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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

DEC 18 2018

STATE OF NORTH DAKOTA

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SUPREME COURT NO. 20180350

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State of North Dakota,

Plaintiff and Appellee,

-vs-

Jasmine Ellen Nice,

Defendant and Appellant.

BRIEF OF AMICUS CURIAE

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APPEAL FROM THE CRIMINAL JUDGMENT  
SOUTH CENTRAL JUDICIAL DISTRICT  
BURLEIGH COUNTY CRIM. NO. 08-2018-CR-01291  
THE HONORABLE THOMAS J. SCHNEIDER PRESIDING

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#### Statutes

N.D.C.C. § 1-02-38(1) .....	¶7
N.D.C.C. § 32-23-11 .....	¶4
N.D.C.C. § 39-08-01(1)(e) .....	¶¶4, 6, 9, 12, 13, 17

#### Other Authority

N.D. Const. art. VI, § 4 .....	¶8
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[3] INTEREST OF ATTORNEY GENERAL

[4] The Attorney General of the State of North Dakota has an interest in this action based upon the Appellant, Jasmine Nice's (hereinafter Nice) arguments attacking the constitutionality of North Dakota Century Code (N.D.C.C.) § 39-08-01(1)(e). N.D.C.C. § 32-23-11 permits the Attorney General to be heard in proceedings involving an attack on the validity of a state statute. Since the constitutionality of a state statute is in question, it is appropriate to allow the Attorney General to be heard.

[5] LAW AND ARGUMENT

[6] **Nice fails to prove N.D.C.C. § 39-08-01(1)(e) is unconstitutional beyond a reasonable doubt.**

[7] Nice bears a substantial burden when attempting to prove the unconstitutionality of a state statute. N.D.C.C. § 1-02-38(1) establishes a presumption that, in enacting a statute, compliance with the constitutions of this state and of the United States is intended. "The presumption is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution." In re M.D., 1999 ND 160, ¶ 25, 598 N.W.2d 799. "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) (quoting Menz v. Coyle, 117 N.W.2d 290, 293 (N.D. 1962)).

[8] "A statute carries a heavy presumption of constitutionality. . . . A legislative enactment is conclusively presumed to be constitutional unless it is clearly shown that the act contravenes the state or federal constitution." Caldis v. Board of County Com'rs, Grand Forks County, 279 N.W.2d 665, 669-72 (N.D. 1979). The North Dakota Constitution requires four justices on the Supreme

Court, instead of the usual majority, to find a statute violates the North Dakota Constitution before it may be declared unconstitutional. N.D. Const. art. VI, § 4; Teigen v. State, 2008 ND 88, ¶ 7, 749 N.W.2d 505.

[9] Nice must prove N.D.C.C. §39-08-01(1)(e) is unconstitutional “beyond a reasonable doubt” in order for it to be held invalid. Menz v. Coyle, 117 N.W.2d 290, 295 (N.D. 1962). “In considering the constitutionality of an Act, every reasonable presumption in favor of its constitutionality prevails. Courts will not declare a statute void unless its invalidity is, in the judgment of the court, beyond a reasonable doubt.” Id. (citations omitted); see also In re Craig, 545 N.W.2d 764, 766 (N.D. 1996); MCI Telecomms. Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994).

This stringent burden for establishing unconstitutionality is mandated by the various roles the state constitution assigns to the three branches of our government:

The legislative branch deliberates upon and decides the policies and principles to be adopted for the future and enacts them into law. The executive branch administers the law so enacted. The judicial branch construes the law, passes on its constitutionality, and determines, in accordance with the law, the rights and interests of the individual citizen.

....

Early in the history of this Court, it laid down the rule that:

In passing upon the constitutionality of any statute, there are certain elementary principles of which courts must ever be mindful. . . . We must remember that legislative power is primarily plenary, and that constitutions are not grants of, but restrictions upon, that power. Hence he who would challenge a legislative enactment must be able to specify the particular constitutional provision that deprived the legislature of the power to pass the enactment. We must remember that it is the duty of courts to reconcile statutes with the constitution when that can be done without doing violence to the language of either, and in all cases of doubt the doubt must be resolved in favor of the constitutionality of the statute.

Verry v. Trenbeath, 148 N.W.2d 567, 570 (N.D. 1967) (citations omitted).

[10] Legislation must be construed so as to preserve its constitutionality. Winkler v. Gilmore & Tatge Mfg. Co., 334 N.W.2d 837, 841 (N.D. 1983). When possible, a court must resolve any doubt as to a statute's constitutionality in favor of its validity. State v. Burr, 1999 ND 143, ¶ 9, 598 N.W.2d 147; In re Craig, 545 N.W.2d 764, 766 (N.D. 1996). 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.

