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JANUARY 15, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| STATE OF NORTH DAKOTA,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>JOSEPH SMITH,<br><br>Defendant/Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Supreme Court No. 20130398<br><br>Burleigh Co. No. 08-2013-CR-01906 |

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# BRIEF OF APPELLANT

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Appeal from a Criminal Judgment

dated and filed December 4, 2013

and the adverse determination within the November 6, 2013, Order

denying the Defendant's Motion to Suppress Evidence

Burleigh County District Court

South Central Judicial District

The Honorable David E. Reich

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## [¶3] STATEMENT OF THE CASE

[¶4] On July 21, 2013, Joseph Smith was arrested for driving under the influence of an intoxicating liquor in Burleigh County, North Dakota. (Appendix ("App.") at 3). On August 7, 2013, a Uniform Traffic Complaint and Summons was filed in the district court informing Mr. Smith that he was standing accused of the charge of DUI. (App. 3).

[¶5] On October 8, 2013, Mr. Smith filed a Motion to Suppress Evidence, and asked the trial court to suppress the results of his Intoxilyzer breath test because the test result was obtained without a warrant and without an exception to the warrant requirement, in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. (App. 4-73). On October 17, 2013, the State filed a response brief opposing suppression and argued that Mr. Smith had consented to the breath test. (App. 74-83). On October 31, 2013, Mr. Smith filed a reply brief arguing that Mr. Smith did not voluntarily consent to the breath test and that the submission to testing was coerced. (App. 84-88).

[¶6] No evidentiary hearing was held and the trial court decided the Motion on briefs submitted by the parties. On November 6, 2013, the trial court denied Mr. Smith's Motion to Suppress Evidence, relying heavily on a controversial Minnesota case, *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013). (App. 89-94).

[¶7] On December 4, 2013, Mr. Smith entered a conditional plea of guilty to the charge of DUI, pursuant to N.D.R.Crim.P. 11 (a)(2), specifically reserving the right to appeal the adverse ruling in the November 6, 2013, Order denying the motion to suppress evidence. (App. 95-97). On December 4, 2013, the Court approved the conditional plea of guilty and entered a Criminal Judgment. (App. 98-100).

[¶8] On December 6, 2013, Mr. Smith filed a Notice of Appeal to this Court. (App. 101-102). Smith appeals and argues that Mr. Smith did not voluntarily consent to the Intoxilyzer breath test and therefore the warrantless test was performed without any exception to the warrant requirement, in violation of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), and in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Mr. Smith asks this court to vacate the Criminal Judgment in this matter, reverse the district court's denial of his Motion to Suppress Evidence, remand to the district court for withdrawal of Mr. Smith's conditional guilty plea, and order the suppression of the results of the Intoxilyzer breath test.

## [¶9] STATEMENT OF THE FACTS

[¶10] On July 21, 2013, at approximately 1:20 a.m., Deputy Silbernagel of the Burleigh County Sheriff's Department noticed a blue pickup with Wyoming plates cross what he at first called the fog line. (App. 21-22) (Exhibit A, below; DOT Administrative Hearing Transcript ("Tr.") at 4, lines ("L.") 17-22; and 5, L. 13-15). He later clarified that he meant a solid white line, not a fog line. (App. 39) (Tr. at 22, L. 4-9). The pickup was traveling northbound on the Bismarck Expressway and it crossed the line "on one occasion" only. (App. 38) (Tr. at 21, L. 1-4 and 14-22). "Other than that one" time, the

deputy "didn't observe any swerving or weaving" and did not note any other violations. (App. 38) (Tr. at 21, L. 23-25). The deputy, who was traveling southbound, did not initiate his overhead lights because he was not ready to stop the pickup and because it did not call for it. (App. 40) (Tr. at 23, L. 6-8).

[¶11] It was "fairly dark that night," so the deputy did not "identify the driver." (App. 40) (Tr. at 23, L. 12-21). Instead, he was "focused on the driving pattern and the headlights more so" and was not "looking at the driver." (App. 40-41) (Tr. at 23, L. 9 – 24, L. 1).

