

**STATE V. ASKEROOOTH: RE-APPLYING THE TERRY  
PRINCIPLE OF REASONABLENESS TO TRAFFIC STOPS  
UNDER THE MINNESOTA CONSTITUTION**

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## I. INTRODUCTION

In *State v. Askerooth*,<sup>1</sup> the Minnesota Supreme Court held that, under the Minnesota Constitution, *Terry v. Ohio*<sup>2</sup> principles of reasonableness govern the scope and duration of a search or seizure for a minor traffic violation. Accordingly, each incremental intrusion during a traffic stop must be individualized toward the person stopped, and it must be justified by: “(1) the original legitimate purpose of the stop; (2) independent probable cause; or (3) reasonableness as defined by *Terry*.”<sup>3</sup> In reaching this conclusion, however, the supreme court departed from the decision reached by the United States Supreme Court in *Atwater v. City of Lago Vista*,<sup>4</sup> which held that an arrest for even a minor criminal offense is valid, provided the officer has probable cause.<sup>5</sup>

*Askerooth* also provides another example of the Minnesota Supreme Court interpreting the Minnesota Constitution more expansively than the Federal Constitution, thereby providing individuals with greater protection in the area of police contacts with the general public. It is the third in a trilogy of cases in which the Minnesota Supreme Court has specifically limited the permissible scope of traffic stops to the original basis for the stop, unless additional suspicious circumstances arise during the police encounter. As recent United States Supreme Court decisions have tended to erode individual rights under the Fourth Amendment, the *Askerooth* decision demonstrates the Minnesota Supreme

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1. 681 N.W.2d 353 (Minn. 2004).

2. 392 U.S. 1 (1968). *Terry* altered the landscape of criminal law by allowing police to stop and briefly detain an individual for questioning on less than probable cause. Recognizing “the myriad of daily situations in which police[] and citizens confront each other on the street,” the Supreme Court carved out an exception to the probable cause requirement previously necessary for a seizure under the Fourth Amendment in order to allow police to act swiftly where police and public safety are at risk. *Terry*, 392 U.S. at 12, 20–21. In balancing the public interest in officer safety with the constitutionally protected interests of the private citizen, the Supreme Court held that a police officer may temporarily seize a person to investigate suspected criminal wrongdoing if the officer has an objective, individualized articulable suspicion of criminal wrongdoing by that person. *Id.* at 21, 27.

3. See *Askerooth*, 681 N.W.2d at 365 (explaining the requirements of article I, section 10 of the Minnesota Constitution in light of *Terry*).

4. 532 U.S. 318 (2001).

5. *Id.* at 354. See also *People v. Gonzalez*, 789 N.E.2d 260, 265 (Ill. 2003) (noting that under *Terry*, “traffic stops are frequently supported by ‘probable cause’ to believe that a traffic violation has occurred, rather than the less exacting standard of ‘reasonable articulable suspicion.’”).

Court's commitment to preserving precedent while also safeguarding the rights of its citizens.

This note first discusses the Minnesota Supreme Court's use of the Minnesota Constitution to provide broader protections for its citizens in the area of Fourth Amendment search and seizure law.<sup>6</sup> This note then explains the rationale for the Minnesota Supreme Court's decision in *Askerooth*.<sup>7</sup> Finally, this note discusses the *Atwater* decision and whether it was necessary for the Minnesota Supreme Court to decide *Askerooth* under the state constitution.<sup>8</sup>

## II. ADEQUATE AND INDEPENDENT STATE GROUNDS<sup>9</sup>

One of the unique facets of the federalist system is the independent authority of the states to interpret their own state constitutions to provide broader protections for their citizens than the federal government does.<sup>10</sup> Exercising this independent authority, the Minnesota Supreme Court has a history of

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6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.

9. See *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983) (asserting that the Supreme Court will not review state court judgments that rest on adequate and independent state grounds, provided that the state court “clearly and expressly” indicates that it is basing its decision on “bona fide separate, adequate, and independent state grounds”); see also Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) (generally discussing the reluctance of state courts to decide cases on adequate and independent state grounds).

10. See *Long*, 463 U.S. at 1041 (noting that “[i]t is fundamental that state courts be left free and unfettered by [the Supreme Court] in interpreting their state constitutions”); *State v. Fuller*, 374 N.W.2d 722, 726–27 (Minn. 1985) (declining to construe article I, section 7 of the Minnesota Constitution, the state double jeopardy clause, more broadly than the federal double jeopardy clause). In *Fuller*, Justice Peterson had this to say about individual rights under the state constitution:

It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution. Indeed, as the highest court of this state, we are “independently responsive for safeguarding the rights of [our] citizens.” State courts are, and should be, the first line of defense for individual liberties within the federalist system. This, of course, does not mean that we will or should cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution. Indeed, a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that, as here, is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force.

