

**STATE V. COLOSIMO: MINNESOTA ANGLERS' FREEDOM  
FROM UNREASONABLE SEARCHES AND SEIZURES  
BECOMES "THE ONE THAT GOT AWAY"**

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I. INTRODUCTION

In *State v. Colosimo*, the Minnesota Supreme Court held that an expectation of privacy does not exist in a boat or other conveyance typically used to transport fish and it is therefore permissible for an armed conservation officer to conduct a nonconsensual inspection of the boat or other conveyance.<sup>1</sup> In making its decision, the court relied upon Minnesota Statutes section 97A.251, subdivision 1(3),

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1. *State v. Colosimo*, 669 N.W.2d 1, 9 (Minn. 2003), *cert. denied*, 124 S. Ct. 2017 (2004).

which provides that a person may not “refuse to allow inspection of a motor vehicle, boat or other conveyance used while taking or transporting wild animals.”<sup>2</sup>

The Minnesota Supreme Court’s decision authorizes searches of individuals absent any suspicion of criminal behavior or behavior in violation of state fishing regulations.<sup>3</sup> By eliminating any requirement of suspicion of wrongdoing, the court allows searches based on an armed conservation officer’s whim, rather than a suspicion that an individual has engaged in conduct that violates Minnesota’s fishing and hunting laws.<sup>4</sup> The decision permits searches based solely on a suspicion that an individual has been engaged in the lawful activity of fishing and/or transporting fish,<sup>5</sup> opening the door to searches at the unbridled discretion of individual officers.

The court’s decision is inconsistent with the Fourth Amendment prohibition of unreasonable searches and seizures<sup>6</sup> and with the court’s own recent decision in *State v. Larsen*,<sup>7</sup> which prohibited the search of a fish house by an officer who lacked probable cause. Additionally, in *State v. Henning*,<sup>8</sup> the court “took a firm stance in favor of the ‘reasonable articulable suspicion’ standard . . . [and] made it clear that constitutional rules apply even during stops of vehicles with special series plates . . . issued chiefly to repeat drunken drivers.”<sup>9</sup>

This article examines the various opinions in the *Colosimo* case, including the opinion of the Minnesota Court of Appeals (which was reversed by the supreme court), as well as the majority, concurring, and dissenting opinions of the supreme court.<sup>10</sup> The article provides a brief background of how the issue of stops and inspections by conservation officers has been dealt with in other jurisdictions<sup>11</sup> before turning to a critique of the Minnesota

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2. MINN. STAT. § 97A.251 subd. 1(3) (2000) (including fish in the definition of wild animal).

3. *Colosimo*, 669 N.W.2d at 9.

4. *Id.*

5. *Id.*

6. U.S. CONST. amend. IV.

7. 650 N.W.2d 144, 153–54 (Minn. 2002).

8. 666 N.W.2d 379 (Minn. 2003).

9. Piper Kenney Webb & Bruce H. Hanley, *Scarlet Letters: Traffic Stops Based on ‘Special’ License Plates Must Follow The Letter of The Constitution*—*State v. Henning*, 30 WM. MITCHELL L. REV. 513, 528 (2003) (citing *Henning*, 666 N.W.2d 379).

10. *See infra* Parts III, IV.

11. *See infra* Part V.A.

Supreme Court's decision in *Colosimo*, which the authors consider far too expansive.<sup>12</sup> The decision in *Colosimo* undermines the right of citizens of Minnesota to be free from invasions of privacy at the unbridled discretion of officers in the field. The court historically has recognized and protected this right, but *Colosimo*, to paraphrase the court in *Henning*, represents "a dramatic departure that demotes constitutional protections to a position inferior to that of fishing regulations."<sup>13</sup>

## II. FACTS AND PROCEDURAL HISTORY

### A. Facts

On the morning of September 18, 2000, John Colosimo was ending a fishing trip with a law school friend and the friend's two adult children on Rainy Lake at Kettle Falls in Voyageurs National Park.<sup>14</sup> The group had stowed their personal belongings and suitcases on Colosimo's open bowed boat in order to make the trip back to the far shore of Lake Namakan where they had left their vehicles.<sup>15</sup>

The Crestliner boat, owned by Colosimo, was being trailered by a truck owned by a National Park licensee along the National Park roadway between Rainy Lake and Namakan Lake.<sup>16</sup> As the truck and trailered boat made a loop on the National Park roadway to allow the driver to back the trailer and boat into the water of Namakan Lake, the occupants of the boat observed another unmarked boat tied by its bow to the dock adjacent to the boat ramp.<sup>17</sup> It was a boat used by the Department of Natural Resources.<sup>18</sup> Once the truck operator had stopped the truck to unhook the Crestliner, Officer Lloyd Stein, a uniformed Minnesota Department of Resources officer, walked toward the truck.<sup>19</sup> He struck up a conversation with Colosimo, who was sitting at the

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12. See *infra* Part V.B.

13. *Henning*, 666 N.W.2d at 386.

14. *State v. Colosimo*, 669 N.W.2d 1, 2 (Minn. 2003), *cert. denied*, 124 S. Ct. 2017 (2004).

15. *Id.*; John M. Colosimo Aff. ¶ 3 (on file with author).

16. See John M. Colosimo Aff. ¶ 3 (on file with author).

17. *Id.*

18. *Colosimo*, 669 N.W.2d at 3.

19. *Id.*

steering wheel of his boat.<sup>20</sup>

Officer Stein asked Colosimo if his group had caught any fish, and Colosimo responded that they had caught some.<sup>21</sup> Colosimo told Stein that they were in a hurry to go because of mechanical problems with his friend's new boat.<sup>22</sup> Stein asked how many fish the group had caught.<sup>23</sup> Colosimo responded that they had not been fishing that day and had less than their limit.<sup>24</sup> Stein asked how they had the fish packaged, and Colosimo responded they had gutted and gilled the fish according to the regulations affecting Rainy Lake.<sup>25</sup> Stein asked if he could take a look at the fish.<sup>26</sup> Colosimo inquired as to why they were being questioned and asked Stein several times what his basis was for searching and inspecting the fish, what his probable cause was, and whether he had a search warrant.<sup>27</sup> Colosimo told Stein he would agree to a search if the officer could articulate legitimate and valid reasons to search the boat.<sup>28</sup>

Officer Stein stated that he didn't need a reason as long as he knew there were fish on the boat.<sup>29</sup> When Colosimo refused inspection, the conservation officer issued Colosimo a ticket for failing to allow an inspection of his boat pursuant to Minnesota Statutes section 97A.251, subdivision 1(3).<sup>30</sup>

### B. *Procedural History*

The State and Mr. Colosimo agreed to a bench trial, and the district court found Colosimo guilty of refusal to allow inspection of

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20. *Id.*

21. *Id.*

22. John M. Colosimo Aff. ¶ 2 (on file with author).

23. *Colosimo*, 669 N.W.2d at 3.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *State v. Colosimo*, 648 N.W.2d 271, 272 (Minn. Ct. App. 2002), *rev'd*, 669 N.W.2d 1 (Minn. 2003), *cert denied*, 124 S. Ct. 2017 (2004).