[¶12] The deputy then did "a U-turn on the expressway" and started to follow the pickup. (App. 41) (Tr. at 24, L. 2-3). Before making the U-turn, the deputy "had to wait for the [blue pickup] to pass," going in the opposite direction. (App. 22) (Tr. at 5, L. 13-18). Now turned around and also heading northbound, the deputy "observe[d] it some more, and [he] noticed that the vehicle that was headed northbound had pulled off towards the frontage road, in the area of Capital RV." (App. 22) (Tr. at 5, L. 18-21).

[¶13] "By the time [the deputy] turned around," the blue pickup "was already turned down the frontage road." (App. 41) (Tr. at 24, L. 8-9). The deputy "had to wait for" even more traffic in order "to turn left down to the frontage road" and "[t]hat's why the vehicle got so far ahead of" him. (App. 41) (Tr. at 24, L. 12-15). After waiting for more traffic to pass, the deputy finally turned left off the Expressway and started to drive down the frontage road. (App. 22-23) (Tr. at 5, L. 21 – 6, L. 2).

[¶14] The deputy did not see the pickup "park in the Capital RV parking lot," but a short time later he observed it parked. (App. 42) (Tr. at 25, L. 1-4). "It was already parked … by the time [he] came down the frontage road and observed the vehicle …

parked in the Capital RV parking lot." (App. 42) (Tr. at 25, L. 5-7). The deputy missed the driver getting out of the vehicle.

[¶15] When the deputy arrived at the Capital RV parking lot, "there was nobody in the vehicle at that time." (App. 42) (Tr. at 25, L. 8-9). "There was no driver in the vehicle at that time" and the deputy "noticed that the headlights on the vehicle flashed, as if you were locking them by the use of a key fob." (App. 23) (Tr. at 6, L. 6-9). Before the headlights flashed, the deputy "didn't see anybody get out of the vehicle" and he "didn't see anybody walking away from the vehicle." (App. 42) (Tr. at 25, L. 10-14).

[¶16] The deputy then "pulled down the street, and turned off all [his] lights, and just observed the vehicle." (App. 23) (Tr. at 6, L. 10-12). The deputy just sat there with his "lights shut off" for about "four or five minutes" and watched the vehicle. (App. 43) (Tr. at 26, L. 2-7). "[T]here was no driver in the vehicle at that time." (App. 43) (Tr. at 26, L. 8-10).

[¶17] After four or five minutes, the deputy "observed the interior light of the cab of the pickup come on, as if someone got into it or turned the vehicle on," and "thought that it would give [him] some good indication that there was someone in the vehicle now." (App. 43) (Tr. at 26, L. 11-17). Because it was so dark and because of the position of the deputy's vehicle, the deputy "didn't observe anybody get into the" pickup. (App. 43) (Tr. at 26, L. 18-21).

[¶18] Once the deputy saw the interior light go on, he drove closer to the pickup and entered "the Capital RV parking lot." (App. 43-44) (Tr. at 26, L. 22 – 27, L. 5). The deputy positioned his vehicle "[b]ehind Mr. Smith's vehicle" which was parked in "the front parking row." (App. 44) (Tr. at 27, L. 6-9). The deputy parked "[a] car length"

behind the vehicle, so the vehicle "would have been unable to back up." (App. 44-45) (Tr. at 27, L. 25 - 28, L. 5). There was no driveway in front of Mr. Smith's vehicle and the deputy does not remember if there was a cement barrier in front of Mr. Smith's vehicle. (App. 44) (Tr. at 27, L. 14-24). However, the frontage road and a "sidewalk or border" was in front of Smith's vehicle. (App. 44) (Tr. at 27, L. 19-21). Mr. Smith's vehicle "couldn't have driven forward without going over a curb onto the frontage road." (App. 45) (Tr. at 28, L. 6-14). When the deputy pulled up directly behind the vehicle, he "activated [his] overhead emergency lights." (App. 45) (Tr. at 28, L. 18-20).