374 N.W.2d at 726–27.

interpreting the state constitution as affording greater protections than the federal government in the area of police contacts with individual citizens.<sup>11</sup> Although the supreme court does not exercise this discretion cavalierly,<sup>12</sup> it has done so in several cases preceding the *Askerooth* decision. Notably in *Ascher v. Commissioner of Public Safety*,<sup>13</sup> *In re Welfare of E.D.J.*,<sup>14</sup> and *State v. Fort*,<sup>15</sup> the supreme court concluded that article I, section 10 of the Minnesota Constitution afforded greater protection than the Fourth Amendment in the area of search and seizure law.<sup>16</sup> Like the Fourth Amendment, article I, section 10 of the Minnesota Constitution commands that, “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.” Applying this mandate, the supreme court found a “principled basis” for interpreting the Minnesota Constitution to provide greater protection for Minnesota citizens than the United States Constitution in the areas in which citizens are most likely to have contact with the police—traffic stops.<sup>17</sup>

Exploring the development of adequate and independent

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11. See *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). In *Scales*, although declining to decide the issue under the state constitution, the Minnesota Supreme Court mandated that all custodial interrogations be recorded under its supervisory power to ensure the fair administration of justice. *Scales*, 518 N.W.2d at 592. At the time that *Scales* was decided, the Minnesota Supreme Court was the second court to mandate a recording requirement for custodial interrogations. See *Stephen v. State*, 711 P.2d 1156 (Alaska 1985). Since that time, however, other jurisdictions have followed Minnesota’s lead. See *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533–34 (Mass. 2004) (adopting a cautionary instruction whenever the police fail to record a defendant’s confession); *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001) (using the Minnesota Supreme Court’s decision in *Scales* as guidance, adopting a recording requirement under the court’s supervisory powers); 725 ILL. COMP. STAT. 5/103-2.1 (2003); D.C. CODE ANN. § 5-133.20 (2003); TEX. CRIM. PROC. CODE ANN. art. 38.22, § 3(a) (Vernon Supp. 1998).

12. See *State v. Carter*, 596 N.W.2d 654, 657 (Minn. 1999); *State v. Risk*, 598 N.W.2d 642, 649 (Minn. 1999).

13. 519 N.W.2d 183 (Minn. 1994).

14. 502 N.W.2d 779 (Minn. 1993).

15. 660 N.W.2d 415 (Minn. 2003).

16. See *Ascher*, 519 N.W.2d at 187; *E.D.J.*, 502 N.W.2d at 783; *Fort*, 660 N.W.2d at 416. See also *Wiegand*, 645 N.W.2d 125, 132 (Minn. 2002) (discussing generally the Minnesota Supreme Court’s history for affording greater protection under these circumstances).

17. *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004) (citing *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997) (noting that “very few drivers can traverse any appreciable distance without violating some traffic regulation”); Roy Moreland, *Some Trends in the Law of Arrest*, 39 MINN. L. REV. 479, 489 (1955) (observing that “it is in traffic situations that most contacts of the public with the police occur”).

state grounds in these cases puts the *Askerooth* decision in a historical context and provides insight into why the court expressly ruled that *Terry* principles apply to traffic stops, regardless of probable cause.

*A. Roadblocks Violate the Requirement of Individualized Articulable Suspicion of Wrongdoing Necessary for an Investigative Stop Under the Minnesota Constitution*

In *Ascher*,<sup>18</sup> the Minnesota Supreme Court declined to follow the United States Supreme Court's decision in *Michigan Department of State Police v. Sitz*,<sup>19</sup> a case that held that a police roadblock to investigate drunk driving did not violate the Fourth Amendment. In *Ascher*, the Burnsville Police Department and the Minnesota State Patrol conducted a roadblock in a high accident area of Burnsville where there had also been a high number of DWIs.<sup>20</sup> The purpose of the roadblock was to apprehend drunk drivers.<sup>21</sup> Departing from *Sitz*, the *Ascher* court specifically held that the roadblock violated article 1, section 10 of the Minnesota Constitution, which requires "objective individualized articulable suspicion of criminal wrongdoing *before* subjecting a driver to an investigative stop."<sup>22</sup> The supreme court's rationale for departing from federal precedent was that, in its opinion, *Sitz* represented a "radical departure from the way the [*Terry* balancing] test has been and should be applied" to police roadblocks and checkpoints.<sup>23</sup> The supreme court, like the dissent in *Sitz*, was not convinced that sobriety checkpoints were much more effective in getting drunk drivers off the road than the traditional standard of reasonable suspicion.<sup>24</sup> Considering both the interests of the police in apprehending impaired drivers and "the interests of ordinary citizens in not having their privacy or freedom of movement interfered with," the supreme court struck the balance in favor of protecting the traveling public from the "minimally intrusive" seizure of a sobriety checkpoint.<sup>25</sup>

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18. 519 N.W.2d at 187 (Minn. 1994).

19. See 496 U.S. 444 (1990).

20. *Ascher*, 519 N.W.2d at 184.

21. *Id.*

22. *Id.* at 187; see *supra* note 2 (discussing the *Terry* balancing test).

23. *Ascher*, 519 N.W.2d at 186.

24. *Id.* at 185–86 (citing *Sitz*, 496 U.S. at 461–63 (Stevens, J., dissenting)).

25. *Id.* at 186.

*B. Under the Minnesota Constitution, a Seizure Occurs When, Under the Circumstances, a Reasonable Person Would Not Feel Free to Leave*

Similarly, in *In re E.D.J.*,<sup>26</sup> the Minnesota Supreme Court declined to follow the United States Supreme Court's decision in *California v. Hodari*.<sup>27</sup> In *Hodari*, the Supreme Court changed the definition of when a seizure occurs from an objective standard of whether a reasonable person, under similar circumstances, would have felt free to leave, to a higher standard requiring the police to use physical force to restrain a person, or where the person physically submits to a show of police authority.<sup>28</sup>

Although the facts of *E.D.J.* did not involve a traffic stop, the supreme court's analysis applies to a traffic stop nonetheless because a traffic stop also constitutes a seizure.<sup>29</sup> E.D.J., a juvenile, was standing with two adults on a street corner in an area known for heavy cocaine trafficking.<sup>30</sup> When they saw a police car approaching, they began to walk in the opposite direction.<sup>31</sup> The police ordered them to stop; while the two adults complied, E.D.J. kept walking, dropped something, took two more steps, and then stopped.<sup>32</sup> The Minnesota Supreme Court held that E.D.J. was seized when the police ordered him to stop, not when he complied with the police directive to stop.<sup>33</sup> In reaching this conclusion, the supreme court rejected the United States Supreme Court's *Hodari* standard because it represented a "sharp departure" from the pre-*Hodari* decisions in *Mendenhall* and *Royer*, which concluded that a person was seized within the meaning of the Fourth Amendment if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to

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26. 502 N.W.2d 779 (Minn. 1993).

