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MAY 27, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, Plaintiff/Appellee, v. JEFFREY FETCH, Defendant/Appellant.	)))))))))	Supreme Court No. 20140129 Burleigh Co. No. 08-2013-CR-01949

BRIEF OF APPELLANT

Appeal from a Criminal Judgment

dated March 24, 2014, and filed March 26, 2014

and the adverse determination within the January 31, 2014, Order

denying the Defendant's Motion to Suppress Evidence (filed February 3, 2014)

Burleigh County District Court

South Central Judicial District

The Honorable Thomas J. Schneider

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[¶3] STATEMENT OF THE CASE

[¶4] On August 3, 2013, Jeffrey Fetch was arrested for driving under the influence of an intoxicating liquor in Burleigh County, North Dakota. (Appendix ("App.") at 4). On August 14, 2013, a Uniform Traffic Complaint and Summons was filed in the district court informing Mr. Fetch that he was standing accused of the charge of DUI. (App. 4).

[¶5] On October 4, 2013, Mr. Fetch filed a Motion to Suppress Evidence, and asked the trial court to suppress the results of his blood 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. 5-22). On October 8, 2013, the State filed a response brief opposing suppression and argued that Mr. Fetch had consented to the blood draw. (App. 23-24).

[¶6] An evidentiary hearing was held on December 6, 2013, and the trial court allowed the parties to submit post-hearing briefs. (App. 25). On December 11, 2013, the State submitted a post-hearing brief. (App. 26-28). On December 20, 2013, Mr. Fetch filed a post-hearing brief. (App. 29-37). On January 31, 2014, the trial court denied Mr. Fetch's Motion to Suppress Evidence, relying heavily on a controversial Minnesota case,

State v. Brooks, 838 N.W.2d 563 (Minn. 2013), and exclusively on Fifth Amendment analysis. (App. 38-41).

[¶7] On March 26, 2014, Mr. Fetch 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 January 31, 2014, Order denying the motion to suppress evidence. (App. 42-44). On March 26, 2014, the Court approved the conditional plea of guilty and entered a Criminal Judgment. (App. 45-47).

[¶8] On April 10, 2014, Mr. Fetch filed a Notice of Appeal to this Court. (App. 48-49). Fetch appeals and argues that he did not voluntarily consent to the blood draw and therefore the warrantless blood test was performed without any 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. Mr. Fetch 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. Fetch's conditional guilty plea, and order the suppression of the results of the blood test.

[¶9] STATEMENT OF THE FACTS

[¶10] On August 3, 2013, Trooper Arndt of the North Dakota Highway Patrol stopped Jeff Fetch for speeding. (Suppression Hearing Transcript ("Tr.") at 4, lines ("L.") 18-21). The trooper ultimately arrested Jeff for DUI, handcuffed him, placed him in the backseat of the patrol car, and then read him the new implied consent advisory. (Tr. at 12, L. 5-13).

[¶11] After arresting Jeff and informing him that he would be charged with DUI, the trooper told Jeff that he needed to provide a blood sample. (Tr. at 27, L. 3-4). The trooper did not ask for Jeff's consent; instead, he told Jeff: [Y]ou have consented to taking a test." (App. 16) (Exhibit B, Transcript of Traffic Stop, (hereinafter "B.") at 6, L. 11-12). Fetch asked the trooper repeatedly: "Do we have to do a blood test? … I literally don't like needles." (App. 12) (B. at 2, L. 13-20). However, the trooper demanded a blood draw.

[¶12] The trooper informed Jeff of the implied consent advisory and the following exchange ensued:

"ARNDT: I'm going to read something. It's kind of long. As a condition of operating a motor vehicle on a highway or public or private area --

FETCH: Okay.

ARNDT: -- which the public has right of access to --

FETCH: Okay.

ARNDT: -- <u>you have consented</u> to taking a test to determine whether you are under the influence of alcohol or drugs.

FETCH: Okay.

ARNDT: I must inform you that North Dakota law requires you to take a breath screen test to determine if you're under the influence of alcohol.

