

A05-0247

A05-247

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Susan Ranae Jackson,

Appellant.

APPELLANT'S BRIEF

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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A05-247

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Susan Ranae Jackson,

Appellant.

PROCEDURAL HISTORY

- | | |
|-----------------------|--|
| 1. November 30, 2003: | Date of the offense. |
| 2. December 2, 2003: | Complaint filed charging Jackson with two counts of conspiracy to sell methamphetamine, two counts of sale of methamphetamine, one count of first-degree possession of methamphetamine, one count of fifth-degree possession of marijuana and one count of aggravated forgery. |
| 3. April 5, 2004: | Omnibus hearing before the Honorable Jon A. Maturi. |
| 4. July 1, 2004: | Judge Maturi filed Findings of Fact, Conclusions of Law, Order and Memorandum denying Jackson's motion to suppress. |
| 5. November 8, 2004: | Jackson submitted her case on stipulated facts. Judge Maturi sentenced Jackson to 105 months in prison. |

6. February 7, 2005: Notice of appeal filed.
7. February 28, 2006: Court of Appeals affirmed Jackson's convictions.
8. April 26, 2006: This Court granted Jackson's petition for review but stayed proceedings pending *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).
9. August 23, 2006: This Court vacated the stay and granted Jackson's petition for review.
10. October 2, 2006: This Court granted Jackson's motion for extension of time to file her brief.

LEGAL ISSUE

Do the Federal and Minnesota Constitutions require suppression of evidence when a nighttime search warrant is executed without sufficient support for its issuance?

The district court denied Jackson's motion to suppress; the court of appeals affirmed.

Apposite Authority

United States ex rel. Boyance v. Myers, 398 F.2d 896 (3d Cir. 1968)

Monroe v. Pape, 365 U.S. 167 (1961)

State v. Askerooth, 681 N.W.2d 353 (Minn. 2004)

STATEMENT OF THE CASE

On December 16, 2003, a complaint was filed in Itasca County District Court charging appellant, Susan Ranae Jackson, with two counts of second-degree controlled substance crime in violation of Minn. Stat. § 152.022, subds. 1(1) (2002) (sale of methamphetamine) and 2(1) (2002) (possession of methamphetamine) and two counts of child endangerment in violation of Minn. Stat. § 609.378, subd. 1(b)(2) (2002). The complaint alleged that the charged offenses took place on December 11, 2003.

On April 5, 2004, an Omnibus Hearing was held before the Honorable Jon A. Maturi. Appellant challenged the search warrant and her statements made to the police.

On July 1, 2004, Judge Maturi filed Findings of Fact, Conclusions of Law, Order and Memorandum.

On September 8, 2004, appellant pleaded guilty to second-degree sale of a controlled substance.

On November 8, 2004, Judge Maturi withdrew appellant's guilty plea. Appellant waived her right to a jury trial and submitted her case on stipulated facts in accordance with *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). Appellant was found guilty of the charged offenses.

On that same day, Judge Maturi committed appellant to the Commissioner of Corrections for 105 months on count one. (S. 7).¹ This is the bottom-of-the-box presumptive sentence for a second-degree controlled substance conviction, a level eight

¹ "S" refers to the sentencing transcript.

offense, with a criminal history score of six. Minn. Sent. Guidelines IV & V. Appellant also received two 12-month concurrent sentences on both child endangerment convictions. (S. 7).

On February 28, 2006, the Court of Appeals affirmed Jackson's convictions. It rejected Jackson's numerous complaints and specifically concluded that a nighttime search was not a constitutional violation.

On April 26, 2006, this Court granted Jackson's petition for review but stayed proceedings pending *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). On August 23, 2006, this Court vacated the stay and granted Jackson's petition for review.

STATEMENT OF THE FACTS

The Search Warrant

The search warrant application is included as an appendix to appellant's brief. The relevant portions of the warrant have been provided in the argument section of appellant's brief.

The Search

"At approximately 9:30 p.m., officers from the Itasca County Sheriff's Department [led] by Investigator Scherf executed the search warrant on the home of" Jackson. (Order 2).² "Upon entering the home officers found [Jackson] at the kitchen table with her two teenage children." (Order 2).