27. 499 U.S. 621 (1991).

28. *Id.*

29. *E.D.J.*, 502 N.W.2d at 782 (citing *Colorado v. Bannister*, 499 U.S. 1, 4 n.3 (1980)).

30. *Id.* at 780.

31. *Id.*

32. *Id.*

33. *Id.* at 783. Determining that E.D.J. was seized when the police ordered him to stop instead of when he actually submitted to the authority of the police is significant. E.D.J. abandoned the cocaine after the police ordered him to stop, but before he actually complied with their order. Under the supreme court's analysis, the order to stop, which was not based on any articulable suspicion of criminal activity, was an illegal seizure, and the abandoned cocaine was the fruit of that illegal seizure and must be suppressed. *See id.*

leave.”<sup>34</sup>

The supreme court’s rationale for maintaining the pre-*Hodari* standard was, essentially, that it was accustomed to applying the pre-*Hodari Mendenhall/Royer* standard, and it was not persuaded that the *Hodari* standard was a better one.<sup>35</sup> Accordingly, the supreme court exercised its independent authority to interpret the state constitution and decided to maintain the pre-*Hodari* approach of determining, based on the totality of the circumstances, whether a reasonable person would have felt that he was not free to leave.<sup>36</sup>

*C. The Minnesota Constitution Imposes a Reasonableness Limitation on the Duration and Scope of a Terry Investigative Detention: The Wiegand, Fort, and Askerooth Trilogy*

The *Askerooth* decision provides yet another example of the supreme court exercising its responsibility to “independently safeguard for the people of Minnesota the protections embodied in our constitution.”<sup>37</sup> The *Wiegand, Fort, and Askerooth* decisions are, to some degree, a reaction to *Atwater v. City of Lago Vista*.<sup>38</sup> In *Atwater*, the United States Supreme Court held that the Fourth Amendment does not prohibit the warrantless arrest of a person who has committed a minor misdemeanor offense—a seatbelt

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34. *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980); *Florida v. Royer*, 491 U.S. 491, 501 (1983).

35. *E.D.J.*, 502 N.W.2d at 781–82. The *Mendenhall/Royer* totality of the circumstances standard recognized that, as a practical matter, police officers, in the course of their duties, should be allowed to speak to citizens to seek cooperation without requiring any suspicion of criminal activity. *Id.* (citing *Mendenhall*, 446 U.S. at 554–55). Thus, it is not a seizure for the police to approach a citizen standing on a public street or in a parked car for the purpose of making general inquiries. *Id.* at 782 (citing *State v. Lande*, 350 N.W.2d 355, 357–58 (Minn. 1984); *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980)). The encounter between the police officer and private citizen becomes a seizure only when the police officer engages in conduct that would make the person feel threatened by the officer’s presence, such as the display of a weapon, physical touching, or the officer’s language or tone of voice. *Id.* at 782 (citing *Mendenhall*, 446 U.S. at 554–55). The pre-*Hodari* standard, therefore, is workable because it recognizes that the touchstone of a seizure under *Terry* is reasonableness—balancing the public interest and “the individual’s right to personal security free from arbitrary interference by law officers.” *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

36. *E.D.J.*, 502 N.W.2d at 783.

37. 681 N.W.2d 353, 362 (Minn. 2004) (citing *State v. Carter*, 596 N.W.2d 654, 657 (Minn. 1999)); *see also O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979).

38. 532 U.S. 318 (2001).

violation in that case—provided the officer has probable cause.<sup>39</sup> The Minnesota Supreme Court was troubled by *Atwater's* “apparent removal of any consideration of a balancing of individual interests with governmental interests” and its “tension with a broad range” of precedent.<sup>40</sup> Accordingly, the Minnesota Supreme Court explicitly adopted “the principles and framework of *Terry* for evaluating the reasonableness of seizures during traffic stops even when a minor law has been violated” under article I, section 10 of the Minnesota Constitution.<sup>41</sup>

But the *Askerooth* decision did not occur in a vacuum. It is really an extension of two prior Minnesota Supreme Court decisions, which dealt with the permissible scope of a routine traffic stop for a minor offense. In fact, the supreme court’s concern about reconciling *Atwater* with its interpretation of article I, section 10 of the state constitution specifically arose from its decisions in *Wiegand* and *Fort*.<sup>42</sup>

In *Wiegand*, the supreme court was asked to consider whether a dog sniffing around a motor vehicle stopped for a routine equipment violation was a search requiring probable cause.<sup>43</sup> The facts of *Wiegand* involved a traffic stop for a burned-out headlight; although the officer planned to issue a warning for the equipment violation, he nonetheless retrieved his narcotics-detecting dog.<sup>44</sup> The officer walked the dog around the car twice, and the dog alerted to narcotics each time at the front, passenger-side corner of the car.<sup>45</sup> The officers searched the car and found suspected marijuana under the hood; more marijuana and cocaine were found on Wiegand’s person in the search incident to arrest that

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39. *Id.* at 353.

