20140327

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff/Appellee,
v.
Jonathan Kordonowy,
Defendant/Appellant.

Supreme Court No. 20140327

BRIEF OF AMICUS CURIAE NORTH DAKOTA ATTORNEY GENERAL

APPEAL FROM THE SEPTEMBER 4, 2014, JUDGMENT OF THE BURLEIGH COUNTY DISTRICT COURT AND THE AUGUST 27, 2014, ORDER OF THE BURLEIGH COUNTY DISTRICT COURT DENYING THE DEFENDANT/APPELLANT'S MOTION TO FIND N.D.C.C. § 39-08-01(1)(e) UNCONSTITUTIONAL

BURLEIGH COUNTY DISTRICT COURT

THE HONORABLE CYNTHIA M. FELAND, PRESIDING

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[¶4] Article I, section 8 of the North Dakota Constitution does not afford greater rights to offenders who violate N.D.C.C. § 39-08-01(1)(e) than the Fourth Amendment of the United States Constitution.

[¶5] N.D.C.C. § 39-08-01(1)(e) is not unconstitutionally vague.

[¶6] FACTUAL SUMMARY

[¶7] The Amicus asserts: (1) there was a legal traffic stop of Kordonowy; (2) there was probable cause to believe Kordonowy was operating a motor vehicle while under the influence of alcohol; (3) Kordonowy was asked to submit to roadside sobriety testing; (4) Kordonowy was read the implied consent advisory; (5) Kordonowy was requested to submit to on-site breath testing; (6) Kordonowy was placed under arrest for driving under the influence of alcohol; (7) Kordonowy was read the implied consent advisory; (8) Kordonowy was requested to submit to chemical testing; and (9) Kordonowy refused to submit to the test.

[¶8] LAW AND ARGUMENT

[¶9] 1. Standard of review of constitutional claims.

[¶10] N.D.C.C. § 39-08-01(1)(e) is presumptively constitutional. N.D.C.C. § 1-02-38(1). "The presumption of constitutionality is so strong that a statute will not be declared unconstitutional 'unless its invalidity is, in the judgment of the

court, beyond a reasonable doubt.'" MCI Telecomms. Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994).

[¶11] Statutes must be construed to avoid constitutional conflicts and, if a statute may be construed two ways, one that renders it of doubtful constitutionality and one that does not, a construction must be adopted that avoids the constitutional conflict. Ash v. Traynor, 1998 ND 112, ¶ 7, 579 N.W.2d 180.

[¶12] 2. The Amicus Curiae's interest in preventing alcohol-impaired driving.

[¶13] Supreme Court Justice Sotomayor wrote about the impaired-driving problem in the United States:

> "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). Certainly we do not. While some progress has been made, drunk driving continues to exact a terrible toll on our society. See NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes).

Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552, 1565 (2013).

[¶14] The Supreme Court wrote thirty years before McNeely:

> The situation underlying this case–that of the drunk driver–occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed. 2d 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); Tate v. Short, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); Perez v.

> Campbell, 402 U.S. 637, 657 and 672, 91 S.Ct. 1704, 1715 and 1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); Mackey v. Montrym, 443 U.S. 1, 17-18, 99 S.Ct. 2612, 2620-2621, 61 L.Ed.2d 321 (1979) (recognizing the "compelling interest in highway safety").

South Dakota v. Neville, 459 U.S. 553, 558-59 (1983).

[¶15] 3. N.D.C.C. § 39-08-01(1)(e) does not violate the Fourth Amendment of the United States Constitution or article I, section 8 of the North Dakota Constitution.

[¶16] "[T]he criminal process often requires suspects and defendants to make difficult choices." Neville, 459 U.S. at 564. The State's "offer of taking a blood-alcohol test is clearly legitimate, [therefore,] the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." Id. at 563. Kordonowy's right to refuse chemical testing "is simply a matter of grace bestowed by the . . . legislature." Id. at 565.

[¶17] In Breithaupt v. Abram, 352 U.S. 432, 435-40 (1957), the Court held taking an involuntary blood sample from a driver after he had been involved in an automobile crash that killed three other individuals did not violate the driver's right to due process.