There was no explanation of officers' observations prior to entering the residence.

² A copy of the Order is contained in an appendix to Jackson's brief.

ARGUMENT

I. BECAUSE A NIGHTTIME SEARCH IMPLICATES THE REASONABLENESS REQUIREMENT OF THE MINNESOTA AND UNITED STATES CONSTITUTIONS, THE DISTRICT COURT ERRED BY RULING THAT THE LACK OF REASONABLE SUSPICION TO ISSUE A NIGHTTIME SEARCH WARRANT IN THIS CASE WAS MERELY A STATUTORY VIOLATION.

A. Introduction.

At the omnibus hearing, Jackson challenged the issuance of a nighttime search warrant in this case. (4/5/04 at 25).³ The search warrant contained the following justification for a nighttime search:

A nighttime search outside the hours between 7:00 a.m. and 8:00 p.m. is necessary to prevent the loss, destruction or removal of objects of the search or to protect the searchers or the public because: This investigation has led your affiant into the nighttime scope of search warrant.

(App. B18). The district court agreed that the “issuance of a nighttime warrant was not justified.” (App. A4).⁴ Yet, it determined that the violation was “purely statutory rather than constitutional.” (App. A4). The Court of Appeals agreed that the search warrant did not provide a sufficient basis for a nighttime search but it agreed with the district court’s legal conclusion. *State v. Jackson*, No. A05-247, 2006 WL 463576, at *4 (Minn. App.

³ “4/5/04” refers to the transcript of the Omnibus Hearing from April 5, 2004.

⁴ Although it is unclear whether the attorney general’s office will contest the district court’s decision regarding the request for a nighttime search warrant, such a challenge would be unsuccessful. The language provided by Investigator Scherf was typical boilerplate language that failed to provide particularized reasons to justify a nighttime search. *See State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000) (stating that boilerplate language, without particularized reasons for unannounced entry, is insufficient to show that announced entry would be dangerous or allow destruction of evidence).

Feb. 8, 2006) (“We agree with the district court that the police did not make a sufficient showing to justify inclusion of the nighttime search clause.”), *review granted* (Minn. April 26, 2006). Because the nighttime search was not authorized by the search warrant and because it violated the reasonableness requirements of both the Minnesota and United States Constitutions, the district court and court of appeals erred as a matter of law and suppression is necessary. *See State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006) (stating that legal issues are reviewed de novo by this Court).

B. The Framers of the United States Constitution Considered Nighttime Searches to be Unreasonable.

In drafting the Fourth Amendment, the Framers of the federal Constitution sought to protect “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The Minnesota constitution provides similar protection. Minn. Const. art. I, sec. 10. Any determination of the scope of this constitutional protection must begin with a historical analysis because the Fourth Amendment is to be “construed in the light of what was deemed an unreasonable search and seizure when it was adopted.” *Carroll v. United States*, 267 U.S. 132, 149 (1925). Such a historical analysis reveals that the Framers characterized reasonable searches as those that were conducted during daytime hours.

At the time the Fourth Amendment was adopted, “[t]he only search-warrant known to the common law was to search for stolen goods. The usual direction of it was to search in the day-time.” *Commonwealth v. Hinds*, 13 N.E. 397, 399 (Mass. 1887).

Indeed, as far back as 1736, noted English jurist Matthew Hale articulated three expectations regarding how searches should be conducted:

But in that case it is convenient, 1. To express that the searches be made in the day-time. 2. That the party suspecting be present to give the officer information of his goods. 3. There can be no breaking open of doors to make the search.

2 Hale, *Pleas of the Crown* 113-114 (1736) (edited to reflect modern English). As this quote illustrates, the common law prior to the ratification of the Fourth Amendment recognized that reasonable searches must be conducted during daytime hours.⁵ See also Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. Rev. 925 n. 8 (1997) (“During the Framers’ era, second to the requirement for specificity in warrants, the hidden unconstitutionality of nocturnal searches was the most certain feature of the fourth amendment’s original understanding. In the 1780’s, American law rejected nighttime searches even more than general ones.” (Citation and quotations omitted)).

