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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, Plaintiff/Appellant, v. STEVEN FLOYD HELM, Defendant/Appellee.	)))))))))	Supreme Court No. 20170036 Cass County Case No. 09-2016-CR-01933

AMICUS CURIAE BRIEF OF NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT/APPELLEE AND AFFIRMANCE

State's Appeal from the Order Granting Motion to Dismiss Count 2

dated January 9, 2017, and filed on January 11, 2017

Cass County District Court

East Central Judicial District

The Honorable Frank L. Racek

Dan Herbel
Attorney at Law
ND State Bar ID # 05769
North Dakota Association of
Criminal Defense Lawyers

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

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[¶1] TABLE OF AUTHORITIES

[¶2] AMICUS CURIAE STATEMENT OF IDENTITY AND INTEREST

[¶3] The North Dakota Association of Criminal Defense Lawyers ("NDACDL") is a non-profit corporation in good standing in North Dakota, formed to promote justice and due process for people accused of crimes within the State. NDACDL membership is comprised of both public and private criminal defense attorneys, and the non-profit has vital and inherent interests in the issues raised in this appeal. The NDACDL members and their clients have an intimate, direct, and continuous stake in the interpretation and application of Sections 39-08-01(1)(e) and 39-08-01(2), N.D.C.C., as well as the interplay with the Fourth Amendment to the United States Constitution and Article I, section 8 of the North Dakota Constitution.

[¶4] STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶5] Neither party's counsel authored any portion of this brief. No money was contributed by any party, nor any counsel to party, nor any person, toward the preparation or submission of this brief.

[¶6] INTRODUCTION

[¶7] The North Dakota Association of Criminal Defense Lawyers ("NDACDL"), an interested party, submits this amicus brief in support of the trial court's order granting the Defendant's motion to dismiss. This amicus brief addresses the constitutionality of legislation criminalizing the right to refuse a warrantless search for urine evidence.

[¶8] AMICUS CURIAE STATEMENT OF THE ISSUES

[¶9] Mr. Helm's prosecution, for refusal to submit to chemical urine testing when no exception to the warrant requirement existed, alleging that it was a crime for Helm to refuse an officer's warrantless request for a urine test, is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution.

[¶10] LAW AND ARGUMENT

[¶11] In asking for a reversal, the State argues that "the district court erroneously categorized all urine tests as violating the Fourth Amendment." *See* Appellant's Brief at ¶53. Instead of a categorical rule, the State advocates for a rule of law that analyzes, on a case-by-case basis, whether genitalia was observed. This case-by-case proposal seems horribly subjective, ad hoc, and highly unworkable, and "[t]his argument contravenes [U.S. Supreme Court] decisions holding that the legality of a search incident to arrest must be judged on the basis of categorical rules." *See Birchfield v. North Dakota*, 579 U. S. ___ , 136 S.Ct. 2160, 2179 (2016) (emphasis added).

[¶12] "[I]f police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis--not in an ad hoc, case-by-case fashion by individual police officers.'" *See Riley v. California*, 573 U.S. __, 134 S.Ct. 2473, 2491-92, 189 L.Ed.2d 430 (2014). Therefore, the case-by-case genitalia peek-a-boo rule, propounded by the State, runs afoul of the categorical search incident to arrest exception.

[¶13] Furthermore, it appears this is a urine "refusal" case. So, there was no collection of urine. Any statement as to how an officer would subjectively, on a case-by-case basis, collect urine seems immaterial. There was no collection of urine.

[¶14] The State's reliance on civil "special needs" cases, *Skinner*[1] and *Von Raab*[2], is also not helpful to this Court. Those cases involved suspicionless special needs searches, divorced from law enforcement, where the purpose of the searches were for safety-sensitive employment matters and were specifically excepted out of law enforcement.