40. *Askerooth*, 681 N.W.2d at 362.

41. *Id.* at 363.

42. *Id.* See also *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002), and *State v. Fort*, 660 N.W.2d 415 (Minn. 2003).

43. *Wiegand*, 645 N.W.2d at 127–28. The United States Supreme Court recently considered a similar issue in *Ill. v. Caballes*, 125 S.Ct. 834 (2005), but reached a different result. *Caballes* involved a traffic stop based on probable cause that the driver was speeding. *Id.* at 836. While the officer was writing a warning ticket, a narcotics-detection dog sniffed the exterior of the vehicle. *Id.* The Supreme Court held that the dog sniff did not violate the Fourth Amendment because it did not extend the stop beyond the time necessary to issue the ticket; therefore, the dog sniff did not have to be supported by reasonable articulable suspicion of criminal activity. *Id.*

44. *Wiegand*, 645 N.W.2d at 128–29.

45. *Id.* at 129.

followed.<sup>46</sup> The supreme court determined that a dog sniff around the exterior of a motor vehicle in a public place is not a search under both the Fourth Amendment and article I, section 10 of the state constitution.<sup>47</sup>

However, the supreme court did not end its analysis there. Applying *Terry* principles of reasonableness<sup>48</sup> to traffic stops for routine equipment violations, the supreme court held that an officer must have a “reasonable, articulable suspicion of drug-related criminal activity before law enforcement may conduct a dog sniff around a motor vehicle stopped for a routine equipment violation in an attempt to detect the presence of narcotics.”<sup>49</sup> The court’s rationale for adopting this rule was that the dog sniff changed the scope of the stop beyond its original purpose of investigating an equipment violation.<sup>50</sup> Noting that investigative detentions under *Terry* are limited in scope and duration by the original purpose for the stop, the supreme court concluded that article I, section 10 of the Minnesota Constitution specifically imposes a reasonableness limitation on the duration and scope of an investigative detention.<sup>51</sup> Because the stop was for a minor offense and the officer did not suspect any additional criminal activity, it was improper to conduct the dog sniff.<sup>52</sup>

The supreme court extended the *Wiegand* holding to investigative questioning and requests for consent to search during a routine traffic stop in *State v. Fort*.<sup>53</sup> Fort was a passenger in a car stopped for speeding and having a cracked windshield.<sup>54</sup> After determining that neither the driver nor Fort had a valid driver’s license, the officers decided to tow the vehicle.<sup>55</sup> But first, one of the officers asked Fort if he had any drugs or weapons and if Fort would mind if he searched him.<sup>56</sup> Based on Fort’s consent, the

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46. *Id.*

47. *Id.* at 132–33.

48. *See supra* note 2 discussing the *Terry* balancing test. The supreme court was specifically concerned about the fact that a dog sniff is intrusive to some degree because it detects something that is generally hidden from view. *Wiegand*, 645 N.W.2d at 134.

49. *Wiegand*, 645 N.W.2d at 135.

50. *Id.*

51. *Id.* at 136 (citations omitted).

52. *Id.* at 137.

53. 660 N.W.2d 415 (Minn. 2003).

54. *Id.* at 416.

55. *Id.* at 417.

56. *Id.*

officer pat-searched Fort and found crack cocaine in his pocket.<sup>57</sup> Applying the *Wiegand* rationale that limited the scope and duration of a traffic stop investigation to the justification for the stop, the supreme court held there was no reason for the officer to ask Fort for consent to search.<sup>58</sup> The purpose of the stop was simply to process violations for speeding and a cracked windshield.<sup>59</sup> Because the officer could not articulate any reasonable suspicion to justify the investigative questioning and consent inquiry that followed the traffic stop, and that inquiry was not supported by the original basis for the stop, the evidence that was seized as a result of the illegal consent search should have been suppressed.<sup>60</sup>

The common thread connecting these cases is that the Minnesota Supreme Court appears to be restoring the balance of reasonableness to police encounters with individual citizens, whereas the United States Supreme Court seems to be moving away from the balance of reasonableness towards the simplicity of a blanket rule.<sup>61</sup> In each case, the Minnesota Supreme Court began its analysis with *Terry's* delicate balancing of the "governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."<sup>62</sup> In reasserting under the state constitution that *Terry* principles of reasonableness apply to traffic stops, the supreme court is simply maintaining its consistency with precedent and its commitment to safeguarding the rights of Minnesotans.<sup>63</sup>

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57. *Id.*

58. *Id.* at 419.

59. *Id.*

60. *Id.*

61. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347–49 (2001). The *Atwater* majority was very concerned about keeping the arrest rules simple for the police: "But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id.* at 347. *See also State v. Askerooth*, 681 N.W.2d 353, 360 n.4 (Minn. 2004) (indicating a mindfulness of the *Atwater* dissent, which had criticized its majority for adopting a "bright-line rule instead of balancing individual and governmental interests.") (quoting *Atwater*, 352 U.S. at 361 (5-4 decision) (O'Connor, J., dissenting)).

62. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–35 (1967)). *See also Askerooth*, 681 N.W.2d at 364; *Fort*, 660 N.W.2d at 418; *Wiegand*, 645 N.W.2d at 134, 136.