[¶18] The Supreme Court wrote driving under the influence was one of the "mortal hazards of the road," chemical testing "likewise may establish innocence" and avoid the "treachery of judgment based on one or more of the senses," and the driver's right to immunity from the invasion of the body is outweighed by the value of its deterrent effect. Id. at 439-40.

[¶19] In Mackey v. Montrym, 443 U.S. 1 (1979), the Court recognized that chemical testing was "the most reliable form of evidence of intoxication for use in subsequent proceedings," and that test results may lead to the release of the driver without criminal charges. 443 U.S. at 19.

[¶20] a. There is a legislative preference for implied consent testing.

[¶21] Under Schmerber v. California, 384 U.S. 757 (1966), law enforcement may obtain a blood sample from an individual pursuant to a search incident to arrest, regardless of the individual's consent under two conditions: (1) there must be a clear indication evidence of blood-alcohol concentration will in fact be found by the search; and (2) the blood test must be performed in a reasonable manner. State v. Mertz, 362 N.W.2d 410, 413 (N.D. 1985).

[¶22] This Court stated the state Legislature in effect modified Schmerber by enacting an implied consent statute, N.D.C.C. § 39-20-04, that grants drivers in North Dakota the right to refuse to submit to blood-alcohol tests. "If a person refuses to submit to testing under section 39-20-01 or 39-20-14, none shall be given, ..." Mertz, 362 N.W.2d at 413.

[¶23] "The operator of a motor vehicle on a highway or area to which the public has a right of access for vehicular use is deemed to have consented to a chemical test to determine the alcohol content of his blood if arrested for driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor. N.D.C.C. § 39-20-01." State v. Murphy, 527 N.W.2d 254, 255 (N.D. 1995). "[C]onsent to testing is presumed.'" Pokrzywinski v. Director, North Dakota Dep't of Transportation, 2014 ND 131, ¶ 15, 847 N.W.2d 776.

[¶24] "[T]he officer [shall] advise the person about implied consent and inform the person of the severe consequences of refusing to consent to testing . . . ." State v. Salter, 2008 ND 230, ¶ 7, 758 N.W.2d 702. "[I]mplied consent occurs at the time an individual operates a motor vehicle. If an individual is subsequently stopped and read the implied consent advisory, the driver has the choice at that point whether to withdraw or ratify the consent." McCoy v. North Dakota Dep't of Transportation, 2014 ND 119, ¶ 23, 848 N.W.2d 659.

[¶25] In Krehlik v. Moore, 542 N.W.2d 443 (N.D. 1996), this Court discussed implied consent testing:

> In Lund, we recognized that the purpose of chapter 39-20, NDCC, was "to eliminate the drunken driver from the highways by requiring drivers suspected of operating motor vehicles while under the influence of intoxicating liquor to submit to a chemical test to determine the alcoholic content of their blood." Although we realize that the Legislature has modified the implied consent statutes, the purpose of chapter 39-20, NDCC, has not changed since Lund. The two-hour limitation in section 39-20-04.1, NDCC, may narrow the reasonable period of time within which the person arrested may change his or her mind, but it does not refute the underlying rationale of Lund. We continue to interpret the implied consent laws "consistent[ly] with the legislature's desire for suspects to choose to take the test." Since Lund, the Legislature has magnified the ramifications for refusing to submit to testing. . . . These changes reflect the Legislature's desire for testing.

542 N.W.2d at 445-46 (citations omitted).

[¶26] "North Dakota, like other states, has continued to increase penalties and enact tougher laws in response to the carnage on our nation's highways." State v. Smith, 2014 ND 152, ¶ 8, 849 N.W.2d 599.

[¶27] b. DUI chemical testing under the implied consent laws is not an unlawful search and seizure.

[¶28] "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Schmerber, supra, at 768, 86 S.Ct. 1826. "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"

Maryland v. King, 133 S.Ct. 1958, 1969 (2013) (emphasis added) (upholding warrantless DNA sample collection from felony arrestees).