[¶15] "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the

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[1] In *Skinner v. Railway Labor Exec. Association*, the United States Supreme Court set out to determine if railroad regulations, that required blood, urine, and breath tests in certain circumstances, violated the Fourth Amendment to the United States Constitution. The regulations in question mandated "blood and urine tests of employees who are involved in certain train accidents" and authorized "railroads to administer breath and urine tests to employees who violate certain safety rules." *See Skinner v. Railway Labor Executive's Association, et al*, 489 U.S. 602, 606, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

[2] In *National Treasury Employees Union v. Von Raab*, decided the same day as *Skinner*, the high court was confronted with the issue of "whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions." *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 659, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). The 1986 drug-testing program implemented by Customs required testing for individuals who applied for, or occupied, positions directly involved in drug interdiction, for individuals who would be carrying a firearm, or for individuals who would be handling classified information. *See id* at 660-61. The *Von Raab* court noted: "Drug interdiction has become the agency's primary enforcement mission, and the Commissioner stressed that "there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs."" *See Von Raab*, 489 U.S. at 660.

Framers." *See New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring). In this case, law enforcement and prosecution are the precise purposes of the search.

[¶16] Recently in *Birchfield v. North Dakota*, 579 U. S. ___ , 136 S.Ct. 2160 (2016), the United States Supreme Court held that criminalizing the refusal of warrantless blood draws is unconstitutional, but that warrantless breath tests may be performed "categorically" as a search-incident to a lawful DUI arrest (*Bernard v. Minnesota*). This unique and unprecedented rule of law, which Justice Thomas called a "compromise" that "is not a good one" and one that "chips away at a well-established exception to the warrant requirement," was apparently a compromise between liberals and conservatives to avoid another 4-4 decision,[3] following the death of Justice Scalia (Scalia would have found both searches unlawful). *See Birchfield*, 136 S.Ct. at 2197 (Thomas, J., concurring in judgment in part and dissenting in part). The Court did not address urine tests, because none of the consolidated cases involved urine. *See id*. at 2168, fn.1.

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[3] The 4-4 Court was so mired in stagnation, that they began trading favors for votes:

> "In August, Justice Stephen Breyer broke with liberal colleagues to provide the requisite fifth vote against high school senior Gavin Grimm in what he called "a courtesy" to four conservative justices. Late Thursday, conservative Chief Justice John Roberts did a similar favor, switching sides to stay the execution of inmate Tommy Arthur, convicted in the 1982 murder-for-hire of a woman's husband. The two votes in emergency appeals offer a rare peek behind the curtain about how the high court operates"

See <http://www.abcfoxmontana.com/story/33633555/supreme-court-votes-bridge-usual-left-right-divide>.

[¶17] The *Birchfield* court distinguished between blood tests and breath tests, finding that the physical intrusion of a breath test "is almost negligible," that the only personal information revealed from a breath test is a BAC reading, and that a breath test is not "likely to cause any great enhancement in the embarrassment that is inherent in any arrest." *See id*. at 2176-78. For these reasons, a divided Court found that blood tests implicate privacy concerns, but breath tests do not.

[¶18] A urine test is more like a blood test than a breath test, under the guidelines enunciated in *Birchfield*. In *Birchfield*, the Court first looked at the intrusion occasioned by the search. The *Birchfield* court found the intrusion of blood tests too invasive, but found the intrusion of breath tests "negligible." The Court minimized the intrusiveness of breath tests, stating that "[h]umans have never been known to assert a possessory interest in or any emotional attachment to *any* of the air in their lungs" and they would expel that air naturally anyway. *See Birchfield*, 136 S.Ct. at 2177. Urine tests are different than breath tests.

[¶19] The intrusion occasioned by a urine test is not negligible. Although motorists do not necessarily assert a possessory interest in their urine, the excretion of urine is not something expelled naturally in public. The passing of urine is a very private activity. Indeed:

> "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms, if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law, as well as social custom."

See Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (emphasis added). The intrusion occasioned by a urine

test is more than a trifling. Indeed, requiring a driver to participate in breath-testing does not require the participant to pull down his pants and undergarments - an intrusive protocol that is mandatory with urine testing. The intrusion of a urine test is more like the intrusion of a blood test than a breath test.

[¶20] Moreover, in the event law enforcement is allowed to bypass the warrant requirement with urine testing, then what is to stop an officer from extracting urine by catheter, incident to arrest, like they are doing in South Dakota? Let's reflect for a moment about the intrusiveness of forced catheterizations to extract urine samples. *See* Police Use Catheters, Force to Collect Urine Samples, *Argus Leader*, July 1, 2016 <http://www.argusleader.com/story/news/crime/2016/07/01/police-use-catheters-force-collect-urine-samples/86577942/> ("After Sparks refused to cooperate, police transported him to Avera St. Mary's Hospital in Pierre, where he was strapped to a bed while a catheter was forced into his penis so that officers could obtain a urine sample.").