29. *Id.* Colosimo did not have any improperly obtained fish on the boat. The fish on the boat had been obtained pursuant to proper permits and gutted and gilled according to regulation. Colosimo was not attempting to hide incriminating evidence from the conservation officer. Colosimo's refusal was based on the fact that Officer Stein did not have a search warrant and did not provide Colosimo with probable cause for searching the boat and inspecting the fish. *See* John M. Colosimo Aff. (on file with author).

30. *Colosimo*, 648 N.W.2d at 272.

a boat under Minnesota Statutes section 97A.251, subdivision 1(3).<sup>31</sup> He was assessed a fine of \$100.00 plus a \$37.00 surcharge.<sup>32</sup> Colosimo appealed the conviction to the Minnesota Court of Appeals. The court of appeals, in an opinion authored by now Justice Sam Hanson,<sup>33</sup> reversed the district court.<sup>34</sup> The court of appeals concluded that in order to inspect Colosimo's boat the officer must have probable cause of a violation of a fish or game law.<sup>35</sup> The court further held that a boat owner's refusal to allow an inspection does not provide probable cause to believe the owner has incriminating evidence of fish violations on the boat.<sup>36</sup>

The State appealed the case to the Minnesota Supreme Court. The supreme court reversed the court of appeals, holding that Colosimo had no reasonable expectation of privacy in the areas of his open boat or other conveyance used to typically store or transport fish.<sup>37</sup> The court held that it was permissible for the conservation officer to conduct a nonconsensual inspection of the area of Colosimo's open boat, including areas where fish are typically stored or transported.<sup>38</sup> The court found that by refusing to submit to the officer's request to inspect all these areas of his open boat, Colosimo had violated Minnesota Statutes section 97A.251, subdivision 1(3).<sup>39</sup> Following the Minnesota Supreme Court decision, a petition for writ of certiorari was made to the United States Supreme Court. The writ was denied on April 19, 2004.<sup>40</sup>

### III. THE COURT OF APPEALS DECISION

The court of appeals first addressed "whether the state must prove, as a predicate to the crime of refusal to allow inspection, that the [conservation] officer had probable cause to request the

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31. *Id.*

32. *Colosimo*, 669 N.W.2d at 3.

33. Justice Hanson was later appointed to the Minnesota Supreme Court, but based on his participation in the decision of the court of appeals, he recused himself when the Supreme Court heard the case.

34. *Colosimo*, 648 N.W.2d 271.

35. *Id.*

36. *Id.*

37. *Colosimo*, 669 N.W.2d at 6.

38. *Id.* at 9.

39. *Id.* at 8.

40. *Colosimo v. Minnesota*, 124 S. Ct. 2017 (2004).

inspection.”<sup>41</sup> Although Minnesota Statutes section 97A.251 does not expressly include that requirement, the court concluded that “it must be implied because of constitutional and other statutory requirements.”<sup>42</sup>

The court noted that the “Minnesota Supreme Court has consistently held that the Fourth Amendment’s prohibition against unreasonable searches and seizures applies to searches made by conservation officers.”<sup>43</sup> The court of appeals also stated that a “conservation officer violate[s] the Fourth Amendment when he enter[s] . . . [a] fish house without consent, a warrant, probable cause or any articulable basis for suspicion.”<sup>44</sup> The court concluded that a person in an automobile has a reasonable expectation of privacy, and saw no reason to distinguish between an automobile and a boat.<sup>45</sup> According to the court this was especially true in *Colosimo*, where the boat was towed by a motor vehicle, further blurring any distinction between a vehicle and a boat.<sup>46</sup> Under the Fourth Amendment—assuming there is no distinction between a boat and a motor vehicle—a conservation officer is required to have probable cause that a crime has been committed in order to justify a search of a boat without the owner’s consent.<sup>47</sup> That being so, the court posed the question whether “the legislature [could] constitutionally require a person to consent to a warrantless search of protected property without probable cause, or make it a crime for a person to refuse such consent?”<sup>48</sup> Although the narrow wording of the statute appeared to require such consent,<sup>49</sup> the court concluded that in order to be consistent with the constitution, it must read the statute to include an implied predicate that the officer have probable cause to support a request for inspection.<sup>50</sup>

The court supported its conclusion by pointing to a related statute, which states, “[w]hen an enforcement officer has probable cause to believe that wild animals taken or possessed in violation of

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41. *Colosimo*, 648 N.W.2d at 273.

42. *Id.*

43. *Id.*

44. *Id.* (citing *State v. Krenz*, 634 N.W.2d 231, 234 (Minn. Ct. App. 2001)).

45. *Id.* at 274.

46. *Id.* at 274 n.1.

47. *See id.* at 274.

48. *Id.*

49. MINN. STAT. § 97A.251, subd. 1(3) (2000).

50. *Colosimo*, 648 N.W.2d at 274.

game and fish laws are present, the officer may: (1) enter and inspect any place or vehicle; and (2) open and inspect any package or container.”<sup>51</sup> By construing the provisions of the crime of refusal to allow inspection together with the probable cause limitations placed on the officer’s authority to inspect, the court concluded that a boat owner could not be convicted of the crime of refusing an inspection unless the state could prove the officer had probable cause to request the inspection.

The appellate court also rejected the state’s contention that probable cause was not required for an inspection because of the “regulated activity exception” to the Fourth Amendment.<sup>52</sup> The court pointed to *State v. Krenz*, which held that warrantless searches conducted to enforce regulatory schemes are only enforceable in the context of a pervasively regulated business activity, not a personal recreational activity.<sup>53</sup> Just as *Krenz* rejected the application of the exception to a fish house used for personal recreational purposes, the *Colosimo* court ruled that “unless a person is using a boat for a pervasively regulated business activity, probable cause is required to enter and inspect a boat.”<sup>54</sup> The court acknowledged “the difficulty a conservation officer faces in acquiring probable cause for fishing violations that are committed essentially in private,” but emphasized that the difficulty of finding probable cause does not override constitutional protections or statutory limitations.<sup>55</sup> Further, the court could not conclude that “the legislature had clearly expressed an intent to prefer the enforcement of the fish laws to individual privacy rights.”<sup>56</sup>

The court cited *State v. Greyeagle*, which held that a statute regulating the issuance of special series license plates to cars registered to convicted DUI offenders (or members of their household) did not expressly authorize vehicle stops based solely on the license plates.<sup>57</sup> Additionally, a driver who displays special series license plates does not give implied consent to stop the vehicle on which the plates are displayed, absent reasonable

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51. *Id.* at 276.

52. *Id.* at 275.