“Even the odious ‘writs of assistance’ which outraged colonial America permitted search of dwellings only in the daytime.” *United States ex rel. Boyance v. Myers*, 398 F.2d 896, 898 (3d Cir. 1968) (citation omitted). Although the constitutionality of

⁵ Hale’s authority on the question of the usual execution of search warrants prior to the ratification of the Constitution was recognized and relied upon by the Supreme Court in *Wilson v. Arkansas*, 514 U.S. 927, 932-33 (1995), in holding that the knock and announce rule had a constitutional basis. The Court also concluded that there was “little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.” *Id.* at 934. Because nighttime searches are also method of entry searches, they should be treated with similar constitutional coverage.

nighttime searches was not directly presented in the *Gooding* case, Justice Marshall took the opportunity to observe:

The Fourth Amendment was intended to protect our reasonable expectations of privacy from unjustified governmental intrusion. In my view, there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night.

Gooding v. United States, 416 U.S.430, 462 (1974) (Marshall, J., dissenting). Similarly, in *Monroe v. Pape*, Justice Frankfurter noted that “[s]earches of the dwelling house were the special object of this universal condemnation of official intrusion. Night-time search was the evil in its most obnoxious form.” 365 U.S. 167, 210 (1961) (Frankfurter, J., concurring and dissenting); *see also Jones v. United States*, 357 U.S. 493, 498 (1958) (“[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home that occurred in this instance.”); *see generally Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971) (stating that a nighttime entry to seize the person is an “extremely serious intrusion.”).

Thus, to preserve the protection against unreasonable searches intended by the Framers, a nighttime search should only be conducted if a neutral magistrate first finds it reasonable to do so. *See* Wayne R. LaFare, *Search and Seizure* § 4.7(b), at 654 (4th ed. 2004) (noting that nighttime searches were disfavored in pre-Fourth Amendment common law and concluding that additional justification to search in the nighttime should be required).

C. The Reasonableness of a Nighttime Search Warrant is a Constitutional Issue.

The touchstone of analysis under the Fourth Amendment and the Minnesota Constitution is “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” *Terry v. Ohio*, 392 U.S. 1, 19 (1968); *In re Welfare of B.R.K.*, 658 N.W.2d 565 (Minn. 2003). Moreover, the United States Supreme Court has explained that the

purpose of the Fourth Amendment’s requirement of reasonableness “is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted--even if a later, less virtuous age should become accustomed to considering all sorts of intrusion ‘reasonable.’”

Richards v. Wisconsin, 520 U.S. 385, 392 n.4 (1997) (citation omitted).

In 1963, the Minnesota legislature attempted to rein in the powers of the police by restricting their ability to enter a residence during the nighttime. *See* Minn. Stat. § 626.14 (2002).⁶ Under the statute, search warrants must be served only between 7:00 a.m. and 8:00 p.m. unless the issuing magistrate authorizes a nighttime search on the basis of a showing in the affidavit that a nighttime search is necessary. *Id.* But this Court has never specifically addressed whether there is, absent this statutory provision, constitutional support for protecting its citizens against nighttime searches.

A contemporary review of the constitutionality of nighttime search warrants, however, shows clear support for heightened coverage under the reasonableness clause of

⁶ The Model Code of Pre-Arrest Procedure § 220.2(3) (1975), provides, except upon special authorization, a search warrant must be executed between 8:00 a.m. and 8:

the Fourth Amendment. In *United States v. Merritt*, 293 F.2d 742 (3d Cir. 1961), the Court held that a warrant that allowed for a search during the daytime, but was executed at nighttime, was illegal. *Id.* at 746-47. Thus, the entry was treated the same as an entry without a warrant, and the evidence found in the subsequent search was suppressed. *Id.* at 746. The third circuit expanded on this decision a few years later. “The time of a police search of an occupied family home” constitutes “a significant factor in determining whether, in a Fourth Amendment sense, the search is ‘unreasonable.’” *United States ex rel. Boyance v. Myers*, 398 F.2d 896, 897 (3d Cir. 1968) (nighttime search violated the Fourth Amendment because no showing was made of any necessity to conduct the search before the following morning). The *Boyance* decision rested largely on the historical aversion to nighttime searches. *Id.* at 888-89.