[¶21] Next, the *Birchfield* court examined the information revealed from the test, beyond simply identifying BAC level or a controlled substance. The Court was concerned with leaving "highly personal information" from blood tests in the "possession of law enforcement authorities," which can be preserved for future additional testing. *See Birchfield*, 136 S.Ct. at 2177. The court did not have the same concern with breath tests, which leave only a BAC reading on a machine. *See id*. "[C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts ... including whether he or she is epileptic, pregnant, or diabetic." *See Skinner*, 489 U.S. at 617 (emphasis added). Urine analysis can also reveal numerous and various substances and metabolites within the body, legal and illegal, and almost always private. Because the highly personal

information obtained, preserved, and revealed from urine tests is virtually identical to that of blood tests, and far more than the BAC revealed from a breath test, it is readily apparent that this privacy concern of urine tests is more like the privacy concern associated with blood, not breath.

[¶22] Finally, the *Birchfield* court considered the embarrassment occasioned by the test search. The Court found "[t]he act of blowing into a straw is not inherently embarrassing, nor are evidentiary breath tests administered in a manner that causes embarrassment." *See Birchfield*, 136 S.Ct. at 2177. Urine tests provide an entirely different level of embarrassment than breath tests - this seems hard to argue against. "Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests." *See Skinner*, 489 U.S. at 617 (even listening for a ringing tinkle sound implicates privacy concerns).

[¶23] Requiring participation in a urine test is "an experience that is likely to cause ... great enhancement in the embarrassment that is inherent in any arrest." *See Birchfield*, 136 S.Ct. at 2177. There is almost nothing more dehumanizing than ordering an arrestee to drop his pants and urinate in a cup. It is even more degrading to order an arrestee to urinate under the threat of prosecution and additional arrest for failure to pass urine. Making urine collection a categorical search incident to arrest, as the State would like (it's hard to know exactly what the State proposes, because they advocate both case-by-case and categorical), would greatly enhance the embarrassment of this highly private routine.

[¶24] From a common sense standpoint, of the three tests considered, only urination routinely involves discreetly leaving a room, passing through several doors until reaching a stall, and then positioning oneself in a hidden location to perform. Because of the embarrassment occasioned by urine-testing, there is a heightened basis to require a search warrant issued by a neutral and detached magistrate. With respect to the embarrassment occasioned by urine collection, that humiliation surpasses both breath and blood.

[¶25] Under *Birchfield*, a urine test is more like a blood test than a breath test. The physical intrusion of a urine test, the enhanced embarrassment of a urine test, and the wealth of personal and private information revealed from a urine test, like blood-testing, show that the extraction of urine requires a search warrant under the Fourth Amendment. Because no search warrant was presented to Mr. Helm, for the extraction of urine, he had a constitutional right to refuse the urine test and, therefore, his refusal cannot be criminalized.

[¶26] A unanimous Minnesota Supreme Court reached the conclusion that urine is more like blood than breath, and that a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver. *See State v. Thompson*, 886 N.W.2d 224 (Minn. 2016). That Court concluded that criminalizing the refusal of a warrantless urine test is unconstitutional. This Court should reach that same conclusion.

[¶27] CONCLUSION

[¶28] Based on the foregoing, the North Dakota Association of Criminal Defense Lawyers respectfully requests that this Court affirm the decision below.

Dated this 15th day of May, 2017.

/s/ *Dan Herbel*

Dan Herbel
Attorney at Law
ND State Bar ID # 05769
North Dakota Association of
Criminal Defense Lawyers

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

[¶29] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 15, 2017, the AMICUS CURIAE BRIEF OF NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT/APPELLEE AND AFFIRMANCE was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to counsel of record, as follows:

Electronic filings to: Reid A. Brady <sa-defense-notices@casscountynd.gov>

Cherie L. Clark <sa-defense-notices@casscountynd.gov>

Monty G. Mertz <fargopublicdefender@nd.gov>

Dated this 15th day of May, 2017.

/s/ *Dan Herbel*

Dan Herbel
Attorney at Law
ND State Bar ID # 05769
North Dakota Association of
Criminal Defense Lawyers

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com