[¶29] A warrant is not necessary if the subject of the search consents to a search. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). "Consent and exigent circumstances are exceptions to the warrant requirement." Hoover v. Dir., N.D. Dep't of Transp., 2008 ND 87, ¶ 15, 748 N.W.2d 730.

[¶30] There is implied consent and there is actual consent under North Dakota's implied consent statutes. The implied consent statute "'does not apply when a person voluntarily consents to chemical testing.'" Smith, 2014 ND 152, ¶ 12, 849 N.W.2d 599 (quoting McCoy, 2014 ND 119, ¶ 13, 848 N.W.2d 659).

[¶31] This Court agreed with the Minnesota Supreme Court in State v. Brooks, 838 N.W.2d 563 (Minn. 2013), a post-McNeely decision, on the issue of coercion because of the criminalization of refusal and determined the criminalization of refusal is not coercive. McCoy, 2014 ND 119, ¶¶ 19-20, 848 N.W.2d 659. Next, in Smith, the court noted that while the level of penalty had increased from the administrative penalty involved in McCoy to a criminal penalty, that did not change the court's analysis. Smith, 2014 ND 152, ¶¶ 16-21, 849 N.W.2d 599 ("Smith could have refused but was informed that refusal is a crime that could

result in a revocation of his driving privileges. Smith was still offered a choice . . . Smith's consent was voluntary . . . .").

[¶32] "While the voluntariness of consent is decided from the totality of the circumstances, submitting to a blood alcohol test is not rendered involuntary merely by an officer fairly giving the implied consent advisory including the criminal penalty for refusing to take the test." Id. at ¶ 24. See also State v. Boehm, 2014 ND 154, 849 N.W.2d 239.

[¶33] c. There is no constitutional right to refuse chemical testing.

[¶34] "There is no Federal constitutional right to be entirely free of intoxication tests," State v. Murphy, 516 N.W.2d 285, 287, n.1 (N.D. 1994) (citing Schmerber) (blood test taken against defendant's will did not violate due process under the Fourteenth Amendment, right against self-incrimination under Fifth Amendment, right to counsel under Sixth Amendment, and right from unlawful search and seizures under Fourth Amendment).

[¶35] "Allowing drivers to refuse testing is a matter of legislative grace." Murphy, 527 N.W.2d at 255-56 (citing Neville, 459 U.S. at 559-60). "A state may, therefore, attach penalties to a driver's choice to refuse testing." Murphy, 527 N.W.2d at 256.

[¶36] Refusal is only statutory in other states. See, e.g., State v. Hoover, 916 N.E.2d 1056, 1060 (Ohio 2009) ("Following Schmerber, we held that '[o]ne accused of intoxication has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication.'"); State v. Turner, 644 N.W.2d 147, 150 (Neb. 2002) ("[A] suspect's right to refuse a chemical test is a matter governed

purely by statute."); Commonwealth v. Hernandez-Gonzalez, 72 S.W.3d 914, 917 (Ky. 2002) ("[O]ne who refuses will not be physically forced to submit to a chemical test. It does not mean that such person has a lawful right to refuse such testing.").

[¶37] Other states that have either criminalized refusal or have enhanced sentencing by imposing jail time for refusal to submit to chemical testing include: Alaska, AS § 28.35.032; California, CAL. VEH. CODE § 23577(a); Hawaii, HAW. REV. STAT. ANN. § 291e-68; Kansas, KAN. STAT. ANN. § 8-1025; Louisiana, LA. REV. STAT. ANN. § 14:98.2(B)(1); Maine, ME. REV. ST. ANN. § 29-A 2411(5)(A)-(D); Maryland, MD CODE ANN. TRANS. § 27-101(x)(3); Minnesota, M.S.A. § 169A.20, subd. 2.; Mississippi, MISS. CODE ANN. §§ 63-11-21, 63-11-30(2); Ohio, R.C. 4511.19(A)(2); Pennsylvania, 75 PA. CONS. STAT. ANN. § 3804(c); Rhode Island, R.I. GEN. LAWS § 31-27-2.1(b); Tennessee, TENN. CODE ANN. § 55-10-406; Vermont, VT. STAT. ANN. tit. 23, §§ 1201(b), § 1202(d)(6); Virginia, V.C.A. § 18.2-268.3.