The Idaho Supreme Court, citing *Boyance*, found that “searches of private dwellings executed during the nighttime take on additional constitutional significance.” *State v. Lindner*, 592 P.2d 852, 857 (Idaho 1979). The *Linder* court went on to note that “the fourth amendment protects individual privacy * * * and entry into an occupied dwelling in the middle of the night is clearly a greater invasion of privacy than entry executed during the daytime.” *Id.*; see also *United States v. Gibbons*, 607 F.2d 1320, 1326 (10th Cir. 1979) (stating that Fourth Amendment itself speaks “in terms of protection ‘against unreasonable searches and seizures’ and it seems logical that the factor of a nighttime search is sensitively related to the reasonableness issue.”); see also *O’Rourke v. Norman*, 875 F.2d 1465 (10th Cir. 1989) (excluding evidence obtained during a nighttime search after a thorough analysis of the historical underpinnings of search

warrants and nighttime searches in particular); *State v. Garner*, 820 S.W.2d 446, 449-50 (Ark. 1991) (“The privacy of citizens in their homes, secure from nighttime intrusions, is a right of vast importance as attested not only by our Rules, but also by our state and federal constitutions.”); *People v. Miller*, 439 N.Y.S.2d 983, 984-85 (1981) (suppressing evidence seized from a gambling establishment during a nighttime search).

The touchstone of analysis under the Fourth Amendment and the Minnesota Constitution is “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” *Terry v. Ohio*, 392 U.S. 1, 19 (1968); *In re Welfare of B.R.K.*, 658 N.W.2d 565 (Minn. 2003). In addition, Justice Scalia explained that:

The purpose of the Fourth Amendment’s requirement of reasonableness “is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion ‘reasonable.’”

Richards v. Wisconsin, 520 U.S. 385, 392 n. 4 (1997) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring)).

Because the invasion of privacy involved with a nighttime search is more onerous than with a typical search of a home, these searches implicate the reasonableness prongs of the United States and Minnesota Constitution. Thus, this Court should require

additional exigency or necessity beyond probable cause to justify nighttime execution of a search warrant.⁷

⁷ In *Bourke*, the defense argued that the justification for a nighttime search warrant required reasonable suspicion of exigency or necessity. This argument relied on the *Richards* holding that the reasonable suspicion standard “strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.” 520 U.S. at 394. Because Jackson’s warrant was deficient under any standard, this issue is not specifically before this court.

II.

BECAUSE A NIGHTTIME SEARCH IS PROTECTED BY THE MINNESOTA AND UNITED STATES CONSTITUTIONS, EVIDENCE ILLEGALLY SEIZED DURING A NIGHTTIME SEARCH SHOULD BE EXCLUDED FROM A SUBSEQUENT TRIAL.

***A. Hudson v. Michigan* is a sharp departure from this Court's remedy of excluding evidence from trial when a constitutional violation and police misconduct are involved.**

Recently a sharply divided Supreme Court issued a decision calling into question the application of the exclusionary rule to cases where the police illegally failed to knock and announce their presence. *See Hudson v. Michigan*, 126 S.Ct. 2159 (2006). It is likely the State will argue that *Hudson* should control on whether the exclusionary rule applies to this case. This Court should not follow the *Hudson* decision because it is a sharp departure from this Court's consistent approach to excluding evidence when police misconduct is involved and a constitutional violation has occurred.

This Court "is free to interpret the Minnesota Constitution as affording greater protection against unreasonable searches and seizures than the United States Constitution." *State v. Askerooth*, 681 N.W.2d 353, 361 (Minn. 2004) (adopting additional protections to Minnesota citizens in the context of misdemeanor traffic stops). (citations omitted). Moreover, this Court has a responsibility "to independently safeguard for the people of Minnesota the protections embodied in our constitution." *Id.* (citations omitted).

When the United States Supreme Court adopts a new constitutional principle that restricts privacy rights, this Court must decide whether to offer greater protection to its

citizens pursuant to the Minnesota Constitution. *See Askerooth*, 681 N.W.2d at 382. In completing this analysis, this Court must decide if the Supreme Court's decision is a "sharp departure" from Minnesota "tradition and practice." *Id.* (citing to *In re E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993)).