53. *Id.* (citing *State v. Krenz*, 634 N.W.2d 231, 236–37 (Minn. Ct. App. 2001)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (citing *State v. Greyeagle*, 541 N.W.2d 326, 328 (Minn. Ct. App. 1995)).

suspicion independent of the special plates.<sup>58</sup> Only after the legislature amended the statute to provide specific authorization for stops based solely on the plates did the court of appeals construe the statute to establish a driver's implied consent without independent suspicion.<sup>59</sup> The *Colosimo* court contrasted that situation with Minnesota Statutes section 97A.215, which "conditions the officer's inspection authority to situations where the officer has 'probable cause.'"<sup>60</sup>

The final issue the appellate court decided was whether Colosimo's refusal to allow an inspection, together with the officer's knowledge that fish were in the boat, gave the officer probable cause to believe Colosimo had violated fishing laws.<sup>61</sup> The court held that Colosimo's refusal did not give the conservation officer probable cause to believe Colosimo had incriminating evidence on the boat because the Fourth Amendment provides "'a constitutional right to refuse to consent to entry and search,' where the officer lacks probable cause,"<sup>62</sup> and because passive refusal cannot be a crime, nor be used as evidence of a crime.<sup>63</sup> The court observed to hold otherwise would effectively eliminate the requirement of probable cause because an officer could avoid the requirement by simply requesting inspection: if the boat owner refused, the officer could use the refusal as probable cause.<sup>64</sup> The appellate court concluded that because the conservation officer admitted he did not have probable cause when he initially approached the boat and Colosimo's refusal could not provide probable cause, Colosimo could not be convicted for refusing to allow inspection.<sup>65</sup>

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58. *Greyeagle*, 541 N.W.2d at 330.

59. *Colosimo*, 648 N.W.2d at 275-76 (citing *State v. Henning*, 644 N.W.2d 500, 503 (Minn. Ct. App. 2002), *rev'd*, 666 N.W.2d 379 (Minn. 2003)). *See also, infra* notes 177-87 and accompanying text.

60. 648 N.W.2d at 276.

61. *Id.*

62. *Id.* (quoting *United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978)).

63. *Id.*

64. *Id.*

65. *Id.*

## IV. THE SUPREME COURT DECISION

A. *The Majority Opinion*

On appeal to the Minnesota Supreme Court, Colosimo argued that the Department of Natural Resources officer “stopped” his fishing party without reasonable suspicion in violation of the Fourth Amendment.<sup>66</sup> He further argued that because the officer did not have probable cause to inspect his boat, the officer’s request to do so was unlawful and Colosimo could not be convicted for his refusal to permit the inspection.<sup>67</sup> Colosimo relied on *Delaware v. Prouse*, which held that the Fourth Amendment prohibits random and suspicionless stops of drivers.<sup>68</sup>

The majority began its analysis by determining that the conservation officer’s approach and subsequent questioning of Colosimo about the group’s fishing activities did not constitute a “stop” under the Fourth Amendment, an issue the court of appeals had expressly declined to address because it was not necessary to its decision.<sup>69</sup> The supreme court pointed out that the conservation officer had simply conversed with Colosimo while the boat was at a standstill prior to its entering the lake.<sup>70</sup> This, the court reasoned, presented a situation distinctly different from that of *Prouse*, where a patrol officer stopped a moving automobile without cause.<sup>71</sup> The court relied on previous cases holding that generally no seizure occurs when an officer approaches and asks questions of a person standing on a public street or sitting in a parked car.<sup>72</sup> The court acknowledged that a seizure eventually took place, but concluded that, by that point, Colosimo had admitted to fishing and transporting fish but refused to allow an inspection, thus giving the conservation officer the suspicion required under the Fourth

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66. *State v. Colosimo*, 669 N.W.2d 1, 3-4 (Minn. 2003), *cert. denied*, 124 S. Ct. 2017 (2004).

67. *See id.* at 3-5.

68. *Id.* at 4 (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)).

69. *See Colosimo*, 648 N.W.2d at 276.

70. *Colosimo*, 669 N.W.2d at 3.

71. *Id.*

72. *Id.* (citing *In re Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 782 (Minn. 1993); *State v. Vohnoutka*, 292 N.W.2d 756 (Minn. 1980)). On the issue of difficulty in determining when a seizure occurs, *see generally* Edwin J. Butterfoss, *Bright Line Seizures: The Need For Clarity In Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988).

Amendment.<sup>73</sup>

The court then considered whether the conservation officer had the authority to search Colosimo's open boat to inspect fish once Colosimo had admitted to transporting fish.<sup>74</sup> The issue turned on whether, under the circumstances, Colosimo had a reasonable expectation of privacy.<sup>75</sup> If not, the Fourth Amendment's prohibition on "unreasonable searches" would not be implicated and his conviction for refusing to allow the search would be lawful.<sup>76</sup> The court framed the issue as a question "whether there are any areas of Colosimo's boat where an expectation of privacy was not reasonable . . . ."<sup>77</sup>

To determine whether Colosimo's expectation of privacy was reasonable, the court considered the nature of recreational fishing, the characteristics of an open boat, and the fact that the request occurred in open season near game fish habitat.<sup>78</sup> The court described recreational fishing as a highly regulated and licensed privilege that imposes strict conditions on those who choose to participate in the sport.<sup>79</sup> One of those conditions, the court concluded, is allowing conservation officers to inspect boats or other conveyances used to transport fish.<sup>80</sup>

The court found guidance in the Montana Supreme Court decision in *State v. Boyer*.<sup>81</sup> *Boyer* held that a fisherman had no legitimate expectation of privacy in the rear platform of his boat, and held that a park warden could legally step on the transom of the boat to inspect fish contained in the live well.<sup>82</sup> The court in *Boyer* explained:

In engaging in this highly regulated activity, anglers must assume the burdens of the sport as well as its benefits. Thus, no objectively reasonable expectation of privacy exists when a wildlife enforcement officer checks for

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73. *Colosimo*, 669 N.W.2d at 3. Of course, that admission by Colosimo was not an admission of wrongdoing or behavior in violation of fishing regulations. Thus, the court ultimately authorized a seizure and search without suspicion of any wrongdoing.

74. *Id.* at 4.

75. *Id.* at 5.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 42 P.3d 771 (Mont. 2002).

82. *Id.* at 779.

hunting and fishing licenses in open season near a game habitat, inquires about game taken, and requests to inspect game in the field. In this capacity, game wardens are acting not only as law enforcement officers, but as public trustees protecting and conserving Montana's wildlife and habitat for all its citizens.<sup>83</sup>

The Minnesota Supreme Court noted the important role fishing plays in the lives of many Minnesotans and the need for regulations to protect the state's natural resources.<sup>84</sup> The court concluded that the citizens of Minnesota understand the need for effective regulation, as evidenced by the fact that they have adopted an amendment to the Minnesota Constitution which states, "Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good."<sup>85</sup> This provision, the court concluded, recognizes the link between the enforcement of fishing regulations and the preservation of Minnesota's game and fish resources.<sup>86</sup>

The court noted that when anglers purchase fishing licenses, they routinely receive pamphlets relating to fishing limitations and regulations.<sup>87</sup> This information, together with the "widespread knowledge of the restrictions accompanying the privilege of fishing casts doubt on the reasonableness of an expectation of privacy that would allow an angler to refuse inspection of his catch. Those who . . . harvest Minnesota's natural game are on notice . . . [and] are subject to regulations."<sup>88</sup> Thus, the court reasoned, Colosimo, who was at a known fishing destination, acknowledged he had been fishing, and admitted to transporting his catch in an open boat "had no reasonable expectation of privacy [in] the areas of his open boat or other conveyance used to typically store or transport fish . . . ."<sup>89</sup>

The court supported its reasoning by citing other courts around the country that have reached similar conclusions when analyzing searches of individuals who choose to take game.<sup>90</sup> They

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83. *Id.* at 776.

84. *Colosimo*, 669 N.W.2d at 6.