63. *See State v. Curtis*, 290 Minn. 429, 431–36, 190 N.W.2d 631, 633–36 (1971) (holding that, in a stop for a minor traffic offense, the search of the driver's person for weapons or contraband is unlawful unless additional circumstances exist because there are typically no "fruits or instrumentalities" involved in the

### III. THE ASKEROTH CASE AND DECISION

#### A. *Facts*

Todd Jeffrey Askerooth was convicted of fifth-degree controlled substance crime for possession of methamphetamine<sup>64</sup> in Ramsey County District Court.<sup>65</sup> The methamphetamine was found in a film canister in the back seat of a squad car where Askerooth was detained during a routine traffic stop.<sup>66</sup> Askerooth, who was driving his mother's van, was stopped shortly after midnight on April 21, 2001, by St. Paul Police Officer Thaddus Schmidt for failing to stop at a stop sign.<sup>67</sup> Askerooth was the only person in the van.<sup>68</sup> Schmidt parked behind the van and left his headlights on as he approached the van.<sup>69</sup> Schmidt asked Askerooth for his driver's license, but Askerooth said he did not have one.<sup>70</sup> Schmidt ordered Askerooth to get out of the van, patted him down for weapons, ordered him to walk to the squad car, and confined him in the back seat where he was not free to leave.<sup>71</sup> Meanwhile, two other officers arrived.<sup>72</sup>

While Askerooth was in the back seat of the squad car, Schmidt asked him if he had any identification.<sup>73</sup> Askerooth again said he did not have a driver's license but provided his name, date of birth, and address.<sup>74</sup> Schmidt entered the information into his computer and learned that Askerooth's driver's license was revoked.<sup>75</sup>

Schmidt explained why he stopped Askerooth and informed

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commission of a minor traffic offense, nor is a person stopped for a minor traffic offense typically armed and dangerous). *See also* State v. Varnado, 582 N.W.2d 886, 890–91 (Minn. 1998). *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.5(a), at 254–57 (3d ed. 1996) (the right to frisk may be automatic when a person is detained for certain types of offenses, but for minor traffic offenses, “other circumstances” must be present).

64. MINN. STAT. § 152.025, subd. 2(1) (2004).

65. *Askerooth*, 681 N.W.2d at 357.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

him that he would be issuing a citation for failing to obey a stop sign and driving after revocation.<sup>76</sup> Schmidt did not immediately issue the citations, however, and instead asked Askerooth for permission to search the van.<sup>77</sup> Askerooth consented to the search, and Schmidt, along with the two other officers, searched the van.<sup>78</sup> Askerooth was confined in the back of the squad car during the van search, which revealed a small scale on the front passenger seat.<sup>79</sup>

After the search, Schmidt issued the citations, advised Askerooth to lock the van, leave it where it was legally parked, and walk the three blocks to his home.<sup>80</sup> Schmidt immediately searched the back of his squad car and found a black film canister under the back seat on the passenger side.<sup>81</sup> Inside the film canister were two small bags of suspected methamphetamine.<sup>82</sup> Askerooth was arrested, and later admitted, during a subsequent police interview, that the canister contained methamphetamine.<sup>83</sup> Subsequent testing revealed 2.5 grams of methamphetamine in the film canister.<sup>84</sup>

Askerooth moved to suppress the methamphetamine, arguing that it was found as a result of his unreasonable seizure in the squad car.<sup>85</sup> Schmidt testified at the contested omnibus hearing that he did not observe any traffic violations other than failure to obey the stop sign.<sup>86</sup> Schmidt acknowledged that he did not recognize Askerooth from prior incidents, and that Askerooth was “cooperative and did not do anything to arouse his suspicion or lead him to believe that Askerooth was dangerous.”<sup>87</sup> Schmidt testified that it was his standard procedure to put individuals

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76. *Id.*

77. *Id.*

78. *Id.* at 357–58.

79. *Id.* at 358.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* Askerooth’s case is somewhat unique factually in that contraband is typically discovered during the pat-frisk that precedes the placement in the squad car instead of abandoned as a result of the seizure. *See State v. Curtis*, 290 Minn. 429, 430–31, 190 N.W.2d 631, 632–33 (1971) (the officer justified the frisk because, as a matter of course, he frisks everyone he puts in his squad car); *see also State v. Varnado*, 582 N.W.2d 886, 888–89 (Minn. 1998) (officer gave same rationale for frisking Varnado before placing her in his squad car).

86. *Askerooth*, 681 N.W.2d at 358.

87. *Id.*

driving without a license in the back of his squad car for his convenience so he did not have to go back and forth between vehicles when he checked the driver's identity on his squad computer.<sup>88</sup>

The district court denied Askerooth's motion to suppress the methamphetamine, ruling that placing Askerooth in the back seat was temporary and reasonable.<sup>89</sup> Askerooth waived his right to a jury trial, to preserve the search and seizure issue for appeal,<sup>90</sup> and the court found him guilty of fifth-degree controlled substance crime.<sup>91</sup>

Askerooth appealed the district court's order denying his suppression motion, and the court of appeals issued an unpublished opinion affirming his conviction.<sup>92</sup> The court of appeals held that placing Askerooth in the back seat of his squad car was reasonable because the stop occurred at 12:40 a.m., Officer Schmidt was alone, and it was a practical way for the officer to accomplish the task of verifying Askerooth's identity and license status.<sup>93</sup>

The supreme court granted Askerooth's petition for review. In his brief to the supreme court,<sup>94</sup> Askerooth argued that it was improper for Officer Schmidt to place Askerooth in the back seat of his squad car because there were no additional suspicious or threatening circumstances present. The facts relied on by the court of appeals—Officer Schmidt was alone and the traffic stop occurred late at night—were not particularized with respect to any suspicious activity by Askerooth. Moreover, such facts depend on the fortuity of the timing of the stop, circumventing the reasonableness requirement of the Fourth Amendment. Finally, the fact that Askerooth did not have a driver's license in his possession, alone, did not warrant his seizure in the back of Schmidt's squad car according to the supreme court's decision in

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88. *Id.*

89. *Id.* at 359.