Our court has found numerous opportunities to reject Supreme Court precedent that restricts the privacy rights pursuant to our Constitution. *See State v. Carter*, 697 N.W.2d 199, 211 (Minn. 2005 (rejecting the *Cabelles* decision and restricting the police's ability to conduct a dog sniff outside a storage unit absent reasonable suspicion); *Askerooth*, 681 N.W.2d at 359-62 (rejecting the *Atwater* decision and restricting the police's ability to place a person in custody based on a misdemeanor traffic stop); *State v. Fort*, 660 N.W.2d 415, 418-19 (Minn. 2003) (explaining that under the Minnesota Constitution the police must have reasonable articulable suspicion to expand a traffic stop past the original purpose for the stop); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994) (excluding evidence from a sobriety checkpoint, although the police were acting pursuant to federal law, by holding that the Minnesota constitution requires individualized suspicion); *In re E.D.J.*, 502 N.W.2d 779, 782-83 (Minn. 1993) (rejecting the *Hodari* decision's requirement that a seizure requires physical restriction). Because the decision in *Hudson* is a sharp departure from both Federal and Minnesota law, this Court should follow the Minnesota Constitution.

In *Hudson*, a five-justice majority concluded that the interests violated by the police's failure to knock and announce had no causal connection to the search that was conducted. 126 S.Ct. at 2165-66 ("Since the interests that *were* violated in this case have

nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.”).

But the four-justice dissent correctly pointed out that the majority’s decision “represents a significant departure from the Court’s precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution’s knock-and-announce protection.” *Id.* at 2171 (Breyer, J., dissenting). Specifically, Justice Breyer noted that since *Mapp v. Ohio*, the use of evidence obtained through “an unreasonable search and seizure” is “barred” in criminal trials and that, without suppression as a remedy, the Fourth Amendment would become a form of words with no value. *Id.* at 2173 (Breyer, J., dissenting). Finally, the dissent points out that there are only two situations where the exclusionary rule has not been applied in the past: 1) where application of the exclusionary rule would not lead to the deterrence of police misconduct; and 2) if the evidence is not being introduced at a criminal trial. *Id.* at 2175. Because neither of these situations applied to knock and announce violations, the dissent concluded that the exclusionary rule should remain in force. *Id.* Because *Hudson* stands in direct conflict with 45 years of Supreme Court caselaw since the *Mapp* decision, this Court should not adopt its ruling.

Hudson is also in direct conflict with Minnesota’s history of applying the exclusionary rule to cases involving misconduct by the police. *See State v. Nolting*, 312 Minn. 449, 456, 254 N.W.2d 340, 345 n. 7 (1977); *State v. Buchholtz*, 295 N.W.2d 629, 632 (Minn. 1980); *State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998). More specifically, Minnesota courts have always excluded evidence as the remedy for a constitutional violation relating to the time and manner of the execution of a search warrant. *Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001); *State v. Wasson*, 615

N.W.2d 316, 320 (Minn. 2000) (“evidence should be suppressed when the circumstances do not warrant an unannounced entry”). This Court has also required suppression when the police did not follow procedural rules for executing telephonic search warrants. *See also City of Mpls. v. Cook*, 498 N.W.2d 17, 20 (Minn. 1993) (holding that “serious violations which subvert the purpose of established [warrant] procedures will justify suppression”). And although the Supreme Court has adopted a good faith exception to the exclusionary rule, this Court has rejected the opportunity to do. *See State v. Zanter*, 535 N.W.2d 624, 634 (Minn. 1995) (declining to adopt the good-faith exception because the warrant was clearly deficient); *Garza*, 632 N.W.2d at 640 (refusing to adopt the good-faith exception, although the police did not act in bad faith, because the search warrant did not provide particularized circumstances justifying an unannounced entry).⁸ Thus, not only does *Hudson* conflict with Federal precedent, it is also a sharp departure from Minnesota Constitutional law which has consistently applied the exclusionary rule to cases involving police misconduct. *See State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998) (applying the exclusionary rule to an unlawful search and seizure and reiterating “that the primary purpose of the exclusionary rule is to deter police misconduct”).