85. *Id.* (citing MINN. CONST. art. XIII, § 12).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

noted that in *People v. Perez*, the California Court of Appeals held that “the high degree of regulation over the privilege of hunting, in turn, reduces a hunter’s reasonable expectation of privacy.”<sup>91</sup> In *Hamilton v. Myers*, the Sixth Circuit held that “[e]veryone who participates in the privilege of hunting has a duty to permit inspections to determine whether they are complying with applicable laws.”<sup>92</sup> And the South Dakota Supreme Court in *State v. Halverson* held that “[s]ince it is a privilege to hunt wild game, a hunter tacitly consents to the inspection of any game animal in his possession when he makes application for and receives a hunting license.”<sup>93</sup> In citing these cases, the Minnesota Supreme Court did not address the dissent’s arguments that these cases involved either searches that occurred in plain view—as opposed to the closed containers in Colosimo’s case—or checkpoint searches, which are not permissible under the Minnesota Constitution.<sup>94</sup>

The court also insisted that its decision was consistent with *State v. Larsen*, which recognized citizens’ expectation of privacy in a fish house and prohibited the search of a fish house without probable cause.<sup>95</sup> A fish house, the court observed, is a “home-like dwelling”<sup>96</sup> that provides “privacy for activities ‘recognized and permitted by society,’”<sup>97</sup> and “the minimal intrusion involved [with inspecting fish on a boat] . . . is markedly less than that occurring [in a] . . . fish house.”<sup>98</sup> The court explained that any other conclusion “would prevent the state from meeting its constitutional mandate [to] manage and regulate fishing to preserve [the state’s] natural resources” because “the state would only be able to inspect boats when it [had] observe[d] or ha[d] information from a ‘confidential reliable informant’ on the actual catching and keeping of fish in excess of the applicable limits, size, season, or species.”<sup>99</sup> To the court, “[t]he idea that officers would be required to personally witness illegal catch activity, coupled with the reality that fishing can take hours or even days, illustrates how absurd it

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91. *Id.* (quoting *People v. Perez*, 59 Cal. Rptr. 2d 596, 601 (Cal. Ct. App. 1996)).

92. 281 F.3d 520, 532 (6th Cir. 2002).

93. 277 N.W.2d 723, 724–25 (S.D. 1979).

94. *Colosimo*, 669 N.W.2d at 12 nn.3–4.

95. *Id.* at 6–7 (citing *State v. Larsen*, 650 N.W.2d 144 (Minn. 2002)).

96. *Id.* at 7.

97. *Id.* (quoting *Larsen*, 650 N.W.2d at 149).

98. *Id.*

99. *Id.*

would be to recognize a privacy interest inherent in an angler's take and only then have probable cause to inspect."<sup>100</sup>

To support its argument, the court again pointed to the reasoning of the Montana Supreme Court in *State v. Boyer*.<sup>101</sup> *Boyer* recognized that "Montana's vast geography, the angler's somewhat uninhibited freedom of movement, and remoteness from warrant-issuing magistrates and law enforcement entities would severely impede game violation investigations," leading to the "depletion of Montana's wildlife and fish."<sup>102</sup> The *Colosimo* court compared Minnesota's more than 10,000 lakes and numerous streams and rivers to Montana's rugged geography and concluded that Minnesota's anglers' "largely uninhibited freedom of movement in remote areas in pursuit of . . . abundant fish" similarly impeded game violation investigations in Minnesota, putting the state's natural resources at risk.<sup>103</sup> Having determined that the Fourth Amendment did not prohibit a limited inspection of Colosimo's boat, the court lastly turned to the issue of whether the statute under which Colosimo was convicted required probable cause in order to undertake a search.<sup>104</sup>

The Minnesota Supreme Court disagreed with the court of appeals' interpretation of the statute, which required proof, "as a predicate to the crime of refusal to allow inspection," that an officer have probable cause to suspect a violation.<sup>105</sup> The supreme court relied on the plain wording of the statute and declined "to interject a probable cause requirement into [section] 97A.251 merely because the legislature in [section] 97A.215[, subdivision] 1(b)(1) granted conservation officers with probable cause the authority to 'enter and inspect any place or vehicle.'"<sup>106</sup>

In conclusion, the court stressed that their decision did "not grant conservation officers power beyond that of other law enforcement officers."<sup>107</sup> Rather, the court argued, "the difference between the inspection permitted under the facts of this case and searches impermissible under the Fourth Amendment is that fishing is a largely recreational privilege that anglers choose to

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100. *Id.*

101. 42 P.3d 771 (Mont. 2002).

102. *Colosimo*, 669 N.W.2d at 7 (quoting *Boyer*, 42 P.3d at 776).

103. *Id.* at 8.

104. *Id.* (referring to MINN. STAT. § 97A.251, subd. 1(3) (2000)).

105. *Id.*

106. *Id.* at 9 (quoting MINN. STAT. § 97A.215, subd. 1(b)(1)).

107. *Id.*

engage in with knowledge of the regulations governing their conduct.”<sup>108</sup> The decision, the court reasoned, “merely acknowledges that an expectation of privacy in all parts of an open boat or other conveyance used to transport fish is not reasonable.”<sup>109</sup> As such, the court concluded that “it was permissible for the conservation officer to conduct a nonconsensual inspection of the areas of Colosimo’s open boat typically used to store or transport fish,” and by failing to submit to the officer’s lawful request, Colosimo violated Minnesota Statutes section 97A.251, subdivision 1(3).<sup>110</sup>

*B. Justice Page’s Dissenting Opinion*

Justice Page, in his dissent, decried the loss of the historic protection for an individual’s right to be free from unreasonable searches: “Today’s sweeping decision holding that there is no expectation of privacy in areas of an open boat where fish are typically stored overturns recent precedent and eviscerates the constitutional protection against unreasonable searches.”<sup>111</sup>

Justice Page’s dissent begins with the acknowledgment that, as a general rule, a state has the power to grant or deny a privilege as the state sees fit.<sup>112</sup> However, Justice Page pointed out, the power of the state is not unlimited and it may not impose conditions that require the relinquishment of constitutional rights.<sup>113</sup> The majority’s decision in *Colosimo*, Justice Page argued, “permits precisely that which the Supreme Court in *Frost* prohibited”—imposing a condition on the privilege of taking wildlife, which infringes on constitutional rights.<sup>114</sup> As a result, Justice Page argued that the court has subjected Minnesota’s citizens to searches at the whim of individual officers:

By concluding that one who engages in the regulated activity of fishing has no expectation of privacy in the areas of an open boat or other conveyance used to

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 9 (Page, J., dissenting).

112. *Id.*

113. *Id.* at 9–10 (“[T]he state may not impose upon the permission to take wildlife the condition that the state be allowed to invade the constitutional rights of the individual.”).