[¶38] Virginia has attached criminal consequences to refuse to submit to chemical testing. See V.C.A. § 18.2-268.3. Virginia recognizes the general rule a search authorized by consent is valid: "The general rule applies here because Rowley, like all drivers, consented to submit breath samples by exercising the legal privilege of driving on the Commonwealth's roads." Rowley v. Commonwealth, 629 S.E.2d 188, 191 (Va. App. 2006). "The act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample. *See* Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1450

(9th Cir. 1986) (holding that there 'is no Fourth Amendment right to refuse a breathalyzer examination')." Rowley, 629 S.E.2d at 191. "We also find no Fourth Amendment violation in punishing a DUI suspect for refusing to provide a breath sample under Code § 18.2-268.3." Id. (emphasis added).

[¶39] Burnett involved a similar Fourth Amendment claim. Alaska criminalizes refusal to submit to chemical testing. See AS § 28.35.032. The Ninth Circuit held there is no Fourth Amendment right to refuse to submit to testing. Burnett, 806 F.2d at 1450. "No rights were relinquished here, however, because there is no Fourth Amendment right to refuse a breathalyzer examination." Id. McNeely did not overrule Burnett.

[¶40] Ohio enhances sentencing, including jail time, for refusal to submit to chemical testing. Ohio's Supreme Court upheld the constitutionality of Ohio's criminal penalty for refusal, R.C. 4511.19(A)(2), stating, "Hoover has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication." State v. Hoover, 916 N.E.2d at 1061. The court also held Ohio's refusal statute does not violate the Fourth Amendment or section 14, article I of the Ohio Constitution. Hoover, 916 N.E.2d at 1062.

[¶41] The Minnesota Court of Appeals held M.S.A. § 169A.20, subd. 2, which criminalizes refusal to submit to chemical testing, does not violate the driver's Fourth Amendment rights. State v. Mellett, 642 N.W.2d 779, 785 (Minn. App. 2002). In a later unpublished opinion, Minnesota's court of appeals found M.S.A. § 169A.20, subd. 2, is constitutional under the Fourth Amendment. "The state has a compelling interest in protecting its residents from drivers impaired by

alcohol, and the statutory framework of implied consent set forth in Minn. Stat. § 169A.20, subd. 2, is a reasonable means to accomplish that objective." State v. Schwichtenberg, 2006 WL 463865 (Minn. App. 2006).

[¶42] Minnesota's refusal statutes have been upheld against very similar Fourth Amendment arguments in at least five post-McNeely refusal cases, State v. Bernard, 844 N.W.2d 41 (Minn. App. 2014); State v. Isaacson, 2014 WL 1271762 (Minn. App., March 31, 2014) (unpublished opinion); State v. Manska, 2014 WL 1516316 (Minn. App., April 21, 2014) (unpublished opinion); State v. Johnson, 2014 WL 2565771 (Minn. App., June 9, 2014) (unpublished opinion); and State v. Chasingbear, 2014 WL 3802616 (Minn. App., August 4, 2014) (unpublished opinion). Isaacson, Manska, Johnson, and Chasingbear specifically recognize the Supreme Court's description of implied consent laws in McNeely as one of the states' "broad range of legal tools to enforce their drunk-driving laws and to secure [blood alcohol concentration] evidence without undertaking warrantless nonconsensual blood draws." McNeely, 133 S.Ct. at 1566.

[¶43] Kordonowy cites Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967). Kordonowy Brief at ¶¶ 26, 30-33, 35-36, 43-45. He also cites See v. City of Seattle, 387 U.S. 541 (1967). Kordonowy Brief at ¶ 35. In Camara and See, the Supreme Court held the Fourth Amendment precluded the state from prosecuting property owners for refusing to allow building inspectors to enter real property without a warrant. He also argues, "[d]rivers, like homeowners, have a right to refuse testing until presented with a search warrant" and he cites Bumper v. North Carolina, 391 U.S. 543 (1968), to

support his statement. Kordonowy Brief at ¶ 34. He concludes, "[w]hen jurisprudence adds Camara plus McNeely, the sum of that math is . . . that neither the homeowner nor the human may 'constitutionally be convicted for refusing to consent to the inspection.'" Kordonowy Brief at ¶ 36.