[¶19] The deputy approached the vehicle on foot, ordered the occupant to "place his hands out the window," and "asked him to exit the vehicle." (App. 24) (Tr. at 7, L. 1-7). The occupant complied with the deputy's directives. (App. 24) (Tr. at 7, L. 8-9). At this point, the deputy still did not "know if this is the same driver as on the expressway." (App. 45) (Tr. at 28, L. 15-17). It was the deputy's belief and "opinion that it was the same vehicle" as on the Expressway, "[b]ut [he] didn't know if it was the same individual." (App. 45) (Tr. at 28, L. 24 – 29, L. 4). While driving on the Expressway, the deputy could not identify the driver and he "couldn't see … whether there were passengers." (App. 63) (Tr. at 46, L. 7-11). A short time later, the deputy "placed Mr. Smith under arrest for DUI." (App. 34) (Tr. at 17, L. 20-21).

[¶20] After arresting Smith, the deputy read Smith the new implied consent advisory. (App. 50) (Tr. at 33, L. 21-25). The deputy informed Smith that "North Dakota law required him to take the test" and that "<u>if [he] refused, it would be a crime</u>." (App. 53) (Tr. at 36, L. 4-7) (emphasis added). The deputy acknowledged that "based upon that advisory" Mr. Smith "provided a breath test on the Intoxilyzer machine."

(App. 53) (Tr. at 36, L. 10-12).[1] Mr. Smith was given this coercive advisory at a time when he was already under arrest for one crime, was handcuffed, and was in the back of a patrol vehicle. (App. 52) (Tr. at 35, L. 19-25).

[¶21] The deputy instructed Mr. Smith that he was taking him to the Burleigh County Sheriff's Department for a breath test. (App. 72) (Exhibit B, below; Affidavit of Joseph Smith, at ¶4)). The deputy never informed Mr. Smith that he had a right to refuse the breath test and Mr. Smith did not know that he could refuse the breath test. (App. 72) (¶¶8-9).

[¶22] Because the deputy told Smith that North Dakota law required him to take the breath test and that if he refused to take the breath test he would be charged with the crime of refusal to take a breath test, Mr. Smith felt compelled to submit to the breath test. (App. 72) (¶¶5-7). Mr. Smith believed that he had no choice but to submit to the breath test or he would be charged with a crime. (App. 72) (¶7). Mr. Smith told the deputy that he would take the breath test because he did not want to be charged with a crime. (App. 72) (¶6).

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[1] The DOT hearing officer made a correction to the transcript from Mr. Smith's DOT hearing (Exhibit A, below), on page 36 (App. 53). The original transcription indicated the following:

> 10 MR. HERBEL: And based upon that advisory, <u>you</u> provided a breath
> 11 test on the Intoxilyzer machine?

Corrected page 36 (App. 71), which is appended to the transcript (Exhibit A, below), indicates the following:

> 10 MR. HERBEL: And based upon that advisory, <u>he</u> provided a breath
> 11 test on the Intoxilyzer machine?

[¶23] The deputy took Mr. Smith to the Burleigh County Sheriff's Department and administered a breath test on him. (App. 72) (¶¶10-11). The deputy "did not apply for a search warrant" before the breath test. (App. 54) (Tr. at 37, L. 17-19). "[T]here was no emergency at hand at the time as far as obtaining the breath test" and the deputy still had well "over an hour" to acquire a test within the two-hour period. (App. 54) (Tr. at 37, L. 6-11).

[¶24] STANDARD OF REVIEW

[¶25] "In reviewing a district court's decision on a motion to suppress evidence," this Court will "defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance." *See State v. Graf*, 2006 ND 196, ¶7, 721 N.W.2d 381. This Court "will affirm a district court's decision on a motion to suppress if there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence." *See id*.

[¶26] "The existence of consent is a question of fact to be determined from the totality of the circumstances." *See State v. Mitzel*, 2004 ND 157, ¶13, 685 N.W.2d 120. "Whether a finding of fact meets a legal standard is a question of law." *See id* at ¶10 (citing *City of Jamestown v. Dardis*, 2000 ND 186, 618 N.W.2d 495). "Questions of law are fully reviewable on appeal." *See id*.