FETCH: Do I have to take that test?

ARNDT: No, you did take a breath screen test.

FETCH: Would I have to take that test?

ARNDT: <u>It requires you to</u>.

FETCH: It requires me to. Otherwise, <u>if I said no, I'd have to go to jail</u>?

ARNDT: <u>Correct</u>.

FETCH: Okay.

ARNDT: And you'd get charged.

FETCH: Okay.

ARNDT: You're going to jail anyway. I mean –

…

ARNDT: North Dakota law requires you to submit to a chemical test --

FETCH: Okay.

ARNDT: -- to determine whether you're under the influence of alcohol or drugs.

FETCH: No chemical test.

ARNDT: The chemical test is --

FETCH: A urine test?

ARNDT: -- a blood test.

FETCH: Okay. I literally -- I literally have a phobia of hypodermic needles condition. Trust me.

…

FETCH: I can't do it. I'll literally -- … I'm not going to take a blood test because I can't handle it."

(App. 16-17) (B. at 6, L. 5 – 7, L. 20). After Jeff told the trooper that he was not taking the blood test, the trooper responded:

"ARNDT: Hear me out, hear me out, okay? Refusal to take the test --

FETCH: Okay.

ARNDT: -- as directed by a law enforcement officer --

ARNDT: -- is a crime punishable --

FETCH: What?

ARNDT: -- in the same manner as DUI –

FETCH: What if I have a fear of it?

ARNDT: -- and includes being arrested. Doesn't matter."

…

FETCH: What if I -- I already took the breathalyzer.

ARNDT: That doesn't count. It's required."

(App. 17-18) (B. at 7, L. 21 – 8, L. 20). Jeff then asked the trooper:

"FETCH: Okay, so if I -- if I negate the blood test, then what happens?

ARNDT: Then you're going to get charged for refusing a test.

…

FETCH: How is it an option if people refuse it and it causes you …

ARNDT: I hear -- hey, I -- I know what you're saying … "

(App. 19) (B. at 9, L. 5-14).

[¶13] At the suppression hearing, Jeff testified that the trooper instructed him that he needed to provide a blood test. (Tr. at 27, L. 3-4). Jeff also testified that the trooper threatened him with being arrested and charged with another crime if he refused the blood test and, therefore, he provided the blood sample because he did not want to be charged with a crime. (Tr. at 27, L. 11 – 28, L. 12). Jeff testified that he felt compelled to submit to the blood test and that he believed that he had no choice but to submit to the blood test or he would be charged with a crime. (Tr. at 29, L. 13-16). Jeff testified:

> "The entire time I didn't feel like I had a choice, because I told him that I did not want to take the test, and I didn't feel like I had a choice. He said that it was a crime if I didn't."

(Tr. at 29, L. 13-16). Jeff also testified:

> "At that point I didn't really think I had an option. It was -- I just had to take the test. I didn't feel like I had the right or ability to refuse the test. He didn't say anything about me being able to refuse the blood test."

(Tr. at 28, L. 13-21).

[¶14] At the suppression hearing, when the trooper was asked whether he told "Jeff that if he didn't take the test he would go to jail," he responded: "I will say that I've never told anybody that." (Tr. at 13, L. 4-13) (emphasis added). This perjurious testimony conflicts with the video and the transcript from the video wherein the trooper clearly informs Fetch that he will go to jail and be charged with a crime is he refuses the test. (App. 16-17) (B. at 6, L. 19 – 7, L. 2). The trooper also testified: "I don't think I have ever said to somebody that they would have to … [go] to jail" if they refused. (Tr. at 14, L. – 15, L. 1). This too was demonstrably false testimony.

[¶15] The trooper testified that he did not recall if Fetch told him that he was not going to take the blood test. (Tr. at 15, L. 13-15). The trooper also testified that he does not know if Jeff's alleged consent was recorded on video or audio, that he does not know when Jeff allegedly consented, and that he does not know if Jeff consented in the car, in front of the nurse, or at the detention center. (Tr. at 21, L. 13 – 22, L. 20).