114. *Id.* at 10 (referring to *Frost v. R.R. Comm’n*, 271 U.S. 583 (1926)).

typically transport or store fish, the court ensures that every such search will be reasonable, even when based on a conservation officer's whim, thereby making a warrant based on probable cause unnecessary. In the end, because no such warrantless searches will be violative of the Fourth Amendment's and article I, section 10's, protections against unreasonable searches, individuals engaging in or who are believed to have engaged in hunting or fishing will be subject to searches otherwise constitutionally forbidden.<sup>115</sup>

According to Justice Page, the erosion of citizens' protection is exacerbated by the court's refusal to define or explain what constitutes an area "of an open boat or other conveyance used to typically store or transport fish."<sup>116</sup> Justice Page conceded that "to the extent a boat is open and items are in plain view, there is no reasonable expectation of privacy in those items because the individual has not sought to keep them private."<sup>117</sup> The problem, he pointed out, "is that the court extends this rationale to any place on the boat where fish are typically stored and to items not in plain view."<sup>118</sup> He explained, "[t]he expansive language in the opinion makes it apparent that a peace officer . . . will be able to search not only open boats, but any boat, car, or truck on the mere hunch that the occupants have engaged in the regulated activity of hunting or fishing."<sup>119</sup> In failing to define these areas, Justice Page argued, the court opened the door to searches of packages and containers on a boat that contains items an individual is seeking to keep private.<sup>120</sup>

Justice Page rejected the court's conclusion that Colosimo had no expectation of privacy because recreational fishing is a privilege and subject to extensive regulation.<sup>121</sup> He argued that the court's reliance on *People v. Perez*<sup>122</sup> and *State v. Halverson*<sup>123</sup> is misplaced, since those cases involved searches that arose out of game checkpoints, a law enforcement procedure that is impermissible under the Minnesota Constitution.<sup>124</sup> Further, he noted that the

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115. *Id.* (citation omitted).

116. *Id.* at 10 n.1.

117. *Id.* at 12 n.3.

118. *Id.*

119. *Id.* at 10 n.1.

120. *Id.* at 12 n.3.

121. *Id.* at 9-18.

122. 59 Cal. Rptr. 2d 596 (Cal. Ct. App. 1996).

123. 277 N.W.2d 723 (S.D. 1979).

124. *Colosimo*, 669 N.W.2d at 12 (Page, J., dissenting).

court in *Larsen* concluded that fishing is not comparable to “running an automobile junkyard business, operating a licensed gun dealership, or engaging in the sale of alcoholic beverages for the purpose of the closely regulated industry exception.”<sup>125</sup> *Larsen* recognized that the state’s fish and game rules were no more comprehensive than the state’s traffic rules, and concluded that the state’s interest in protecting and regulating wildlife and natural resources was less than its interest in deterring drunk driving.<sup>126</sup> Therefore, a fishing boat—particularly one not in the water—at a minimum is entitled to the same protection as an automobile. “If, in the face of extensive regulation, the search of a vehicle may ‘not be initiated without at least a reasonable articulable suspicion of unlawful conduct,’ then the search of a fishing boat should not be treated any differently.”<sup>127</sup>

As to the statute under which Colosimo was convicted, Justice Page asserted that the presumption that the legislature did not intend an absurd or unreasonable result, and that the legislature intended the entire statute to be effective and certain, compels a different result.<sup>128</sup> Here, Minnesota Statutes section 97A.251, subdivision 1(3), provides that a person may not “refuse to allow inspection of a motor vehicle, boat, or other conveyance used while taking or transporting wild animals.”<sup>129</sup> However, Minnesota Statutes section 97A.215, subdivision 1(b), authorizes conservation officers to “enter and inspect any place or vehicle” and to “open and inspect any package or container” *only* when the officer “has probable cause to believe that wild animals taken or possessed in violation of the game and fish laws are present.”<sup>130</sup> Although the majority refused to impose a probable cause requirement on the inspections for which citizens can be punished for refusing “merely because” the legislature required officers to have probable cause before carrying out the inspection, Justice Page contended that reading the provisions together compels the conclusion that a citizen need only accede to an invitation if the officer has the authority to inspect—that is, probable cause.<sup>131</sup> The majority’s

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125. *Id.* (quoting *State v. Larsen*, 650 N.W.2d 144, 152–53 (Minn. 2002)).

126. *Id.* at 13; *see Larsen*, 650 N.W.2d at 153.

127. *Colosimo*, 669 N.W.2d at 13 (quoting *Larsen*, 650 N.W.2d at 153).

128. *Id.* at 16.

129. MINN. STAT. § 97A.251, subd. 1(3) (2000).

130. *Id.* § 97A.251 subd. 1(b).

131. *Colosimo*, 669 N.W.2d at 16.

interpretation produces an absurd result. “The enforcement officer cannot conduct an inspection without probable cause,” but a person can be criminally penalized for refusing to allow an inspection that the enforcement officer had no authority to conduct in the first place.<sup>132</sup>

Justice Page acknowledged that a probable cause requirement will make it more difficult to detect fishing violations, but noted, “as we concluded in *Larsen*, the ‘ease in enforcing the law has never been a sufficient justification for government intrusion.’”<sup>133</sup> In addition, although the majority claimed that a probable cause requirement “would prevent the state from meeting its constitutional mandate that it manage and regulate fishing to preserve our natural resources,” the State offered no evidence to show that this was the only effective enforcement measure.<sup>134</sup> In fact, the State conceded that requiring conservation officers to comply with the constitutional requirements of probable cause “does not pose any kind of direct threat to fish, per se,” and the “resource itself can be protected even if individual harvest behaviors cannot be regulated.”<sup>135</sup> Justice Page contended that “[w]ithout empirical evidence to the contrary, there is no way to reach the conclusion that the random seizure of an individual on the mere belief that the individual has engaged in . . . fishing or gaming is . . . an effective [or justifiable] means of promoting resource preservation.”<sup>136</sup>

Justice Page was also concerned that the court, rather than requiring the state to properly manage Minnesota’s wildlife resources, “has instead decided to grant the state the power to compel the relinquishment of an individual’s constitutional right not only to be free from unreasonable searches, but also the freedom to assert one’s constitutional right without fear of criminal punishment.”<sup>137</sup>

He was worried that the court’s decision holding that there is no expectation of privacy in areas of an open boat where fish are typically stored overturns recent precedent and eviscerates the constitutional protection against unreasonable searches:

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132. *Id.*

133. *Id.* at 17 (quoting *Larsen*, 650 N.W.2d at 150 n.5).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 17–18.

Because both conservation officers and police officers are bound as peace officers by the same constitutional constraints, the court's decision has now opened the door for warrantless searches by any peace officer upon the mere suspicion that an individual is, has been, or will in the future engage in hunting or fishing. As the Court said in *Frost*, "It is inconceivable that guaranties embedded in the Constitution . . . may thus be manipulated out of existence."<sup>138</sup>

C. *Justice Paul Anderson's Concurrence and Dissent*

Justice Paul Anderson concurred with the majority's conclusion that the conservation officer had the right to inspect the open sections of Colosimo's fishing boat and that Colosimo prevented the conservation officer from doing so.<sup>139</sup> Justice Anderson argued, however, that the court's analysis went beyond what was necessary by granting the officer the right to inspect "any other conveyance" used to transport fish.<sup>140</sup> He agreed with the majority that Colosimo, as an angler in a stopped, open boat who admitted to fishing, had no reasonable expectation of privacy in the open section of his boat, even though it would be intrusive to some degree to have an officer look in his boat.<sup>141</sup> His concern was that the majority's express holding that the officer could also search "any other conveyance" used to transport fish was overly broad, unnecessary, and inadvisable.<sup>142</sup> He noted that because the conservation officer in Colosimo was prevented from any search, it is unknown what "other conveyance," if any, the conservation officer sought to inspect.<sup>143</sup> The court's vague holding that conveyances "used to typically store or transport fish" are subject to search makes it difficult to ascertain with any degree of certainty what other conveyances are subject to search.<sup>144</sup> Presumably because "other conveyances" potentially includes areas with significant expectations of privacy, Justice Anderson would have left the resolution of what a conservation officer has the right to

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138. *Id.* at 18 (quoting *Frost v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926)).

