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IN THE NORTH DAKOTA SUPREME COURT

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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, )  
 )  
 PLAINTIFF/APPELLEE, )  
 )  
 vs. )  
 )  
 BRENT MAURSTAD, )  
 )  
 )  
 DEFENDANT/APPELLANT. )

District Ct. No.01-K-193/194

Supreme Court Nos. ~~2001092~~ 20010292  
~~2001093~~ 20010293

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APPEAL FROM FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW  
ENTERED OCTOBER 9, 2001 AND JUDGMENT ENTERED NOVEMBER 11, 2001  
PEMBINA COUNTY DISTRICT COURT  
THE HONORABLE LAURIE A. FONTAINE, PRESIDING

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities.....	ii
Issues Presented.....	iii
Statement of the Case.....	1
Statement of the Facts.....	1
Summary of Argument.....	6
Law and Argument.....	6
I.    THE "PROBATION SEARCH" OF DEFENDANT WAS SUBTERFUGE TO ADVANCE A CRIMINAL INVESTIGATION.....	6
II.   MOTIVE FOR THE PROBATION SEARCH MUST BE CONSIDERED IN DETERMINING VIOLATION OF THE FOURTH AMENDMENT.....	11
III.  ARTICLE 1, SECTION 8 OF THE NORTH DAKOTA CONSTITUTION MAY PREVENT THIS SORT OF SEARCH. ....	18
Conclusion.....	20

Table of Authorities

*Schmerber v. California*, 384 U.S. 757 (1966).....19  
*State v. Herrick*, 1997 ND 155, 567 N.W.2d 336 .....18, 19  
*State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982).....19  
*State v. LaFromboise*, 542 N.W.2d 110 (N.D. 1996).....7, 8  
*State v. Matthews*, 216 N.W. 2d 90 (N.D. 1974).....18  
*State v. Orr*, 375 N.W.2d 171 (N.D. 1985).....18, 19  
*State v. Perbix*, 331 N.W.2d 14 (N.D. 1983).....*passim*  
*State v. Ringquist*, 433 N.W.2d 207 (N.D. 1988).....18  
*State v. Sarhegyi*, 491 N.W.2d 284 (N.D. 1992).....17  
*State v. Smith*, 1999 N.D. 9, 589 N.W.2d 546.....6, 7, 8, 9, 15  
*U.S. v. Knights*, 219 F.3rd 1138 (9<sup>th</sup> Cir. 2000).....13  
*U.S. V. Knights* 122 S.Ct. 587 (2001).....passim

NORTH DAKOTA CENTURY CODE

NDCC § 12.1-32-07 4(n) (1997 & Supp. 1999).....8

LAW REVIEW ARTICLE

Boughey, An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation, 63 NDL Rev. 157 (1987).....18, 19

OTHER SOURCE

www.afen.onelook.com (subterfuge).....10

ISSUES PRESENTED

I. WHETHER THE "PROBATION SEARCH" OF DEFENDANT WAS SUBTERFUGE TO ADVANCE A CRIMINAL INVESTIGATION.

*State v. Smith*, 1999 N.D. 9, 589 N.W.2d 546

*State v. LaFromboise*, 542 N.W.2d 110 (N.D. 1996)

*State v. Perbix*, 331 N.W.2d 14 (N.D. 1983).

II WHETHER MOTIVE FOR THE PROBATION SEARCH MUST BE CONSIDERED IN DETERMINING VIOLATION OF THE FOURTH AMENDMENT.

*U.S. v. Knights*, 122 S.Ct. 587 (2001).

*State v. Perbix*, 331 N.W.2d 14 (N.D. 1983).

*State v. Sarhegyi*, 491 N.W.2d 284 (N.D. 1992).

III WHETHER ARTICLE 1, SECTION 8 OF THE NORTH DAKOTA CONSTITUTION MAY PREVENT THIS SORT OF SEARCH.

*State v. Ringquist*, 433 N.W.2d 207 (N.D. 1988)

Boughey, An Introduction to North Dakota Constitutional Law Content and Methods of Interpretation, 63 NDL Rev. 157, 247-259 (1987).

#### STATEMENT OF THE CASE

On May 17, 2000, Defendant, Brent Maurstad, was arrested and charged with possession of methamphetamine with intent to deliver and manufacturing of methamphetamine. A criminal complaint was filed on May 18, 2001. D. 1., A. 2, On July 2, 2001, Defendant waived his right to a preliminary hearing. D. \*\*. On July 3, 2001 Defendant filed a motion to suppress and brief in support of motion. D. 6., A. 5 On July 11, 2001 a hearing was held on Defendant's motion to suppress evidence. On October 9, 2001 the Court issued its Findings of Fact, Opinion and Conclusions of Law denying Defendant's motion. D. 11, A. 6. On November 11, 2001 the criminal informations were filed. D. 14, A. 9. On November 21, 2001, Defendant entered into a conditional guilty plea. D. 15, A.12, On November 21, 2001, the criminal judgments were entered. D. 17, A. 15. On November 21, 2001, Defendant timely filed notice of appeal with the Clerk of District Court, Pembina County, which was entered on November 26, 2001. D. 11, A. 17. Additionally, Defendant requested that the sentence be stayed, which was granted on November 26, 2001. D. 24, A. 17.

