**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MINNESOTA**

FOREST OLIVIER, ADAM LUGUNA, WIA DAY, DANIEL BELL, and ZACHARY LORENZ,

Plaintiffs,

v.

KARL WILLERS, in his official and individual capacities; CITY OF HUTCHINSON; KENNETH WILLERS, in his official and individual capacities; NOBLES COUNTY; NICHOLAS JACOBSON, in his official and individual capacities; OLMSTED COUNTY; BRYCE SCHUENKE, formerly identified as JOHN DOE #1, in his official and individual capacities; DAKOTA COUNTY; JOHN DOE #2, in his official and individual capacities; PINE COUNTY; DANIEL LEWIS, in his official and individual capacities; STEVE SCHULZ, in his official and individual capacities; KANABEC COUNTY; MICHAEL HADLAND, in his official and individual capacities; and FILLMORE COUNTY,

Defendants.

Docket No. 0:13-cv-00266-JRT-FLN

**JURY TRIAL DEMANDED**

**PLAINTIFFS' OBJECTIONS IN PART TO THE MAGISTRATE'S REPORT AND RECOMMENDATON**

## INTRODUCTION

Plaintiffs Forest Olivier, Adam Luguna, Wia Day, Daniel Bell, and Zachary Lorenz (collectively, "Plaintiffs"), by and through their counsel, Alan C. Milstein of Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., and Nathan M. Hansen, respectfully submit these objections in part to the "Report and Recommendation" ("R&R") issued by

the Honorable Franklin L. Noel, U.S.M.J. on the Defendants' motions for summary judgment (collectively, "Motions").

This case arises out of the 2012 Drug Recognition Evaluator ("DRE") program in Minnesota. In 2012, as in past years, officers participating in the program could not complete the fieldwork portion of the program, and receive their DRE certifications, until they theoretically found fifteen individuals who were already high, trusting of the police, and willing to be transported for voluntary observation and testing. Everyone involved knew or would quickly learn that this was an impossible task, and the only realistic way to complete the assignment, a method apparently used in Minnesota for years, was to give people drugs (or watch people take drugs they already have), and then test them.

In 2012, by happenstance, Occupy Minneapolis was occurring in downtown Minneapolis, providing the officers with what they may have thought was a treasure trove of young, vulnerable protesters. This, however, proved to be a proverbial double-edged sword. On one hand, the young, vulnerable people who were protesting did provide a convenient target. On the other hand, the officers perhaps did not count on what happened next: those young people, along with at least one police officer, Andrew Mahowald, spoke up. Officer Mahowald's partner, Defendant Karl Willers, later stated that, in 2012, "between 30 and 40 percent of his training class distributed narcotics in order to perform observations, and that a coordinator of the program told them to get rid of the drugs after the allegations went public."[1]

[1] See Declaration of Alan C. Milstein ("Milstein Declaration") [Document No. 167], Exhibit A (emphasis added).

The Plaintiffs agree with some of the conclusions within the Magistrate's Report and Recommendation ("R&R"). Therein, the Magistrate correctly concluded that a jury could find that Defendant Daniel Lewis provided marijuana to Plaintiff Wia Day; correctly concluded that a jury could find that Ms. Day's participation in the DRE program was involuntary; and correctly concluded that a jury could find that "the conduct alleged by Day was so conscience-shocking that it violated her substantive due process rights protected by the Fourteenth Amendment."[2] The Magistrate further correctly concluded that Officer Lewis was not entitled to qualified immunity because "the fundamental constitutional protection of bodily integrity under the Fourteenth Amendment was clearly established at the time of the alleged unconstitutional conduct of Lewis."[3] Finally, the Magistrate correctly concluded that the question of whether Officer Lewis's employer Kanabec County "was deliberately indifferent to the rights of individuals with whom the untrained employee would come in [contact] is more appropriately determined by a jury."[4] These rulings reflect the holding that, if any given individual's participation in the DRE program was not truly voluntary, that individual's claims against both the officer who provided him or her with drugs, and that officer's employer, should indeed proceed to trial.

Respectfully, however, the Magistrate committed three legal errors elsewhere in the R&R. First, the Magistrate usurped the jury's exclusive role as factfinder by improperly making credibility determinations about the Plaintiffs' testimony about the

[2] See R&R [Document No. 182], page 29.
[3] See R&R [Document No. 182], page 30.
[4] See R&R [Document No. 182], page 40.

other officers.[5] Second, the Magistrate erroneously concluded, contrary to the litany of experimentation cases cited in the Plaintiffs' opposition brief, that the participation of the Plaintiffs (except Ms. Day) was truly voluntary. Third, and finally, the Magistrate erroneously concluded that the Plaintiffs' claim for First Amendment retaliation should be dismissed on summary judgment.