90. *See e.g.*, *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980) (establishing the right to reserve certain issues for appeal).

91. *Askerooth*, 681 N.W.2d at 359.

92. *Id.* (citing *State v. Askerooth*, No. C6-02-318, 2003 WL 230673, at \*2 (Minn. Ct. App. Feb. 4, 2003)).

93. *State v. Askerooth*, No. C6-02-318, 2003 WL 230673, at \*2 (Minn. Ct. App. Feb. 4, 2003).

94. The summary of Askerooth's argument is taken from the author's brief to the supreme court. *See Generally* Brief for Appellant, *State v. Askerooth* 681 N.W.2d 353 (Minn. 2004) (No. C6-02-318) (on file with clerk of court).

*State v. Varnado*.<sup>95</sup> Because Askerooth was illegally seized in the back of the squad car, the canister of drugs he abandoned as a result of the illegal seizure should have been suppressed.<sup>96</sup>

*B. The Court's Decision*

Askerooth did not challenge the basis for the stop—his failure to stop at a stop sign. And there is no question that Askerooth was seized when he was ordered to sit in the back of the locked police squad car. Therefore, the issue squarely before the court was whether Askerooth's seizure in the squad car was reasonable.<sup>97</sup> Specifically, the question was “whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.”<sup>98</sup> Relying on the *Terry* rubric of reasonableness and its prior decisions in *Wiegand* and *Fort*, the supreme court held that, under article I, section 10 of the Minnesota Constitution,

each incremental intrusion during a traffic stop [must] be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*. Furthermore, the basis for the intrusion must be individualized to the person toward whom the intrusion is directed.<sup>99</sup>

The court determined that confining Askerooth in the squad car was not justified by the original purpose of the stop or independent probable cause, and focused its analysis on the third ground: whether the governmental interest in confining Askerooth outweighed his constitutionally protected interests.<sup>100</sup>

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95. 582 N.W.2d 886, 891 (Minn. 1998). According to *Varnado*, “the inability of a minor traffic violator to produce a driver’s license in and of itself is not a reasonable basis to require the driver to sit in the back of a squad car.” *Id.* Askerooth relied on *Varnado* to dispose of this issue. 681 N.W.2d at 365.

96. See *In re E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (if property is abandoned because of an unlawful act by the police, it is not admissible as evidence).

97. *Askerooth*, 681 N.W.2d at 359; see also *E.D.J.*, 502 N.W.2d at 783 (stating that after a seizure was identified, the issue became a question of whether a sufficient basis for the stop existed).

98. *Askerooth*, 681 N.W.2d at 364 (citing *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968); accord *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003); *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002)).

99. *Askerooth*, 681 N.W.2d at 365.

100. *Id.*

Officer Schmidt's stated reason for placing Askerooth in the back of the squad car was for his convenience. Because officer convenience did not outweigh Askerooth's interest in being free from an unreasonable seizure, the supreme court concluded that the lack of a driver's license was not a reasonable basis for confining the driver in a squad car for a minor traffic offense.<sup>101</sup>

Next, the supreme court addressed the state's alternative argument that Schmidt had authority to order Askerooth out of the van without having to give a reason, as authorized by *Pennsylvania v. Mims*.<sup>102</sup> Although it is permissible for an officer to order a driver to get out of a lawfully stopped vehicle without any reason under *Mims*, the supreme court declined to extend that authority to allow automatic placement in the back of a police squad car.<sup>103</sup>

The court also rejected the state's argument that the reasons advanced by the court of appeals—the 12:40 a.m. stop, the lack of identification, and the fact that Officer Schmidt was working without a partner—were sufficient to justify confining Askerooth in the back of the squad car.<sup>104</sup> Based on these facts, Schmidt's confinement of Askerooth in the squad car was not reasonably related to the investigation of a stop-sign violation, necessary to investigate Askerooth's identity, or related to an objectively reasonable threat to officer safety.<sup>105</sup>

After concluding that it was unreasonable to confine Askerooth in the back of the squad car, the supreme court considered whether the methamphetamine Askerooth discarded should have been excluded on the ground that it was abandoned in response to an illegal police seizure.<sup>106</sup> Although it was unclear when Askerooth abandoned the methamphetamine, it was clear that it was abandoned as a result of the illegal seizure, and the supreme court held that the district court erred when it denied Askerooth's motion to suppress the evidence.<sup>107</sup>

The conclusion that Askerooth was unreasonably seized when he was confined in the squad car was enough to resolve the issue in this case. The supreme court decided, however, to address the question of whether Schmidt's consent inquiry improperly

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101. *Id.* at 366 (citing *State v. Varnado*, 582 N.W.2d 885, 891 (Minn. 1998)).

102. 434 U.S. 106, 111 (1977).

103. *Askerooth*, 681 N.W.2d at 367.

104. *Id.* at 368–69.

105. *Id.* at 370.

106. *Id.*; see *In re. E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993).