B. State v. Lien was wrongly decided to the extent that it held that nighttime searches involve a statutory, not constitutional, issue.

The state will also likely argue that *State v. Lien*, 265 N.W.2d 833 (Minn. 1978) is still good law and it should control the result in this case. This Court has not addressed

⁸ Both *Zanter* and *Garza* rejected the good-faith exception pursuant to Art. I, § 10 of the Minnesota Constitution.

the constitutionality of nighttime warrants since its opinion in *Lien*. At that time, this Court referenced Justice Marshall's dissent in *Gooding* and noted that "although the general rule against nighttime searches is statutory, it may also have a constitutional dimension." *Id.* at 839. Despite its recognition of a constitutional dimension, the *Lien* court did not evaluate the warrant application in terms of whether the nighttime search was reasonable. Instead the court concluded that, while the warrant application was facially insufficient to support a nighttime search, the error was not "of a constitutional nature" because "the intrusion was not the kind of nighttime intrusion with people being roused out of bed and forced to stand by in their night clothes while the police conduct the search." *Id.* at 841.

The *Lien* court concluded that the erroneous issuance of a nighttime warrant was a technical violation of Minn. Stat. § 626.14, but was not a constitutional violation. *Id.*⁹ Finally, the Court noted that "the last word has not been written in this difficult matter of setting limits on the manner in which police may execute search warrants." *Id.*

To the extent that *Lien* based its finding that the error in issuing the nighttime warrant was not "of a constitutional nature" because the particular circumstances of the case were not as invasive as they might have been, it should be overruled. 265 N.W.2d at 841. If a nighttime search is not justified by reasonable suspicion, it violates a defendant's constitutional rights. This is true regardless of the individual facts of the

⁹ In *Cook*, a case that was decided after *Lien*, this Court concluded that the exclusionary rule applied to the violation of a procedural rule required for telephonic search warrants. See 498 N.W.2d at 20. Although the case did not reference *Lien*, it is unclear whether the failure to exclude evidence in *Lien* is good law after *Cook*.

case. The unlawful nature of the search is not defined by the circumstances of the case; it is defined by law enforcement's failure to present adequate evidence that such a search is necessary.

Indeed, in the context of no-knock searches, this Court has not grounded its constitutional analysis on whether the circumstances of the individual case were the type intended to be protected by the Fourth Amendment. In *Garza*, for example, the defendants were not present when the unannounced search was conducted at their home. 632 N.W.2d at 636. Thus, the defendants were not startled or embarrassed by the unannounced entry of law enforcement officers on their property, one of the consequences the knock-and-announce rule is designed to prevent. *Id.* at 639. Despite the fact that the *Garza* defendants could not show that they were shocked and frightened by the officers' unannounced entry, this Court still held that their constitutional right to be free from unreasonable searches had been violated because the warrant application in the case did not demonstrate reasonable suspicion. *Id.* at 640. Likewise, this Court should find that a defendant's right to be free from an unreasonable nighttime search is not dependent on whether he was "roused out of bed and forced to stand by in [his] nightclothes," but on whether the search application demonstrated reasonable suspicion. 265 N.W.2d at 841.

If this court rejects *Hudson* but keeps the *Lien* balancing test, the nighttime search in this case still violates the constitution. The warrant was executed at 9:30 p.m., on a winter night when it had been dark out for at least 3 or more hours. It was later than the search in *Lien* and unlike that case, there was no evidence presented here that the police

had observed people coming and going as they observed in *Lien*. 265 N.W.2d at 836. Because it was late December and not a warm summer evening, presumably the front door was closed and, unlike *Lien*, 265 N.W.2d at 836, there was no evidence of vehicle traffic outside of appellant's home. The evidence obtained in this unconstitutional search should therefore have been suppressed.

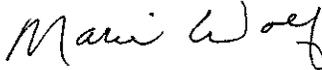
CONCLUSION

For the foregoing reasons, this Court should acknowledge that nighttime searches implicate the reasonableness clause of the Federal and Minnesota Constitutions. Because the nighttime search in this case was a constitutional violation, the exclusionary rule must apply.

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Respectfully submitted,

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