In its de novo review of the R&R,[6] this Court should reject those aspects of the R&R, deny the Defendants' Motions in toto, and allow this case to proceed to trial.

## FACTUAL BACKGROUND[7]

### I.

In the 1970's, the LAPD developed the DRE program, which is used to train officers to recognize individuals under the influence of drugs.[8] In April 2012, approximately twenty-five police officers from cities and counties throughout Minnesota participated in Minnesota's very different DRE program.[9] In Minnesota, unlike in California, state law prohibits police officers from arresting people for simply being high; nevertheless, the Minnesota officers were required to perform fifteen field evaluations.[10]

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[5] See Quick v. Donaldson Co., 90 F.3d 1372, 1376-77 (8th Cir. 1996).

[6] See Federal Rule of Civil Procedure 72(b)(3).

[7] A more complete factual background is set forth in the Plaintiffs' omnibus memorandum of law [Document No. 166].

[8] See, e.g., U.S. v. Everett, 972 F. Supp. 1313 (D. Nev. 1997).

[9] See Affidavit of Stephanie A. Anglokar ("Anglokar Affidavit"), Exhibit 11 [Document No. 149-11].

[10] See Anglokar Affidavit, Exhibit 7 [Document No. 149-7], 5:21-25; Exhibit 9 [Document No. 149-9], 15:15-20; Exhibit 10 [Document No. 149-10], 7:9-20; see also Affidavit of John M. Baker ("Baker Affidavit"), Exhibit 22 [Document No. 156-1], 28:24-29:11.

As Defendant Karl Willers testified, and as a reasonable jury could surely conclude, this proved a "very difficult" task; according to Officer Willers, the only realistic way to complete the assignment, a method apparently used for years since the inception of the program, was to give people drugs (or watch people take drugs they already have):

> Q And was that basically the way it was, that if you went up to people and asked them, you weren't going to get any -- you weren't going to get your 12 to 15 that you needed for the evaluations?
>
> A It was difficult, yes, very difficult.
>
> Q And everybody in the program more or less knew the only way to get your 15 was either to give them drugs or to know they had drugs and watch them take it?
>
> [Objections are interposed.]
>
> Q Go ahead. You can answer.
>
> A Pretty much that was the basis of what everybody had told me about the program, is that it was difficult and that was one way to do it.[11]

Similarly, Karl Willers' brother Kenneth testified as follows:

> Q And then little bit farther down you say, "There was really, every time I would talk to somebody or someone would talk about their stories I want to say pretty much when you come up to DRE school certifications your morals are gone."
>
> Did I read that right?
>
> A Yep.
>
> Q Do you remember saying that?

[11] See Anglokar Affidavit [Document No. 149-8], 7:2-11:2 (emphasis added).

A Yes.

Q And what do you mean by that?

A You needed to do anything you could to get your evals done. That's what I was told prior to going up there.

Q Told by who?

A Other people that have went through the DRE program.

Q So people that had gone through the DRE program before?

A Yes.[12]

Defendant Karl Willers has candidly stated that "between 30 and 40 percent of his training class distributed narcotics in order to perform observations, and that a coordinator of the program told them to get rid of the drugs after the allegations went public."[13] As the preceding makes clear, however, and as a jury could surely deduce, the *only* realistic way to complete the DRE program was to leave "your morals" at the door and engage in the very acts the Plaintiffs allege.

The officers were supposed to accurately record each subject's name on a required official form called the "Drug Influence Evaluation" form.[14] The officers, however, did not use real names, thereby depriving the Plaintiffs of a permanent record of which officers they interacted with. For example, Defendant Bryce Schuenke testified:

Q Did you ever get the lab results back from this person?

[12] See Anglokar Affidavit, Exhibit 10 [Document No. 149-10], 23:15-25:3 (emphasis added).

[13] See Milstein Declaration [Document No. 167], Exhibit A.

[14] See, e.g., Milstein Declaration [Document No. 167], Exhibit E.

A Like I had stated earlier, I had a spreadsheet and that information was entered into my rolling log.

Q But Ted Nugent is not his real name, right?

A No.

Q Did he offer up that name or did you make it up?

A I believe Deputy Hadland did.[15]

Similarly, Defendant Nicholas Jacobson testified as follows:

Q So you didn't ask for identification?