[¶27] LAW AND ARGUMENT

I. Mr. Smith did not voluntarily consent to the Intoxilyzer breath test and therefore the warrantless test was performed without any exception to the warrant requirement, in violation of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), and in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution; accordingly, the test result must be suppressed

[¶28] Both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution "prohibit unreasonable searches and seizures" and "[t]he guiding principle behind these prohibitions is to safeguard personal privacy and dignity against unwarranted intrusions by the State." *See State v. Phelps*, 286 N.W.2d 472, 474 (N.D. 1979). The United States Supreme Court has "never retreated" from its "recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *See Missouri v. McNeely*, 133 S.Ct. 1552, 1565 (2013). "Warrantless searches and seizures … are "presumptively unreasonable."" *See City of Fargo v. Ellison*, 2001 ND 175, ¶10, 635 N.W.2d 151. A search into the body for evidence "is a search within the meaning of the Fourth Amendment." *See State v. Kimball*, 361 N.W.2d 601, 604 (N.D. 1985). "Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, … implicates similar concerns about bodily integrity and, like the blood-alcohol test … should also be deemed a search." *See Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989).

[¶29] In *Missouri v. McNeely*, the United States Supreme Court held that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant

before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *See Missouri v. McNeely*, 133 S.Ct. 1552, 1561 (2013). Therefore, the *McNeely* court placed DUI searches for evidence on par with any other search for evidence. Now, probable cause and a search warrant are required to draw blood or extract a breath sample.

[¶30] Warrantless breath test searches will now only be allowed if there is an exception to the warrant requirement. One such exception is consent. There was no valid consent to breath-testing in this case.

[¶31] In the case at hand, the deputy read Smith the new implied consent advisory after he arrested Smith. (App. 50) (Tr. at 33, L. 21-25). In giving Smith the new advisory, the deputy informed Smith that "North Dakota law required him to take the test" and that "<u>if [he] refused, it would be a crime</u>." (App. 53) (Tr. at 36, L. 4-7) (emphasis added). The deputy admitted that "based upon that advisory" Mr. Smith "provided a breath test on the Intoxilyzer machine." (App. 71) (Tr. at 36, L. 10-12). Through the deputy's advisory, Mr. Smith was given the choice of waiving his Fourth Amendment rights or being charged with another crime. Mr. Smith was already under arrest for one crime, was handcuffed, and was in the back of a patrol vehicle when he was threatened with being charged with another crime if he refused. (App. 52) (Tr. at 35, L. 19-25).

[¶32] "[T]o sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent, rather than merely showing that the person took no affirmative actions to stop the police." *See State v. Avila*, 1997 ND 142, ¶17, 566 N.W.2d 410. "Mere acquiescence

to police authority is insufficient to show consent." *See State v. Mitzel*, 2004 ND 157, ¶16, 685 N.W.2d 120. Consent "must be definitive." *See State v. Brockel*, 2008 ND 50, ¶11, 746 N.W.2d 423. "Consent must be received, not extracted." *See State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

[¶33] "When consent is the product of a free and unconstrained choice and not the product of duress or coercion, it is voluntary." *See State v. Mitzel*, 2004 ND 157, ¶26, 685 N.W.2d 120 (emphasis added). "[C]onsent obtained under threat of subjecting [the defendant] to … an arrest cannot be said to be voluntary." *See McMorran v. State*, 46 P.3d 81, 85 (Nev. 2002); *see also United States v. Ocheltree*, 622 F.2d 992, 994 (9th Cir. 1980). In our case, that is precisely what happened. Mr. Smith was threatened with arrest on a refusal charge if he didn't consent to testing. "Consent" obtained in this manner cannot be said to be voluntary.

[¶34] In the case at hand, Mr. Smith's submission to breath-testing was not voluntary; rather, it was the product of coercion. "Where there is coercion there cannot be consent." *See Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S.Ct. 1788, 1792 (1968). Because Mr. Smith was coerced into providing a breath sample, he did not voluntarily consent to chemical testing. "[A] warrantless [breath] test, performed without consent, is presumptively unreasonable." *See Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1172 (10th Cir. 2003). Accordingly, the compelled manner of the breath test in this case made the extraction of Smith's breath an unreasonable search for evidence.