[¶44] There are significantly distinguishing factors in the present case. First of all, sixteen years after the Supreme Court held there was a constitutional right to refuse an inspector's non-emergency warrantless request to enter onto property, the Supreme Court held a drunk driver's right to refuse a blood alcohol concentration test "is simply a matter of grace bestowed by the [state] legislature" – it does not arise from the Constitution. Neville, 459 U.S. at 565.

[¶45] Next, Kordonowy, as the driver of a motor vehicle, has already granted implied consent to submit to chemical testing. North Dakota law imposes the implied consent laws on every driver. McNeely recognized the implied consent laws as legal tools – drivers have to accept the difficult choice to either submit to chemical testing upon request by law enforcement or be subject to "significant consequences when a motorist withdraws consent" to chemical testing. McNeely, 133 S.Ct. at 1566. Prior to stopping a vehicle and conducting the investigation which led to an arrest, the officer is required to have reasonable and articulable suspicion the driver was violating the law. Salter v. N.D. Dep't of Transp., 505 N.W.2d 111 (N.D. 1993). Further, in order to charge an individual with a violation of section 39-08-01, the arresting officer must have probable cause to believe the driver has committed a crime. State v. Berger, 2004 ND 151, 683 N.W.2d 897. The arresting officer had probable cause to believe

Kordonowy had committed a crime. In Camara and See, there was no probable cause to believe the property owners had committed a crime. Finally, a driver is placed under arrest before being asked to submit to chemical testing. Kordonowy was under arrest when asked to submit to chemical testing. The property owners in Camara and See were not under arrest when inspectors asked to do a search of their properties.

[¶46] In Bumper, the Supreme Court held the state could not prove consent to a search was voluntary when it showed "no more than acquiescence to a claim of lawful authority." 391 U.S. at 548-49. Brooks also distinguished Bumper because of Minnesota's implied consent law, namely that if an individual refuses the test, law enforcement must honor the refusal and not require the test. Brooks, 838 N.W.2d at 571.

[¶47] Kordonowy cites Ferguson v. City of Charleston, 532 U.S. 67 (2001), and quotes from the syllabus. Kordonowy Brief at ¶ 28. Ferguson is inapposite. A state hospital conducted suspicion-less drug tests of obstetric patients and submitted the results to law enforcement without their knowledge or consent. The issue of coerced consent was not before the Court.

[¶48] This Court reviewed the implied consent advisory in which law enforcement advises drivers refusal to submit to testing is a crime in Smith:

> There has been no change, however in a person's statutory right to refuse to take the test. "If a person refuses to submit to testing under section 39-20-01 . . . none may be given. . . ." N.D.C.C. § 39-20-04. The North Dakota Legislative Assembly created a statutory right to refuse, but that refusal comes with consequences. "[A] driver may not refuse testing to avoid the potential consequences of test submission and to avoid the penalties of refusal by remaining ambivalent." McCoy, 2014 ND 119, ¶ 12, 848

> N.W.2d 659. The implied consent law "does not apply when a person voluntarily consents to chemical testing." Id. at ¶ 13.

Smith, 2014 ND 152, ¶ 9, 849 N.W.2d 599.

[¶49] Kordonowy only has a conditional statutory right to refuse a chemical test. While McNeely may have narrowed the parameters of legislative grace because it declined to except a per se exigency based on the natural dissipation of alcohol in the blood, Smith, 2014 ND 152, ¶ 13, 849 N.W.2d 599, only legislative grace, not a constitutional right, allows a driver to refuse to submit to reasonable chemical testing.

[¶50] 4. Section 39-08-01(1)(e) is not unconstitutionally vague.