A Correct.

Q Did you suspect that some people had given fake names?

A I didn't know.

Q Did you suspect?

A It was entirely possible.[16]

Defendant Karl Willers testified that he simply threw out his copies.[17]

**II.**

Given that the sine qua non of the Plaintiffs' allegations is that officers got them incredibly high on large quantities of marijuana, observed them, and then dropped them back downtown, as part of an unconstitutional human subjects experiment, it is completely unsurprising that some of the Plaintiffs' testimony reflected some confusion as to the sequence and sometimes details of events. Nevertheless, as the "City and

[15] See Anglokar Affidavit, Exhibit 17 [Document No. 149-17], 41:7-42:3.
[16] See Baker Affidavit, Exhibit 22 [Document No. 156-1], 31:2-7.
[17] See Anglokar Affidavit, Exhibit 8 [Document No. 149-8], 19:3-12.

County Defendants" (all of the officers and employers except for Nicholas Jacobson and Bryce Schuenke and their employers) conceded in their memorandum of law on summary judgment, "[f]or the purposes of summary judgment … these Defendants understand the Court will view the facts in the light most favorable to Plaintiffs."[18] A reasonable jury could conclude as follows based upon the Plaintiffs' deposition testimony.

Plaintiff Wia Day, who was born in 1984, reads and writes at a second-grade level.[19] In 2008, Ms. Day was adjudicated to be "an incapacitated person," and a judge appointed a guardian.[20] Ms. Day joined the Occupy movement on April 12, 2012, and began living at Peavey Plaza.[21] Ms. Day testified that, on April 26 or April 27, 2012, Defendants Daniel Lewis and Steve Schultz of the Kanabec County Sheriff's Office approached Ms. Day and a friend at Peavey Plaza and asked Ms. Day whether she would participate in "a little survey for them." After having a conversation with the officers, Ms. Day and her friend decided to enter their squad car because she was "worried about [her] friends" who had been asked to participate.[22]

According to Ms. Day, Mr. Lewis and Mr. Schultz "said they didn't care for … real names." They then drove Ms. Day and her friend in their Kanabec County squad car to "some dirt hills" near the testing facility, where they provided Ms. Day and her friend with three bowls of marijuana each to smoke. Ms. Day smoked three bowls of marijuana "right in front of" the officers. The officers then took Ms. Day and her friend to the

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[18] See generally "Memorandum in Support" [Document No. 150] (emphasis added).

[19] See Milstein Declaration [Document No. 167], Exhibit F, page 3, ¶ 1.

[20] See generally Milstein Declaration [Document No. 167], Exhibit F.

[21] See Anglokar Affidavit, Exhibit 1 [Document No. 149-1], 8:1-23.

[22] See Anglokar Affidavit, Exhibit 1 [Document No. 149-1], 22:4-36:3.

testing facility, waited while Ms. Day and her friend were evaluated, purchased some food for Ms. Day and her friend because they had the "munchies," and brought Ms. Day and her friend back to the Peavey Plaza area. When she was returned back downtown, Ms. Day felt like she was "floating while [she] was walking."[23]

On one occasion at Peavey Plaza, Mr. Olivier, who was a member of the Occupy movement, was invited into a Kanabec County squad car being driven by Mr. Lewis.[24] Mr. Lewis and Mr. Schultz (who was also in the vehicle) then picked up Plaintiffs Zachary Lorenz and Daniel Bell.[25] The officers told Mr. Lorenz that they did not want to know his "real name," and assigned him the sobriquet "Homer J. Simpson."[26] Thereafter, the officers took the three individuals to the testing facility, where the officers provided Mr. Olivier, Mr. Lorenz, and Mr. Bell a large amount of marijuana to smoke, as well as drug paraphernalia. The three individuals smoked twelve bowls' worth of marijuana, and received marijuana to take home.[27] Separately, Karl Willers "came down to Peavey," talked to Mr. Olivier, took Mr. Olivier out to the testing facility "and just smoked [Mr. Olivier] up and did tests," and also sought information about Occupy Minneapolis from Mr. Olivier.[28] Later in time, Karl Willers' partner, Officer Mahowald, told investigators

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[23] See Anglokar Affidavit, Exhibit 1 [Document No. 149-1], 22:4-36:3.

[24] See Anglokar Affidavit, Exhibit 2 [Document No. 149-2], 17:11-21, 20:1-5; see also Anglokar Affidavit, Exhibit 12 [Document No. 149-12].