[¶35] The State argued below that threatening with arrest, charges, and potential jail time does not constitute coercion. If this is true, then what exactly constitutes

coercion? Is it coercion to threaten to fine a driver if he doesn't perform the tests? Is it coercion to threaten physical harm in the event of nonperformance? How about to pressure with the threat of going to bed without supper, or being required to purchase health insurance? Is it coercive to threaten to take the driver's money, or shoot or kill the driver if he would dare exercise his Fourth Amendment constitutional rights? It is hard to fathom that threatening with arrest and a new criminal charge is not coercion. This is coercion. "Where there is coercion there cannot be consent." *See Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S.Ct. 1788, 1792 (1968).

[¶36] In fact, the language in the new implied consent advisory is coercive, threatening, and unconstitutional, and the sole purpose of the criminalized refusal subsection is to compel submission to testing. However, a driver has "a constitutional right to insist" that an officer "obtain a warrant to search" and he "may not constitutionally be convicted for refusing to consent to the inspection" into his body for evidence. *See Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 540, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (emphasis added).

[¶37] Indeed, the *McNeely* court did not endorse the type of implied consent statute that criminalized refusal, like the one in North Dakota. The United States Supreme Court has never upheld an implied consent statute that criminalized a refusal. In fact, the precedent of the high court is that exercising one's Fourth Amendment rights, by refusing a search, may not be criminalized. *See Camara*, 387 U.S. 523 (1967); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 84, 121 S.Ct. 1281, 149 L.Ed.2d 205, 69 USLW 4184 (2001) (a policy of conducting warrantless searches with "the primary

purpose … to use the threat of arrest and prosecution in order to force women into treatment" is "inconsistent with the Fourth Amendment"); *see also* *Ferguson v. City of* Charleston, 308 F.3d 380, 403 (4th Cir. 2002) ("The choice to be searched or forego necessary medical treatment "is the antithesis of free choice" to consent or refuse"). "The interest in using the threat of criminal sanctions to deter" conduct "cannot justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." *See Ferguson*, 532 U.S. at 68.

[¶38] Additionally, the State argued below, and the Court agreed, that *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) has some sort of application in this case. Mr. Smith argues that this reasoning is entirely off-point and flawed.

[¶39] The *Neville* court was performing a Fifth Amendment analysis, not a Fourth Amendment analysis, and the *Neville* court was not discussing the coercion involved in criminalizing a refusal and extracting consent under the threat of criminal prosecution. Instead, the *Neville* court considered whether the words of refusal constituted compelled testimony excludable under *Miranda* and the Fifth Amendment. Using words of refusal in a Fifth Amendment context is far different than threatening a crime in exchange for exercising one's Fourth Amendment rights. *Neville* does <u>not</u> condone being threatened with arrest and a separate crime for refusing chemical testing.

[¶40] In fact, under Fifth Amendment analysis, the high court has said that it violates the Fifth Amendment <u>to require an individual to choose "between self-incrimination or job forfeiture</u>" (losing his job), and that kind of subtle pressure

constitutes "[c]oercion that vitiates a confession," because "the accused was deprived of his "free choice to admit, to deny, or to refuse to answer."" *See Garrity v. New Jersey*, 385 U.S. 493, 496, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) ([s]ubtle pressures … may be as telling as coarse and vulgar ones"). "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent," and "[t]hat practice …is likely to exert such pressure upon an individual as to disable him from making a free and rational choice," such that "the statements were infected by the coercion inherent in this scheme of questioning, and cannot be sustained as voluntary." *See id* at 497-98 (emphasis added). "[T]he fear of being discharged under it for refusal to answer, on the one hand, and the fear of self-incrimination, on the other, was "a choice between the rock and the whirlpool, which made the statements products of coercion in violation of the Fourteenth Amendment." *See id* at 496. The threat of being charged with a crime is at least as coercive as the threat of losing one's job.

[¶41] But again, the analysis above, and the flawed analysis in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), which the State and the district court relied heavily upon below, involves the Fifth Amendment. In addition, the State misreads the *Brooks* decision. *Brooks* was a review by just 3 justices of the Minnesota Supreme Court. Only Chief Justice Gildea thought that the consent was voluntary, but only under the facts of that particular case. *See Brooks*, 838 N.W.2d at 572-73 ("we do not hold that Brooks consented because" of Minnesota's implied consent law, but instead based upon "the totality of circumstances of this case").