107. *Askerooth*, 681 N.W.2d at 370.

expanded the scope and duration of the stop.<sup>108</sup> Because Schmidt did not articulate any concern for officer safety, the supreme court concluded that it was unreasonable for him to even ask for permission to search the van.<sup>109</sup> Moreover, the consent inquiry improperly prolonged the detention and expanded the scope and the duration of the detention beyond the original justification for the stop.<sup>110</sup> Regardless of when Askerooth may have abandoned the methamphetamine, it was in response to an illegal seizure—both in terms of the original confinement in the squad car and in terms of the expansion of the duration and scope of the stop.

#### IV. ANALYSIS OF THE *ASKEROOTH* DECISION

The supreme court could have decided *Askerooth* by relying on its decision in *Varnado*,<sup>111</sup> in which the court held that “the inability of a minor traffic violator to produce a driver’s license in and of itself is not a reasonable basis to require the driver to sit in the back of a squad car.”<sup>112</sup> The facts of *Varnado* are virtually identical to the facts of *Askerooth*. The officers in *Varnado* were patrolling in a high-crime area known for drug trafficking, violence, and weapons; they stopped Varnado at 9:30 p.m., and the police suspected that the owner of the car, Varnado’s sister, was selling drugs out of her apartment.<sup>113</sup> Nonetheless, the supreme court held that the routine frisk that preceded placing Varnado in the rear of the officer’s squad car was not justified where the driver was stopped for a minor traffic violation—a cracked windshield—in the absence of additional suspicious circumstances supporting a reasonable basis for believing that the driver is armed and dangerous.<sup>114</sup> The *Askerooth* court acknowledged that the facts in *Varnado* were more favorable to the state’s argument that confinement in the squad car was reasonable because the stop occurred in a high-crime area and the officers suspected the owner of the car of drug dealing.<sup>115</sup>

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108. *Id.*

109. *Id.* at 370–71.

110. *Id.* at 371 (citing *State v. Fort*, 660 N.W.2d 415, 417–18 (Minn. 2003); *State v. Wiegand*, 645 N.W.2d 125, 136 (Minn. 2002)).

111. *State v. Varnado*, 582 N.W.2d 886, 891 (1998).

112. *Id.* at 891.

113. *Id.* at 888.

114. *See id.* at 890.

115. *Askerooth*, 681 N.W.2d at 369 (stating “[i]n the past when presented with circumstances that were arguably more favorable to the state’s argument, we have refused to consider it to be reasonable for police officers to confine a driver in the

Although *Varnado* would appear to be dispositive, the *Askerooth* court went beyond an analysis of the facts and circumstances of *Varnado* to expressly hold that, under the state constitution, *Terry* principles of reasonableness apply to traffic stops, regardless of probable cause.

Moreover, the supreme court could have reached the same result without deciding that the seizure in the squad car was unreasonable. For example, the concurrence saw “no principled basis” to resort to the state constitution, but ultimately reached the same result as the majority by focusing on the improper expansion of the scope and duration of the traffic stop by the consent inquiry and van search while Askerooth remained locked in the back seat of the squad car.<sup>116</sup>

The question is why did the supreme court decide to expressly adopt *Terry* principles with respect to traffic stops based on probable cause under the state constitution when it did not need to do so to reach the result it did. The answer appears to lie in *Atwater*.<sup>117</sup>

A. *The Atwater Majority*

*Atwater* involved a warrantless arrest for a minor criminal offense—a seatbelt violation punishable only by a fine.<sup>118</sup> According to Texas law, if a car has safety belts, the front-seat passenger must wear one, and the driver must secure any small child riding in the front seat; violation of either provision is a misdemeanor punishable by a fine.<sup>119</sup> Texas law also expressly authorizes the police to arrest a person violating the seatbelt law.<sup>120</sup> *Atwater* was arrested for a seatbelt violation, as well as for failing to have her driver’s license and insurance documents in the car.<sup>121</sup> *Atwater* subsequently sued the city for violating her rights under

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back seat of a squad car when the driver was stopped for a minor traffic violation.”) (citing *Varnado*, 582 N.W.2d at 890).

116. See *Askerooth*, 681 N.W.2d at 372–76 (Anderson, Russell, J., concurring specially) (noting that MINN. R. CRIM. P. 6.01, subd. 1(1)(a) and subd. 2 place a “limiting proviso” on arrests for a minor misdemeanor offense and ensure that custodial arrests are a “reasonable and proportional response to the circumstances of the offense” without requiring state constitutional intervention).

117. 532 U.S. 318 (2001).

118. See *id.*

119. *Id.* at 323.

120. *Id.*

121. *Id.* at 324.

the Fourth Amendment; the issue before the Supreme Court was whether the Fourth Amendment limited the authority of the police to make a warrantless arrest for a minor criminal offense.<sup>122</sup>

After exploring the nature of arrests under the common law, the Supreme Court rejected *Atwater*'s argument that the Framers intended to prohibit warrantless arrests for misdemeanors not involving a breach of the peace.<sup>123</sup> In fact, all 50 States have statutes which permit warrantless misdemeanor arrests.<sup>124</sup> The Supreme Court was particularly interested in keeping the rules governing warrantless arrests simple for police, instead of requiring the police to balance reasonableness when they are in the field and acting in the heat of the moment.<sup>125</sup> Accordingly, the court confirmed that the standard of probable cause "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations."<sup>126</sup> Thus, "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."<sup>127</sup> Therefore, *Atwater*'s arrest, which was based both on probable cause to believe she violated the seatbelt statute, and on a Texas statute authorizing the arrest, satisfied constitutional requirements.<sup>128</sup>

#### B. *The Atwater Dissent*

It is important to note that *Atwater* is a 5-4 decision. Moreover, the dissent aptly points out that the majority's holding that probable cause justifies a warrantless arrest for a minor offense "mints a new rule."<sup>129</sup> According to the dissent, "[t]his rule is not only unsupported by our precedent, but runs contrary to the

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122. *Id.* at 326.