[25] See Anglokar Affidavit, Exhibit 3 [Document No. 150-3], 8:15-17; see also Anglokar Affidavit, Exhibit 4 [Document No. 150-4], 7:23-25, 8:1-6, 9:19-25, 15:24-25, 16:1-8.

[26] See Anglokar Affidavit, Exhibit 3 [Document No. 150-3], 19:11-12; accord Anglokar Affidavit, Exhibit 4 [Document No. 150-4], 30:16-21.

[27] See Anglokar Affidavit, Exhibit 3 [Document No. 150-3], 18:10-25:25.

[28] See Anglokar Affidavit, Exhibit 2 [Document No. 150-2], 143:24-145:18.

that he witnessed Mr. Willers essentially provide marijuana to Mr. Olivier (described as "afro guy") on Friday, April 27, 2012, while Mr. Olivier was in the back of a squad car.[29]

In the R&R, the Magistrate determined that "neither Olivier nor Plaintiffs' counsel truly know the sequence of events and what officers transported Olivier on which occasions." At best for the Defendants, Mr. Olivier may be confused as to which officers he interacted with in which order; this, however, is completely unsurprising, given that the officers provided large quantities of marijuana to Mr. Olivier.

Finally, Plaintiff Adam Luguna was approached by Michael Hadland at Peavey Plaza and asked to participate in the DRE program.[30] Mr. Luguna was sitting next to an individual who was hiding a marijuana cigarette. Mr. Luguna was told, "I think we can all come to an agreement that either … one of you can volunteer now, or we can take all of you down to county and put you on a 72-hour hold just to inconvenience you."[31] At that point, Mr. Luguna "volunteered" to go to the testing facility and smoke marijuana.[32]

Again, in their memorandum, these "City and County Defendants" denied providing the Plaintiffs with drugs, but stated that "[f]or the purposes of summary judgment, however, these Defendants understand the Court will view the facts in the light most favorable to Plaintiffs."[33] Though Mr. Jacobson and Mr. Schuenke did not so

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[29] See Milstein Declaration [Document No. 167], Exhibit G, pages 8-9, 19-20.

[30] See Anglokar Affidavit, Exhibit 5 [Document No. 150-5], 28:7-25, 29:1-30:5. Michael Hadland was the only officer from the Fillmore County Sheriff's Office who participated in Minnesota's 2012 DRE program. See Angolkar Affidavit, Exhibit 11 [Document No. 150-11].

[31] See Anglokar Affidavit, Exhibit 5 [Document No. 150-5], 32:17-34:6.

[32] See Anglokar Affidavit, Exhibit 5 [Document No. 150-5], 50:16-65:14.

[33] See "Memorandum of Law" [Document No. 150], page 3 n.1.

concede, Mr. Olivier's testimony that Mr. Jacobson did provide him with drugs,[34] as well Mr. Olivier's similar testimony regarding Mr. Schuenke,[35] demonstrates a dispute of fact. Moreover, these officers' admitted failure to use real names on the evaluation forms deprived Mr. Olivier of the opportunity to prove his interactions with them through the forms. Indeed, Officer Jacobson admitted to the Minnesota Bureau of Criminal Apprehension that he knowingly recorded inaccurate names and other identifying information of participants.[36] Amazingly, at the end of discovery, Mr. Jacobson, who had admittedly failed to accurately record names on the official forms, asked Mr. Olivier to admit that "[t]he allegation … that Defendant Nick Jacobson provided Forest Olivier with marijuana rests entirely on the words of Mr. Olivier."[37]

## LEGAL ARGUMENT

It is well-established that, "[w]hen evaluating a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party and refrain from assessing credibility."[38] Indeed, "[a]t the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. … Rather, the court's function is to determine whether a dispute about a

[34] See, e.g., Anglokar Affidavit, Exhibit 2 [Document No. 150-2], 143:4-7 ("Q. Do you know the names of any officers who gave you drugs? Can you identify the officers who gave you drugs by name? A. Nick Jacobson.").

[35] See Anglokar Affidavit, Exhibit 2 [Document No. 150-2], 117:19-118:25 (making clear that an officer from the Dakota County Sheriff's Office got him high and performed tests on him). Though Mr. Olivier does not identify Mr. Schuenke by name, Mr. Schuenke was the only officer from the Dakota County Sheriff's Office who participated in the 2012 DRE program in Minnesota. See Anglokar Affidavit, Exhibit 11 [Document No. 150-11].

[36] See Milstein Declaration [Document No. 167], Exhibit I, pages 4-5.