[¶16] The trooper testified that "the stop in this case was 1:26 a.m.," and the arrest and the implied consent "was at 1:41" a.m. (Tr. at 19, L. 24 – 20, L. 9). The trooper agreed that he "still had one hour and 45 minutes" to obtain a chemical test within the statutory two-hour time period and testified that he "didn't even attempt to get a search warrant to do a blood draw." (Tr. at 20, L. 10-19).

[¶17] STANDARD OF REVIEW

[¶18] "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.*

[¶19] "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.*

[¶20] LAW AND ARGUMENT

I. Mr. Fetch did not voluntarily consent to the blood draw in this case and, therefore, the warrantless search was performed without any 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; accordingly, the test result must be suppressed

[¶21] 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).

[¶22] 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 clarified the largely misapplied jurisprudence in DUI chemical testing and 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 and there is no per se DUI exception to the warrant requirement.

[¶23] 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 blood-testing in this case.

[¶24] In the case at hand, the trooper told Fetch that North Dakota law required him to take a blood test and that if he did not take the blood test, he would go to jail and be charged with another crime, in addition to DUI. (App. 16-17) (B. at 6, L. 5 – 7, L. 20). The trooper also informed Fetch that he would be arrested if he refused to take the test. (App. 17-18) (B. at 7, L. 21 – 8, L. 20). Through the trooper's advisory, Mr. Fetch was given the choice of waiving his Fourth Amendment rights or being charged with another crime. Mr. Fetch 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. Fetch was about to be released on bond, which would have

subjected him to being re-arrested on a refusal charge upon refusing and then posting bond for the DUI charge.

[¶25] Despite this coercive factual backdrop, the State argues that Jeff's submission to the blood test evidences voluntary consent. But, can it really be voluntary consent if the driver is threatened with arrest, being charged with a crime, and potential imprisonment if he doesn't perform the tests? What realistic choice does the driver have in the matter?

[¶26] The State contends that Jeff consented to the blood test. However, "to 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.

[¶27] Here, the trooper could not testify as to when Mr. Fetch consented, he does not know where Mr. Fetch consented, he does not know who Fetch gave consent to, and he does not know if any digital evidence exists to support the assertion that Fetch consented. Consent must be definite. This is not definite.

[¶28] In our case, the trooper told Jeff: "you have consented to taking a test;" then threatened Jeff with arrest and a new criminal charge after Jeff told the officer: "I'm not going to take a blood test." (Tr. at 6, L. 11-12) and (Tr. at 7, L. 19-20). This does not sound, smell, or taste like consent. "Consent must be received, not extracted." *See State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

[¶29] "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. After Jeff told the trooper that he didn't want to do the blood draw, Jeff was threatened with arrest on a refusal charge if he didn't submit to testing (upon refusal, Jeff would have been subject to re-arrest). "Consent" obtained in this manner cannot be labeled voluntary.

[¶30] At the suppression hearing, when the trooper was asked whether he told "Jeff that if he didn't take the test he would go to jail," he responded: "I will say that I've never told anybody that." (Tr. at 13, L. 4-13) (emphasis added). However, the video evidence and the transcript from the traffic stop in this case (Exhibit B) show the trooper was not truthful.

[¶31] In the case at hand, Mr. Fetch's submission to blood-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. Fetch was threatened and coerced into providing a blood sample after he told the trooper he would not provide a blood sample, there was no voluntary consent to chemical testing in this case. "[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 blood

draw in this case made the extraction of Fetch's blood an unreasonable search for evidence.

[¶32] The State argued below that threatening with arrest, additional charges, and potential jail time does not constitute coercion. If the State is right, then where does the line of coercion begin? Does threatening arrest and charging out an additional crime that is punishable with jail time for refusing a test constitute coercion? I think most courts would believe so. The driver, like in our case, is not in a position to bargain. Fetch was handcuffed in the backseat of a locked quad car. He did not have a seat at the bargaining table. Like any individual told by law enforcement to do something or face arrest, jail, and criminal prosecution, Fetch complied.[1] "Mere acquiescence to police authority is insufficient to show consent." *See Mitzel*, 2004 ND 157 at ¶16.