[¶51] Kordonowy must demonstrate N.D.C.C. § 39-08-01(1)(e) is vague as applied to his own conduct without regard to its potentially vague application in other circumstances. Parker v. Levy, 417 U.S. 733, 756 (1974).

[¶52] "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975).

[¶53] A statute does not require "meticulous specificity," but may instead be marked by "flexibility and reasonable breadth." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

[¶54] This Court must apply a two-part test: (1) the statute must provide adequate notice of the proscribed conduct; and (2) the statute must not lend itself to arbitrary enforcement. Kolender v. Lawson, 461 U.S. 352, 355, 358 (1983).

[¶55] Ordinary people should understand what conduct is prohibited. Id. at 357. "[L]aws [must] give the person of ordinary intelligence a reasonable opportunity

to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108.

[¶56] "[The] inquiry looks at what a person of 'common intelligence' would 'reasonably' understand the statute to proscribe, not what [Kordonowy] understood the statute to mean." United States v. Washam, 312 F.3d 926, 930 (8th Cir. 2002).

[¶57] N.D.C.C. § 39-08-01(1)(e) provides adequate notice to Kordonowy that refusal to submit to chemical testing is a crime. Kolender, 461 U.S. at 355. There is nothing that lends to arbitrary enforcement. Id. at 358. Peace officers, prosecutors, and juries are not allowed to pursue their "personal predilections" to enforce N.D.C.C. § 39-08-01(1)(e). Id.

[¶58] Kordonowy fails to prove N.D.C.C. § 39-08-01(1)(e) is unconstitutionally void for vagueness as applied to him.

[¶59] 5. Kordonowy is not entitled to greater protection under article I, section 8 of the North Dakota Constitution than under the Fourth Amendment.

[¶60] Kordonowy provides no authority why in a DUI case when there is an implied consent to submit to chemical testing, when there is probable cause to believe he committed the crime of DUI, and when he has been placed under arrest, and if he refuses to submit to testing, no test may be taken, that he should have more constitutional protection than searches in other cases. He already has procedural protection if he chooses to not submit to chemical testing – in that event no test may be taken – there is no reason for greater protection.

[¶61] Kordonowy cites N.D.C.C. §§ 12.1-05-07.1(1) and (3)(d) and 39-20-04, but his explanation why they result in greater protection under the state constitution than under the Fourth Amendment is absent persuasive authority. See Kordonowy Brief at ¶¶ 55, 56.

[¶62] The Fourth Amendment and article I, section 8 are not disrupted by criminalizing refusal to submit to chemical testing. Kordonowy is protected against an unreasonable search and seizure. If he refuses and withdraws his implied consent, a test may not be conducted without a warrant. But if he ratifies his implied consent by consenting to the search, the exception to the search warrant exists and a peace officer may conduct chemical testing.

[¶63] CONCLUSION

[¶64] For the above reasons, this Court should uphold the constitutionality of section 39-08-01(1)(e).

Dated this 17th day of December, 2014.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, v. Jonathan Kordonowy, Defendant/Appellant.	)	**AFFIDAVIT OF SERVICE BY MAIL** Supreme Court No. 20140327

. . . . . .

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Peggy A. Brunelle states under oath as follows:

[¶1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶2] I am of legal age and on the 17th day of December, 2014, I served the attached BRIEF OF AMICUS CURIAE upon Dan Herbel and Alexander Stock by placing true and correct copies thereof in envelopes addressed as follows:

MR DAN HERBEL
ATTORNEY AT LAW
THE REGENCY BUSINESS CENTER
3333 E BROADWAY AVE STE 1205
BISMARCK ND 58501-3386

MR ALEXANDER STOCK
BURLEIGH COUNTY ASSISTANT STATES ATTORNEY
514 E THAYER AVE
BISMARCK ND 58501-4413

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Peggy A. Brunelle

Peggy A. Brunelle

Subscribed and sworn to before me
this 17th day of December, 2014.

Vanessa K Kroshus

NOTARY PUBLIC

VANESSA K. KROSHUS
Notary Public
State of North Dakota
My Commission Expires June 12, 2020