[11] To adequately raise a constitutional issue, Nice must submit more than bare assertions – she must also provide persuasive authority and reasoning. Southern Valley Grain Dealers Ass'n v. Board of County Com'rs of Richland County, 257 N.W.2d 425 (N.D. 1977). She must bring the heavy artillery or forego her claims. Riemers v. O'Halloran, 2004 ND 79, ¶ 6, 678 N.W.2d 547; Burr, 1999 ND 143, ¶ 9, 598 N.W.2d 147. "Absent authority and a reasoned analysis to support it, the mere assertion of unconstitutionality is insufficient to adequately raise a constitutional question." N.D. Guaranteed Student Loan Program v. Voigt, 513 N.W.2d 64, 66 (N.D. 1994). Failure to provide supporting authority or analysis is insufficient to raise the constitutional issues in the trial court and precludes the appellant from presenting the question on appeal. Id.

[12] In her brief, Nice appears to make a facial constitutional attack on N.D.C.C. § 39-08-01(1)(e) while also claiming the statute was unconstitutionally applied to her. A distinction exists between a facial constitutional challenge to a statute and a challenge based upon the application of the statute to a party. A statute may meet constitutional standards on its face but an otherwise valid

statute may be unconstitutionally applied to a party under the circumstances of a specific case. See Glaspie v. Little, 1997 ND 108, 564 N.W.2d 651; State v. Knoefler, 279 N.W.2d 658 (N.D. 1979).

[13] This distinction between “facial” and “as applied” attacks on the constitutionality of a statute are important in delineating the response of the Attorney General. The Attorney General appears in this proceeding to support and defend the constitutionality of N.D.C.C. § 39-08-01(1)(e) against a facial constitutional attack. Since an “as applied” constitutional attack is fact-based, the Attorney General’s discussions, if any, regarding these claims are made to address any constitutional issues that may arise that extend to an attack upon the statutory provision itself.

[14] Nice fails to meet this high burden in all respects. Her brief misstates what occurred in her case. Recent case law makes it apparent that an individual cannot be charged with refusal to submit to a warrantless urine test. State v. Helm, 2017 ND 207, ¶ 6, 901 N.W.2d 57. The arguments raised by Nice appear to be made without standing and without an actual constitutional challenge. Nice continually asserts (apparently inaccurately) that she was arrested for refusal to submit to a warrantless urine test. In fact, the underlying court documents show she was originally charged with DUI based on her driving and failed field sobriety testing. She was advised of her rights and asked to submit to chemical testing but wasn’t charged with refusal to submit to a chemical test until after a search warrant was obtained for her urine and she again denied to submit a urine sample. This fact is laid out in the State’s Response to Defendant’s Motion to



Dismiss (dated July 5, 2018). The District Court also noted this in its Order Denying Defendant's Motion to Dismiss (dated July 13, 2018). The court there stated "This is not a case involving a refusal to submit to a warrantless urine test. She refused to provide a urine sample after the warrant was obtained and after Deputy Wohler re-read the implied consent advisory to her. Only then, was she charged with refusal to submit to a chemical test."

[15] Since a search warrant was obtained before Nice being placed under arrest for refusal to submit to a urine test, her claim that the statute is unconstitutional isn't properly asserted. Nice goes on to assert that her refusal to submit a urine sample wasn't a sufficient refusal because the State did not attempt to execute the search warrant. How was the State suppose to do that, try to "force" her to provide a urine sample? Imagine the claims that would be made if that had occurred. Law enforcement obtained a search warrant, asked Nice to provide a urine sample and she refused. Nice was then charged with refusal. Nice's arguments fail in their entirety.

[16] CONCLUSION

[17] Nice has not shown that N.D.C.C. § 39-08-01(1)(e) is unconstitutional. The Attorney General respectfully requests that this Court deny Nice's appeal.

Dated this 18<sup>th</sup> day of December, 2018.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20180350
	)	
Plaintiff and Appellee,	)	
	)	AFFIDAVIT OF SERVICE
-vs-	)	BY MAIL
	)	
Jasmine Ellen Nice,	)	
	)	
Defendant and Appellant.	)	

STATE OF NORTH DAKOTA    )  
  ) ss  
COUNTY OF BURLEIGH        )

Vanessa K. Kroshus 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 18th day of December, 2018, I served BRIEF OF AMICUS CURIAE upon Yancy B. Cottrill and Derek Steiner, by placing true and correct copies thereof in envelopes addressed as follows:

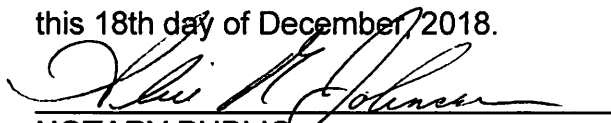
YANCY B COTTRILL  
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BURLEIGH COUNTY ASSISTANT  
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514 E THAYER AVE  
BISMARCK ND 58501

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

  
Vanessa K. Kroshus

Subscribed and sworn to before me  
this 18th day of December, 2018.

  
NOTARY PUBLIC