[¶33] Mr. Fetch understands that this Court has to draw jurisprudential lines. It seems, from a visceral standpoint, that threatening arrest and an additional crime crosses the line. On the other hand, threatening a driver with a driver's license suspension does not seem to cross the line. Indeed, the *McNeely* court seemed to endorse driver's license suspensions as a "legal tool" for states to "enforce their drunk-driving laws and to secure BAC evidence <u>without undertaking warrantless nonconsensual blood draws</u>." *See Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013) (emphasis added).

[¶34] However, the *McNeely* court did not endorse the type of implied consent statute that threatens criminal prosecution, like the one in North Dakota. The United States Supreme Court has never endorsed an implied consent statute that criminalizes a

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[1] Most folks are subject to being charged with Physical Obstruction of a Government Function, under N.D.C.C. § 12.1-08-01, if they do not comply with a directive or command of a law enforcement officer.

refusal or threatens prosecution for failure to submit to a chemical test. 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 v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (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.

[¶35] 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. Fetch argues that this reasoning is entirely off-point and flawed.

[¶36] 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 not condone being threatened with arrest and a separate crime for refusing chemical testing, and *Neville* is not on point with our issue.

[¶37] In fact, under Fifth Amendment analysis, the high court has said that it violates the Fifth Amendment to require an individual to choose "between self-incrimination or job forfeiture" (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.

[¶38] Also, in *New Jersey v. Portash*, the United States Supreme Court ruled that requiring a witness, under a grant of legislative immunity, to choose between waiving his Fifth Amendment rights and testifying or facing a contempt charge is coercive. *See New Jersey v. Portash*, 440 U.S. 450, 459, 99 S.Ct. 1292, 1297 (1979). In

our case, making a person chose between waiving his Fourth Amendment rights or being arrested and charged with another crime, in addition to DUI, which carries the possibility of prison time, is at least as coercive as the "choices" in *Garrity* and *Portash*.

[¶39] 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").

[¶40] 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").

[¶41] 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.

[¶42] One has to wonder why the United States Supreme Court vacated all three (3) of Brooks' convictions and remanded with instructions to analyze the Fourth Amendments challenges over again with the wisdom of *McNeely,* if the high court thought Minnesota's reasoning was sound. *See Brooks v. Minnesota*, 133 S.Ct. 1996 (2013). Then, instead of performing a Fourth Amendment analysis under *McNeely*, like instructed, one justice of the Minnesota Supreme Court in *Brooks* conducted a flawed Fifth Amendment exercise and blazed a treacherous legal path down a mountainside, with no relevant supporting case law to break its fall.

[¶43] Mr. Fetch 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) and to compare with *New Jersey v. Portash*, 440 U.S. 450, 99 S.Ct. 1292 (1979). If we are going to perform our analysis on a Fifth Amendment playing field, then *Garrity* is much more on point than *Neville*. The *Garrity* court certainly would have found that requiring a person to choose between forfeiting Fourth Amendment rights and being charged with a crime constitutes 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).

[¶44] Since Mr. Fetch did not voluntarily consent to the blood test search, there was no exception to the warrant requirement. Mr. Fetch's blood 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.

[¶45] "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 blood sample from Mr. Fetch. "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. Fetch's blood test result must be suppressed.

[¶46] CONCLUSION

[¶47] For the foregoing reasons, Mr. Fetch 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. Fetch's conditional guilty plea, and order the suppression of the results of the blood test.

Respectfully submitted
this 27th day of May, 2014.

/s/ *Dan Herbel*

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[¶48] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 27, 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 Lea Wilson, counsel for Appellee, at the following:

Electronic filing TO: "Lea Wilson" < bc08@nd.gov >

Dated this 27th day of May, 2014.

/s/ *Dan Herbel*

_____

Dan Herbel