123. *Id.* at 340.

124. *Id.* at 344-45 (citing *inter alia* MINN. STAT. § 629.34 subd. 1(c)(1), which permits an arrest for a public offense committed in the officer's presence; the rest of the statute deals with warrantless arrests for felony offenses). The Supreme Court ignored Minnesota Rule of Criminal Procedure 6.01, subdivision 1, which makes the issuance of a citation mandatory for misdemeanor offenses, unless arrest or detention is necessary to prevent bodily harm, or there is a substantial likelihood that the accused will not respond to the citation.

125. *Id.* at 347-54.

126. *Id.* at 354 (citing *Dunaway v. New York*, 442 U.S. 200, 208 (1979)).

127. *Id.*

128. *Id.*

129. *Id.* at 361-62 (O'Connor, J., dissenting).

principles that lie at the core of the Fourth Amendment.”<sup>130</sup> The dissent was particularly concerned by the fact that a full custodial arrest could be justified by the same “quantum of evidence” that justified a traffic stop where the penalty for the traffic offense is only a fine.<sup>131</sup> The state’s interest in taking a person into custody for an offense that is not punishable by imprisonment is not reasonable, unless other circumstances exist, such as verifying the identity of the offender, or if the offender is a flight risk.<sup>132</sup>

Balancing the intrusion on individual liberty of a full custodial arrest against the availability of a citation when a fine-only offense has been committed, the dissent could not agree with the majority’s blanket rule that a custodial arrest was reasonable in every circumstance where a misdemeanor is committed in the officer’s presence.<sup>133</sup> Instead, the dissent adopted the *Terry* approach of reasonableness: a citation is required when there is probable cause to believe that a fine-only offense has been committed, unless the officer can point to specific and articulable facts which warrant the additional intrusion of a custodial arrest.<sup>134</sup>

The *Atwater* dissent also recognized that the majority’s opinion could have “potentially serious consequences for the everyday lives of Americans” because a broad range of conduct falls into the fine-only misdemeanor category of offenses.<sup>135</sup> Many of these offenses are not so much criminal as they are directed at protecting public health and welfare.<sup>136</sup> The majority’s decision in *Atwater* would give officers “unfettered discretion” to arrest a driver stopped for a minor traffic offense, search the interior of the car, and impound the car “without articulating a single reason why such action is appropriate,” which in turn creates the potential for abuse.<sup>137</sup> Ultimately, a minor traffic violation could be used as an excuse for stopping and harassing individuals, which is a particular concern in the ongoing debate about racial profiling.<sup>138</sup>

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130. *Id.* at 362.

131. *Id.* at 364.

132. *Id.* at 365. Interestingly, these are similar to the factors MINN. R. CRIM. P. 6.01, subd. 1(a) requires for a custodial arrest for a misdemeanor.

133. *Id.* at 365–66.

134. *Id.* at 366.

135. *Id.* at 371–72.

136. *Id.* at 371.

137. *Id.* at 372.

138. *Id.*; see also *State v. Curtis*, 290 Minn. 429, 436, 190 N.W.2d 631, 635 (1971) (discussing the common and customary practice of police to frisk minor traffic offenders in order to “shake down almost everybody we stop if it’s a man”)

Considering the majority's bright-line rule and the dissent's preference for the balance of reasonableness, the Minnesota Supreme Court's decision to depart from *Atwater* under the state constitution makes sense. The concerns anticipated by the *Atwater* dissent create a "principled basis" for deciding *Askerooth* on adequate and independent state grounds. If the goal is to safeguard the rights of Minnesotans, the *Askerooth* decision accomplishes that goal in an area where citizens are most likely to encounter the police—traffic stops.

## V. CONCLUSION

Whether *Atwater* was a real or perceived threat to individual rights remains to be seen. Nonetheless, the Minnesota Supreme Court was concerned. Like Minnesota, other jurisdictions have held that *Terry* principles apply to traffic stops based on probable cause.<sup>139</sup> Some jurisdictions have even done so under their state constitutions, as Minnesota has.<sup>140</sup> Perhaps *Askerooth* is simply another example of the Minnesota Supreme Court taking the lead in the area of searches and seizures to protect the individual rights of its citizens where the United States Supreme Court appears to be eroding those rights. If the United States Supreme Court's trend continues, arguing adequate and independent state constitutional grounds will become a vital criminal defense tool.

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(citation omitted).

139. See *People v. Gonzalez*, 789 N.E.2d 260, 266 (Ill. 2003) (holding that courts generally do not distinguish between cases in which the traffic stop is based on articulable suspicion and those cases in which the traffic stop is supported by probable cause; therefore, *Terry* principles apply even when the stop is based on probable cause); see also *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (en banc).

140. See *State v. Bauer*, 36 P.3d 892, 897 (Mont. 2001) (holding that under the Montana Constitution, it is unreasonable for an officer to arrest and detain a person for a non-jailable offense unless special circumstances exist); *State v. Brown*, 792 N.E.2d 175, 177–79 (Ohio 2003), reasserting that under *State v. Jones*, 727 N.E.2d 886 (Ohio 2000), the Ohio Constitution prohibits a custodial arrest for a minor misdemeanor offense; see also *State v. Bayard*, 71 P.3d 498, 503 (Nev. 2003) (state constitution prohibits warrantless arrests for non-jailable offenses in the absence of "special circumstances").