[¶42] Justice Stras, who concurred in the Judgment in *Brooks*, because of good-faith reliance on then-existing precedent, said the consent was coerced. *See Brooks*, 838

N.W.2d at 573 (“the obvious and intended effect of the implied consent law is to *coerce* the driver … into ‘consenting’ to chemical testing”). Justice Stras remarked that, after *McNeely*, “we now know that *Netland* was wrongly decided.” *See id* at 576 (citing *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009) (In *Netland*, the pre-*McNeely* Minnesota Supreme Court stated: “We hold that the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense”).

[¶43] Justice Wright, who wrote the opinion at the appellate level in *Netland* (*State v. Netland*, 742 N.W.2d 207 (Minn.App. 2007)), and previously ruled in that case that "[b]ecause an individual does not have the right to say no to a chemical test and, indeed, is subject to criminal penalties for doing so, the "consent" implied by law is insufficiently voluntary for Fourth Amendment purposes" (*See Netland* at 214), took no part in the *Brooks* decision. So basically, in *Brooks*, we have a 1-1 decision on the merits, with one justice abstaining.

[¶44] *Brooks* will likely be reversed by the United States Supreme Court, who vacated all three (3) convictions, and remanded with instructions to analyze the Fourth Amendments challenges over again with the wisdom of *McNeely*. *See Brooks v. Minnesota*, 133 S.Ct. 1996 (2013). Instead of performing a Fourth Amendment analysis under *McNeely*, like instructed, <u>one justice</u> of the Minnesota Supreme Court conducted a flawed Fifth Amendment exercise.

[¶45] Mr. Smith asks this Court to review *Brooks* and compare with *Garrity v. New Jersey*, 385 U.S. 493, 496, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (requiring a person to choose between self-incrimination [forfeiting Fifth Amendment rights] or losing his job constitutes coercion). The United States Supreme Court will likely reverse *Brooks*, relying, in part, on *Garrity*. Similarly in our case, requiring a person to choose between forfeiting Fourth Amendment rights and being charged with a crime constitutes coercion.

[¶46] Since Mr. Smith did not voluntarily consent to the breath test search, there was no exception to the warrant requirement as pronounced in *Missouri v. McNeely*. Mr. Smith's breath test result must be suppressed because it was obtained without a warrant and without an exception to the warrant requirement. This violates both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution.

[¶47] "It is the State's burden to show that a warrantless search falls within an exception to the warrant requirement." *See State v. Mitzel*, 2004 ND 157, ¶12, 685 N.W.2d 120. The State has not done that. No exception existed to justify the extraction of a breath sample from Mr. Smith. "When no exception exists, the evidence obtained must be suppressed as inadmissible under the exclusionary rule." *See Mitzel*, 2004 ND 157 at ¶12. Since there was no exception to the warrant requirement here, Mr. Smith's breath test results must be suppressed.

## [¶48] CONCLUSION

[¶49] For the foregoing reasons, Mr. Smith respectfully requests that this Court vacate the Criminal Judgment in this matter, reverse the district court's denial of his

Motion to Suppress Evidence, remand to the district court for withdrawal of Mr. Smith's conditional guilty plea, and order the suppression of the results of the Intoxilyzer breath test.

Respectfully submitted
this 21st day of January, 2014.

/s/ *Dan Herbel*

_____

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[¶50] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 21, 2014, the BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Christine Hummert McAllister, counsel for Appellee, at the following:

Electronic filing TO: "Christine Hummert McAllister" < bc08@nd.gov >

Dated this 21st day of January, 2014.

/s/ *Dan Herbel*

_____

Dan Herbel

Respectfully submitted
this 15th day of January, 2014.

/s/ *Dan Herbel*

_____

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[¶50] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 15, 2014, the BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Christine Hummert McAllister, counsel for Appellee, at the following:

Electronic filing TO: "Christine Hummert McAllister" < bc08@nd.gov >

Dated this 15th day of January, 2014.

/s/ *Dan Herbel*

_____

Dan Herbel