139. *Id.* (Anderson, Paul, J., concurring in part and dissenting in part).

140. *Id.*

141. *Id.* at 19.

142. *Id.*

143. *Id.*

144. *Id.*

inspect beyond the open sections of a fisherman's boat for another day.<sup>145</sup>

## V. ANALYSIS

The Minnesota Supreme Court's holding that there is no reasonable expectation of privacy in the areas of an open boat or other conveyance typically used to transport fish, making such areas subject to inspection without individualized suspicion, is contrary to the Fourth Amendment's prohibition against unreasonable searches and seizures. Although the privilege of fishing is important, the rights of citizenship are vital, and a constitutional right must outweigh a broad, unlimited right of inspection by an officer. No citizen should be criminally punished for refusing to consent to an unrestrained, suspicionless search.

### A. *Background*

In his concurring opinion in *Delaware v. Prouse*, Justice Blackmun emphasized that in his view the case did not address the constitutionality of "the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties."<sup>146</sup> Since then, although never addressed by the United States Supreme Court, numerous state and lower federal courts have addressed the issue. Generally, these courts have recognized the important government interest in protecting the natural resources of their respective states, but they have imposed limits on the actions of game wardens in order to protect citizens from indiscriminate searches and seizures undertaken at the whim of individual officers.

Several courts have permitted searches or seizures if the officer has reasonable suspicion that a violation of fish and game laws has occurred. For example, in *People v. Coca*, the Colorado Supreme Court required reasonable suspicion of illegal behavior before stopping a vehicle.<sup>147</sup> In *Hill v. State*, the Florida Supreme Court permitted an officer to board a ship to view a shrimping permit, but required probable cause of a violation before an inspection of the boat could take place.<sup>148</sup> The Illinois Court of Appeals, in *People*

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145. *Id.*

146. 440 U.S. 648, 664 (1979) (Blackmun, J., concurring).

147. 829 P.2d 385 (Colo. 1992).

148. 238 So.2d 608 (Fla. 1970).

*v. Levens*, held that a motorist may only be stopped if an officer has reasonable suspicion that the motorist is presently engaged in illegal hunting.<sup>149</sup> Also, the New Mexico Court of Appeals in *State v. Creech*<sup>150</sup> and the West Virginia Supreme Court in *State v. Legg*<sup>151</sup> both held that reasonable suspicion was required for a stop by a conservation officer.

A few courts, however, have permitted suspicionless stops and searches. In *State v. Keehner*, the Iowa Supreme Court permitted stops of vehicles of individuals “engaged in an activity which may be reasonably interpreted as ‘hunting.’”<sup>152</sup> And the Sixth Circuit in *Hamilton v. Myers* upheld the right of game wardens to make inspections and conduct searches without warrants when it is clear that someone has been hunting.<sup>153</sup>

Consistent with *Prouse*, several courts have permitted suspicionless searches only if a scheme is in place to limit the discretion of the officer in the field. In *People v. Perez*, the California Court of Appeals allowed the use of traffic checkpoints near hunting areas during hunting season in order to inspect licenses, tags, equipment and any wildlife taken.<sup>154</sup> Similarly, the South Dakota Supreme Court in *State v. Halverson*,<sup>155</sup> and the Mississippi Supreme Court in *Drane v. State*,<sup>156</sup> upheld checkpoints used in search of wildlife and game violations.

### B. *An Overly Broad Rule*

By holding that Colosimo did not have a reasonable expectation of privacy in the “areas of an open boat or other conveyance used to typically store or transport fish”<sup>157</sup> and thus could be criminally punished for refusing to permit inspection, the Minnesota Supreme Court improperly stripped Colosimo of a reasonable expectation of privacy. This placed an impermissible burden on the right to assert one’s constitutional rights without

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149. 713 N.E.2d 1275 (Ill. App. Ct. 1999).

150. 806 P.2d 1080 (N.M. Ct. App. 1991).

151. 536 S.E.2d 110 (W. Va. 2000).

152. 425 N.W.2d 41, 45 (Iowa 1988).

153. 281 F.3d 520 (6th Cir. 2002).

154. 59 Cal. Rptr. 2d 596, 601 (Cal. Ct. App. 1996).

155. 277 N.W.2d 723 (S.D. 1979).

156. 493 So. 2d 294 (Miss. 1986).

157. *State v. Colosimo*, 669 N.W.2d 1, 10 (Minn. 2003), *cert. denied*, 124 S. Ct. 2017 (2004).

fear of criminal punishment.

The United States Supreme Court has consistently recognized that citizens enjoy an expectation of privacy in containers found within a vehicle. In *United States v. Ross*, the Court concluded that “the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.”<sup>158</sup> In upholding a suspicionless boarding of a vessel in waters providing access to the open sea in *United States v. Villamonte-Marquez*, the Court emphasized the fact that “[n]either the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search.”<sup>159</sup>

To the extent that a boat is open and items are in plain view, there is no reasonable expectation of privacy in those items because the individual has not sought to keep them private. The problem with the Minnesota Supreme Court’s decision in *Colosimo* is that its holding extends to any place where fish are typically stored, including those items not in plain view. The Minnesota Supreme Court did not specifically delineate the limits of a legal search of an open boat, but nevertheless permitted a search of areas used “to typically store or transport fish.”<sup>160</sup> This necessarily includes those areas not in plain view and presumably includes containers, which are often used to transport fish.<sup>161</sup> In fact, in the *Colosimo* case, Colosimo told the conservation officer that the party was transporting fish “gutted and gilled . . . in accordance with the regulations affecting Rainy Lake.”<sup>162</sup> Thus the fish were likely to be found in closed containers. By permitting suspicionless searches of closed containers, the Minnesota Supreme Court expanded the authority of conservation officers beyond justification. The court’s holding in this regard exceeds the holding and rationale of *State v. Boyer*,<sup>163</sup> a case on which the court so heavily relied.

In *Boyer*, the Montana Supreme Court was careful to justify the seizure of defendant as based on reasonable suspicion that an

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158. 456 U.S. 798, 822–23 (1982) (citing *Robbins v. California*, 453 U.S. 420 (1981)).

159. 462 U.S. 579, 592 (1983) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *Carroll v. United States*, 267 U.S. 132, 154 (1925)).

160. *Colosimo*, 669 N.W.2d at 6.

161. The majority cited to Webster’s International Dictionary which defined “conveyance” as “[a] means of carrying or transporting something.” *Id.* at 8 n.2 (citing WEBSTER’S INTERNATIONAL DICTIONARY 499 (3d ed. 1993)).

162. *Id.* at 3.

