. And then I went out and discovered this whole universe of good training and client-centered lawyering. I was like, okay, this is what it's all about. And I was able to bring that back to an office and hire a bunch of people who have that same mindset. And so that was really fulfilling—just the idea that I could empower, hire, and train a bunch of people who are doing great work was really, really meaningful to me.

MACDL:

Very few women have gotten this award. What advice do you have for women lawyers?

Mary:

That's a great question. I was very proud to be the first woman Chief Public Defender, and I didn't know the impact of that... I probably still don't know... until I became Chief Public Defender, and so many people... parents actually... came up to me and said, "Oh, this is [my daughter]." Saying, just the idea that a woman could be Chief Public Defender is a great thing for my child. That kind of thing. And I do think a lot about this question. In public defense, there are a lot of women. I came up in a generation where you really had to put up with a lot, and you certainly would never ever show emotion. That was the goal. If you felt like you were going to cry, you needed to run back to your office and shut the door, because otherwise you'd be viewed as being weak.

I had to deal with... and still I dealt with... in my role as Chief Public Defender, a lot of sexism, misogyny. And I know that one of my goals as Chief, was to try to change the culture so that young women didn't have to deal with that anymore. And by that I meant, I did intervene at times when judges or prosecutors were treating women in a different way. And it was interesting that there's some women my age, who would say, "Well, that's just the way it is. That's this profession." And I refuse to believe that. I mean yes, the profession has been that way, it is still that way in many ways, but I refuse to accept the idea that women coming through the profession now have to accept that. It shouldn't be part of the profession that you get screamed at or comments on your clothes.

So I took the position as Chief, that I was going to intervene... And I think about this with race, too. I will intervene, because I don't like it. And if a judge or a prosecutor is doing something that's really sexist, racist too... because I take this view about race... the person who's the subject of that, should not have to bear that by themselves. And they should never be told, "Well, this is part of the profession. You want the judge to like you." Because that's what we were told all the time. And this is oftentimes what happens too, a supervisor will say, "Well, what do you want me to do?" And that puts the burden on the individual, who's then thinking, "Well, if I say something, am I going to be looked at as weak? Am I going to be looked at as a troublemaker? Is that going to hurt my career in some way?"

And we need to change that. It can't be just on the individual, it really has to be on supervisors, leaders to be saying, "No, that's not okay." And I'm saying that as Chief. "Don't treat anybody that way in our... Don't treat women that way, no matter who it is. That's just not acceptable." And so I tried to do that when I could. But it's an uphill battle, because there are women... I remember talking to a woman not from here... She's a generation older than I am. We were talking about, "How do we deal with some of this stuff?" And this woman, who's a generation older than me, said, "Well, I just acted like a man, and they just had to deal with it." And I said, "Well, I don't think that's helpful. Women don't want to act like men, they want to act like women."

I would say to younger women, "Here, you don't have to put up with that, and you shouldn't. Even if you're told that's the culture, you shouldn't have to put up with that." Now the reality of it is, where are you working? Do you have support? Because I also understand the reality of it is, if a person doesn't have a supportive supervisor, then they may be on their own, and they may be making a calculation, wondering if it will hurt their career to speak up. So probably I'm speaking to men, and saying, "If you are in positions of authority and power, make sure you're aware this stuff, and listening for it." I say that about race too, microaggressions, and that sort of thing. "Don't wait until somebody brings it to your attention, and speak about it because you don't like it, because you don't want your daughter, your niece, what have you, to be subjected to this kind of behavior."

And I think it's really when men start noticing this behavior, this kind of talk, and saying something to guys, I think that's going to be very powerful in stopping it.

And so, I think that's an important piece. And this is my philosophy, too: I want women to uplift women. When I was Chief, I didn't want people to be competing. I wanted people to be the best lawyers they could be. I always wanted to lift women up, and men too.

MACDL:

What does this award mean to you?

Mary:

It means a great deal. I didn't know Ron Meshbesher very well, but I always heard really wonderful things about him, and he seemed, from the short time I did see him... I hate to say a gentleman, but I mean, he really seemed to behave with grace and integrity. I also know it's a very important award to this organization, and it's very humbling. I have to say, after what happened to me with the Public Defender's Office, it's something that was really even more meaningful to me. But I know there are so many wonderful lawyers in Minnesota, and I am very appreciative of the award. I was kind of speechless on the phone when Piper called me about it. It's a really big honor and I appreciate it.

MACDL:

Anything else you want to say, add? Something important that we haven't talked about?

Mary:

So, many things have changed I think, since the beginning of my career, about race, and I think the way we approach race. And that has to do with... I mean, my last year when I was Chief, one of our black lawyers told me a deputy came up to her—she was in the well of the courtroom—and the deputy came up to her and said, "Can I help you?" And there were bunch of lawyers there, white lawyers in suits, and she was a black lawyer in a suit. And the woman said, "I'm a public defender. I'm representing a client," and the deputy actually asked to see her ID.

I think we need to, as defense lawyers, think through some of the assumptions that we make and the arguments that follow those assumptions.

I mean, we're going to have jurors that think differently than they did, and there are arguments that probably played really well with certain jurors in the past, that aren't playing well now. And I think that we, as a defense bar, can represent people very well, but we really need to think about what kinds of arguments we're making on behalf of our clients. I think it's really incumbent upon all of us to really educate ourselves, and really think about how we're making arguments, because they do have an impact on jurors in a larger audience, as well as how we are interacting with, and the environment we are creating for lawyers of color.

We have to talk about those things, but we also have to recognize them to be able to have that conversation. I'm saying this, because I know as defense lawyers, we have a really hard job. There are times when we make the assumption that we are the good guy, that we are immune from bias. We're a public defender, we're a criminal defense lawyer. We fight against this. We're immune from this. And it just isn't true, because no one's immune from it. And so it's something that I think we have to check ourselves on.

...

MACDL:

This has been great. Thank you. Thank you for taking the time and congratulations.

Mary:

Thank you for doing this. ■

MACDL Summer Softball Squad

Front row: Lizzy Karp; Allison Chadwick; Laura Prahl and Mike Millios
"2nd Row": Mike Brandt; Justin Duffy; Dan Koewler; Ryan Pacgya; Jill Barreto; Chelsea Knutson; Saraswati Sing
Back Row: Ben Koll; Noah Johnson; Andy Garvis; Charlie Clippert; Vanessa Rybick and Paula Brummel

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