[37] See Baker Affidavit, Exhibit 52 [Document No. 156-7], page 10.

[38] See Hedges v. Poletis, 177 F.3d 1071, 1074 (8th Cir. 1999).

material fact is genuine, that is, whether a reasonable jury could return a verdict for the nonmoving party based on the evidence."[39] "'If reasonable minds could differ as to the import of the evidence,' summary judgment is inappropriate."[40] The application of these principles is especially important here considering, just as the Plaintiffs argued on summary judgment, that "the officers targeted people who they knew might not be believed."[41]

Here, the Magistrate's opinion plainly attempts to weigh the evidence, and concludes that, in the Magistrate's view, the Plaintiffs' testimony (except Ms. Day's testimony regarding Officer Lewis) lacked credibility. Controlling case law prohibited the Magistrate from engaging in this function. This is especially so considering that the Magistrate's chief concern appeared to be some confusion and occasionally contradictions on the part of the Plaintiffs, which are explainable by the circumstances. Indeed, the City and County Defendants' only arguments in their memorandum were that the individual officers were entitled to qualified immunity, and the Plaintiffs "cannot maintain a viable Monell claim." While Officers Jacobson and Schuenke attempted to have this Court engage in a fact-finding mission, that is for the jury, not the Court.

As for voluntariness, as the Magistrate correctly decided, Ms. Day, who is a ward of a guardian and has been adjudged to be incompetent, was by definition incapable of voluntarily participating. The Magistrate, however, committed legal error in determining that the remaining Plaintiffs' participation was voluntary. Indeed, just as the Plaintiffs

[39] See Quick, 90 F.3d at 1376-77.
[40] See id.
[41] See Document No. 166, page 3.

argued, the officers' attempted "voluntariness" defense is inapposite in the first place, as the nature of what occurred vitiates any possible consent. As one District Court held, "well-reasoned opinions argue that the failure to disclose the alleged true nature of the experiments – that they were conducted with no expectation of therapeutic value to the patients but rather only to observe the effects of radiation on human subjects – vitiates any 'consent' that may have been given, thereby rendering the experiments similar to the forced, involuntary invasions of bodily integrity that the Supreme Court has deemed unconstitutional."[42] Here, what occurred was "conducted with no expectation of therapeutic value to the [Plaintiffs] but rather only to observe the effects of [marijuana] on human subjects." As such, because of the unconscionable nature of the officers' actions in providing a "Schedule 1" drug to citizens in order to serve the officers' needs only, "any 'consent' that may have been given" by the Plaintiffs cannot serve as a defense.

In any event, the officers gave Mr. Luguna the "choice" of participating or being detained for three days.[43] And, certainly a reasonable jury could find that the remaining Plaintiffs' participation was equally involuntary given that the officers were in full uniform, including weapon and handcuffs, when they went out looking for individuals to evaluate,[44] and given the sway that officers in full uniform (with gun and handcuffs) hold, especially to more vulnerable members of society.

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[42] See Heinrich ex rel. Heinrich v. Sweet, 62 F. Supp. 2d 282 (D. Mass. 1999). The Plaintiffs cited, and argued, numerous other cases in their brief [Document No. 166].

[43] See Anglokar Affidavit, Exhibit 5 [Document No. 149-5], 32:17-34:6.

[44] See, e.g., Anglokar Affidavit, Exhibit 7 [Document No. 149-7], 25:13-26:21.

Finally, the Magistrate erred when he concluded that "Plaintiffs have failed to put forth any evidence that any Defendant's decision to approach an individual at Peavey Plaza was motivated by the individual's participation in the Occupy Minneapolis protests." To the contrary, a reasonable jury could conclude, based upon the circumstantial evidence in the record, that the *only* reason the Plaintiffs were targeted were that they were assembled and participating in the Occupy Minneapolis protests. Just as the Plaintiffs argued in their brief, the officers "hardly targeted patrons of the Minnesota Orchestra, which performs in a concert hall adjacent to Peavey Plaza, while they were leaving a matinee performance"; rather, the officers indisputably targeted assembled protesters with significant medical problems and limited educations.[45] This strongly supports a claim of retaliation, as defined in the case law, based upon the exercise of First Amendment rights to speech and assembly.

## CONCLUSION

For the foregoing reasons, this Court should reject those portions of the R&R granting summary judgment, and direct that this compelling matter proceed to trial.

Dated: Wednesday, January 27, 2016

Respectfully submitted,

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[45] See Document No. 166, page 3.

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