163. *State v. Boyer*, 42 P.3d 771 (Mont. 2002).

offense had occurred, noting that “[i]t is the presence of reasonable suspicion that allowed [the game warden] to proceed with the investigative stop.”<sup>164</sup> The Montana court was further careful to limit the intrusion onto the boat to the transom, an area it equated to the bumper of a vehicle, in which the court found the defendant had no reasonable expectation of privacy.<sup>165</sup> Finally, the Montana court justified the officer looking into the live well as plain view. The court emphasized the importance of the fact that the officer “did not conduct a search of the boat, look under the seats, remove or rearrange any personal belongings, or even open the top of the live well.”<sup>166</sup>

The Minnesota Supreme Court, however, failed to recognize the importance of this limitation. In the court’s view, because at least some portion of the boat was subject to search, Colosimo was guilty of a crime by refusing any search. But how was Colosimo to know the search demanded by the conservation officer would be limited to lawful areas? There was no search warrant describing the places to be searched; there were no administrative regulations or guidelines in place to limit the search; and, under the court’s ruling, probable cause did not limit or define the scope of the search. The limit the court articulated in its opinion—areas of the open boat typically used to store or transport fish—was created by the court and was not in place at the time of the demand to search that led to Colosimo’s criminal conviction.

Mr. Colosimo was faced with a demand for a broad, unlimited search of the trailered boat in which he was traveling and the containers on that boat, and was criminally punished for refusing to consent to such a search. This is precisely the type of “standardless and unconstrained discretion” by the officer in the field that the Fourth Amendment was designed to protect against and that *Delaware v. Prouse* sought to prevent.<sup>167</sup> If Minnesota seeks to utilize suspicionless searches to enforce its hunting and fishing laws, the Fourth Amendment at a minimum requires that such searches be appropriately limited by statute, regulation, or administrative policy.

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164. *Id.* at 777.

165. *Id.* at 778.

166. *Id.* at 780.

167. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 532–33 (1967)).

C. *The Balance Between Environmental and Individual Rights*

Fishing plays an important role in the lives of many Minnesota citizens. With its 10,000 lakes and plentiful streams and rivers, Minnesota is a haven of natural resources for sport fishing enthusiasts. The State, to ensure the protection of this natural resource, created statutes and regulations that limit certain aspects of the sport, such as quantity, season, species, location, and size. These regulations help protect the resource so it can be enjoyed by countless generations to come.

In its attempt to protect the state's natural resources, the Minnesota Supreme Court has issued a decision that goes far beyond commonly recognized regulations and violates the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures. The court's decision that boats used in fishing are subject to indiscriminate searches at the whim of conservation officers is contrary to decisions of the United States Supreme Court and contradicts the Minnesota Supreme Court's own recent precedent. In *State v. Larsen*, the Minnesota Supreme Court held that a fish house, although not a substitute for a private dwelling, provides citizens with a reasonable expectation of privacy.<sup>168</sup> The fish house, the court reasoned, protected its occupants from the elements and often provided eating, sleeping, and other facilities, thus providing privacy for activities "recognized and permitted by society" as important activities of a personal nature.<sup>169</sup>

In *Colosimo*, the court justified its decision not to provide citizens in boats the same protection as occupants of a fish house because "the minimal intrusion involved here is markedly less than that occurring when the privacy of the private, home-like dwelling of a fish house is invaded."<sup>170</sup> Putting aside the difficult questions the court will face when a conservation officer attempts to search a houseboat he believes may contain fish, the court's conclusion that the state's interest in regulating fishing outweighs the intrusion involved in the search of a boat is difficult to square with the previous treatment it has accorded motor vehicles. Perhaps a fish house deserves greater protection than a boat, but why should citizens in a boat (or in a car pulling a boat) receive less protection

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168. 650 N.W.2d 144, 149 (Minn. 2002).

169. *Id.*

170. *State v. Colosimo*, 669 N.W.2d 1, 6 (Minn. 2003), *cert. denied*, 124 S. Ct. 2017 (2004).

than citizens in a car?

In *Larsen*, the court asserted that the state's fish and game rules and regulations were "no more pervasive or comprehensive than the state's traffic rules and regulations."<sup>171</sup> It concluded that the state's interest in protecting and regulating wildlife was less than its interest in deterring drunk driving, which previous cases had concluded did not outweigh the privacy expectations of a motor vehicle occupant.<sup>172</sup> That being the case, it is anomalous that, according to the *Colosimo* court, the state's interest in protecting and regulating wildlife outweighs the privacy expectations of the occupant of a boat.

In *Ascher v. Commissioner of Public Safety*, the court exercised its independent authority to interpret the Minnesota Constitution to strike down the use of roadblocks to stop all vehicles at sobriety checkpoints.<sup>173</sup> The court pointed out that it "ha[d] long held [that Minnesota Constitution article I, section 10] generally requires the police to have an objective individualized articulable suspicion of criminal wrongdoing before subjecting a driver to an investigative stop."<sup>174</sup> Because the court believed the state had failed to articulate a persuasive reason for dispensing with the requirement of individualized suspicion, the court concluded that "the constitutional balance must be struck in favor of protecting the traveling public from even the 'minimally intrusive' seizures which occur at a sobriety checkpoint."<sup>175</sup> That being so, the constitutional balance must be struck in favor of protecting boat occupants from the intrusion of a search—even one characterized as a "minimal intrusion"—if the countervailing state interest is protection and regulation of fish and wildlife, which the court has found less weighty than the interest in deterring drunk driving.

In *State v. Henning*, the court again protected occupants of cars when faced with the issue of whether police could stop individuals based solely on the basis of special series license plates issued for cars registered to individuals (or members of their household) whose license has been revoked as a result of DUI convictions.<sup>176</sup>

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171. *Larsen*, 650 N.W.2d at 153.

172. *Id.* (relying on *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183 (Minn. 1994)).

173. 519 N.W.2d 183.

174. *Id.* at 187.

175. *Id.*

176. 666 N.W.2d 379 (Minn. 2003).

The court relied on *Delaware v. Prouse* for the proposition that where individualized suspicion is not required to make a stop, other safeguards must be present to assure that a driver's reasonable expectation of privacy is not invaded at the unbridled discretion of a patrolling officer.<sup>177</sup> The court complained that the statute at issue in *Henning* "seeks to eliminate the constitutional safeguard requiring an officer to have reasonable articulable suspicion of criminal activity before stopping a motorist, but provides no substitute to protect licensed motorists . . . from repeated stops at the unchecked discretion of law enforcement officers."<sup>178</sup> Of course, the statute empowering conservation officers to conduct a search in *Colosimo* arguably did impose such a limit: it required conservation officers to have probable cause to search.<sup>179</sup> However, the Minnesota Supreme Court read this limitation out of the statute, leaving anglers with nothing to protect them from repeated searches at the unchecked discretion of conservation officers.

The *Henning* court was concerned that permitting stops based solely on the special series plates would subject innocent citizens<sup>180</sup> "to the possibility of numerous stops made each and every day" and to the possibility "of being stopped by every law enforcement officer they encounter."<sup>181</sup> Anglers in the state of Minnesota, and even non-anglers who happen to be in the area of fishing lakes, are now subject to the possibility of being searched by every conservation officer they encounter because the court in *Colosimo* did not see fit to provide the protection for them that the court provides motorists. The only reason to not provide this protection was a perceived need to protect the natural resources of the state. It is hard to understand how the need to protect fish is greater than the need to protect human life, which was found insufficient to overcome the privacy interests of motorists in *Ascher* and *Henning*.

The *Colosimo* court attempted to further support its decision by pointing to the difficulty of finding probable cause that a fishing

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177. *Henning*, 666 N.W.2d at 383 (citing *Delaware v. Prouse* 440 U.S. 648, 653-54 (1979)).

178. *Id.* at 385.

179. See MINN. STAT. § 97A.215, subd. 1(b) (2000).

180. Even if the convicted offender was driving, he might be doing so lawfully within the limits of a limited license, or a member of his household might lawfully be driving the car with the special series plates.

181. *Henning*, 666 N.W.2d at 384.

violation occurred on a boat.<sup>182</sup> The court found it unreasonable to require an officer to track anglers' "largely uninhibited freedom of movement in remote areas in pursuit of our abundant fish resources" in order to gain probable cause to inspect.<sup>183</sup> However, the court failed to acknowledge that "difficulty" has never in the past been a basis for overriding constitutional requirements of individualized suspicion. In *Henning*, the court recognized that the state has an obvious and substantial interest in safeguarding our roads from drivers who repeatedly drive while impaired.<sup>184</sup> Nevertheless, when faced with the argument that the suspicionless stops were necessary to protect this interest, the court answered: "We have never before simply allowed the ends to justify the means when the means void our citizens' constitutional protections."<sup>185</sup> Arguably, in *Colosimo*, the court has now done just that. In *Henning*, the court went on to declare that permitting suspicionless stops "would be a dramatic departure that demotes constitutional protections to a position inferior to that of traffic safeguards."<sup>186</sup> In *Colosimo*, the court has demoted constitutional protections to a position inferior to that of fish and game regulations.

The *Colosimo* court, however, attempted to differentiate *Ascher* from the case before it by again pointing to the level of intrusion. The court stated that the intrusion suffered by *Colosimo*, whose boat was already stopped when the officer began questioning him, "[did] not raise similar concerns of a 'roadblock' addressed in *Ascher*, where a large number of motor vehicles were stopped on the public highways . . . ."<sup>187</sup> The court comfortably differentiated between suspicionless searches of boats and stops of vehicles, which require reasonable articulable suspicion, by focusing on the "recreational privilege that anglers choose to engage in with knowledge of the regulations governing their conduct."<sup>188</sup> But both boats and vehicles are heavily regulated. Both require the use of public property and those who operate both are granted the "privilege" to do so by acquiring a license from the state.

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182. *State v. Colosimo*, 669 N.W.2d 1, 6-8 (Minn. 2003), *cert. denied*, 124 S. Ct. 2017 (2004).

183. *Id.* at 8.

184. *Henning*, 666 N.W.2d at 386.

185. *Id.*

186. *Id.*

187. *Colosimo*, 669 N.W.2d at 8 n.1 (citing *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994)).

188. *Id.* at 9.

Moreover, like the fish house in *Larsen*, both boats and vehicles at one time or another may be utilized to shield the occupants from the elements and “provid[e] privacy for activities ‘recognized and permitted by society.’”<sup>189</sup> The *Colosimo* court also took comfort in the fact that it only authorized searches, not stops.<sup>190</sup> But whether that limitation holds when the court is presented with a case raising the issue of a stop by a conservation officer remains to be seen. In any event, the court’s distinction will provide little comfort to citizens if conservation officers may, as the court permitted in *Colosimo*, take advantage of the situation whenever a citizen stops his boat or vehicle in order to enter a lake.

John Colosimo was an innocent angler whose catch was in strict accordance with all of the state’s regulations. Yet, despite Colosimo’s innocence, he was punished for asserting his Fourth Amendment rights against an officer who had no probable cause or even a hint of suspicion that any fishing rules had been violated. This is a violation of Colosimo’s constitutional rights, and is contrary to Minnesota Statutes section 97A.215, subdivision 1(b), which clearly states that an enforcement officer must have probable cause that a game or fish law violation has occurred before the officer enters or inspects any place or vehicle.<sup>191</sup> By finding John Colosimo in violation, the court in essence said that a citizen automobile driver has a reasonable expectation of privacy in his or her vehicle, while the boater who innocently spends a day on the lake is left with no protection and is subject to the indiscriminate whims of a conservation officer.

## VI. CONCLUSION

In *Henning*, *Larsen*, and *Ascher*, the Minnesota Supreme Court “took a firm stance in favor of the ‘reasonable articulable suspicion’ standard.”<sup>192</sup> After *Henning*, commentators in this law review praised the court, stating “[t]he Minnesota Supreme Court’s firm position that suspicionless stops of motorists are improper can be cast in terms heard frequently at the United States Supreme Court during Chief Justice Earl Warren’s reign: the ends do not justify the

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189. *State v. Larsen*, 650 N.W.2d 144, 149 (Minn. 2002) (quoting *Minn. v. Carter*, 525 U.S. 83, 88 (1998)).

190. *Colosimo*, 669 N.W.2d at 8 n.1.

191. MINN. STAT. § 97A.215, subd. 1(b) (2000).

192. *See Webb & Hanley, supra* note 9, at 528 (referring to the court’s decision in *Henning*).

means.”<sup>193</sup> That makes the court’s decision in *Colosimo* all the more surprising because it turns directly against this “firm stance,” and, in Justice Page’s words, “turns our court’s search and seizure law on its head.”<sup>194</sup>

With the court’s decision in *Colosimo*, Minnesota’s citizens may now be criminally punished for refusing to submit to suspicionless searches and seizures of their motor vehicles, boats, or the other conveyances they use to typically store and transport fish. The citizens of the State of Minnesota deserve better. The court’s decision forces the state’s citizens to choose between their constitutional rights to be free from unreasonable searches and their “privilege” to engage in the hunting and fishing sports for which Minnesota is renowned.

It is unfortunate that the United States Supreme Court did not grant certiorari to address the question whether a conservation officer is subject to the same rules and limitations as other law enforcement. It is even more unfortunate that in the absence of a ruling from the United States Supreme Court, the Minnesota Supreme Court, a court which has regularly provided citizens with greater protection than required under the federal constitution, has subjected the state’s anglers to the standardless and unconstrained discretion of officers in the field which was condemned in *Delaware v. Prouse*. With its decision in *Colosimo*, the Minnesota Supreme Court has left Minnesota’s citizens unprotected; any innocent angler, trapper, or hunter—or citizen thought to be an angler, trapper, or hunter—is subject to a demand to search at the whim of the state’s conservation officers and may be criminally punished if they do not comply. As Justice Page so eloquently stated in his dissent:

Rather than requiring the state to properly manage Minnesota’s wildlife resources, the court has instead decided to grant the state the power to compel the relinquishment of an individual’s constitutional right not only to be free from unreasonable searches, but also the freedom to assert one’s constitutional right without fear of criminal punishment.<sup>195</sup>

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193. *Id.* at 526.

194. *Colosimo*, 669 N.W.2d at 13 (Page, J., dissenting).

195. *Id.* at 17–18.