#### STATEMENT OF THE FACTS

In late April, or early May, 2001, Steve Gilpin of the Grand Forks County Narcotics Task Force met with Probation Officers Carrie Iverson (Grand Forks) and Chad Hoornaert

(Grafton) to inform them of that he had received information that Defendant was possibly involved in a meth lab located in his father's shop in Drayton. T. at 4, 26, & 39. Defendant works for his father's Tree Service. During this meeting Steve Gilpin asked Carrie Iverson, Defendant's probation officer, if Defendant had been following his probation clauses and making his meetings. T. at 39. He was told that Defendant had been complying. T. at 39-40. Probation officer Hoornaert indicated that the Task Force asked him and Carrie Iverson to do a probation search on the Defendant's father's tree service shop because they believed that the building would contain evidence of a meth lab. T. at 5. Defendant has a search provision. T. at 3, 9. A. 19, #11. Hoornaert and Iverson told the Task Force that they could not do that because the building did not belong to Defendant. T. at 5-6.

On approximately May 10, 2001, Hoornaert went to Drayton with Jeremy Quam and Steve Gilpin, members of the Task Force, to conduct surveillance on the shop. T. at 6, 26. Hoornaert claims that he saw people coming to the building late at night, but was not able to identify the Defendant as one of the person present. T. at 6. Hoornaert stated that he was present to investigate if "somebody is violating probation, violating a criminal law, that that's why I have a search clause and different clauses for them to follow, to give me

the ability to make sure they are not violating the law." T. at 6-7. Since Hoornaert could not identify if Defendant was present that night, he

informed the task force guys, Steve and Jeremy particularly that if they witnessed Brent at this building, to contact myself or Carrie and that if he left the building to stop his vehicle and search under his probation conditions, supervised probation conditions, that we would stop him and search the vehicle and his person.

T. at 7, 28.

Agent Gilpin stated that no probation search was conducted during the surveillance because "We were unable to establish and reason for it at that time." T. at 28.

Hoornaert stated that Carrie Iverson requested that Defendant be stopped if any suspicious activity was noted at the Tree Service building. T. at 16. During this two week period Hoornaert did not conduct any probation visits or make telephone calls to the Defendant. T. at 12.

On May 17, 2001 at approximately 8:10 p.m., Deputy Kraft was at the Dairy Queen in Drayton when he saw a person named David Laticer emerge from behind the Dairy Queen. T. at 29. Kraft then looked behind the Dairy Queen and saw Defendant's vehicle at his dad's Shop. T. at 29. Kraft called Gilpin to

inform him of that Defendant's vehicle was at the Tree Service shop and that Laticer had come from behind the Dairy Queen. T. at 42. Gilpin had been suspicious that Laticer was involved in narcotics. T. at 29. However, Kraft did not say that Laticer had come from the shop. T. at 42. At the same time, Jeremy Quam of the Task Force called Hoornaert and asked him if he still wanted to go ahead with the plan to stop and search Defendant. T. at 7, 20. Hoornaert stated he did. T. at 7.

A few minutes later, at approximately 8:15 p.m., Defendant was seen mowing the grass at the shop. Defendant finished mowing and left the area. There was nothing suspicious about mowing the grass. T. at 19-20. Agent Gilpin stated that other than the probation search clause, he could not point to any wrongdoing by the Defendant which would substantiate a stop of the vehicle. T. at 45. When asked about the stop and search directive, Hoornaert stated

My concern is that he is not violating his probation, I've got information from the task force , that this may be going on, my idea was to stop him, if he had something on him it was a violation of his probation that was of interest to me, if the task force was going to use that to further themselves, they were able to do that, that was their-I was concerned with that he was violating his probation on, with Carrie, Carrie was



concerned that he was violating his probation because of the information we received.

T. at 17. Hoornaert's written report provides contrary information.

We had information that Brent was cooking methamphetamine in the -warehouse. ... That plan was to search his person and his vehicle as authorized per court order of, of his supervised probation conditions. ... If enough probable cause would be found from this, Steve Gilpin from the task force would attempt to get a search warrant for the building.

T. at 18.

Agent Gilpin confirmed the plan by admitting that the stop of the vehicle was to garner probable cause to get a search warrant for the Tree Service building. T. at 46.

Officer Kraft stopped Defendant and the Task Force agents began to search the vehicle. T. at 8, 9. While some agents were searching the car, others were dispatched to Defendant's dad's shop to secure the building and get information for a search warrant. T. at 54-55. The search of the vehicle lasted approximately 45 minutes. The Task Force found several items they believed indicated evidence of manufacturing methamphetamine but did not find any illegal substances. T. at

22-23. In the rear seat was a blue jug which had a white residue at the opening. T. at 30. It was amphetamine. T. at 30. Agent Gilpin stated that amphetamine was not an illegal item. T. at 45.

At the shop, Gary Maurstad was told that a search warrant was on the way so he consented to the search of the shop. T. at 70. Numerous items of alleged contraband to make methamphetamine were found. T. at 47-48. Defendant was then arrested and charged with manufacturing methamphetamine. The Court concluded that "this probationary search was reasonably conducted to determine whether Defendant was in compliance with the law. A. 7. Thus, the Court determined that the stop and search of Defendant's vehicle was not subterfuge for a criminal investigation. A. 7.

#### SUMMARY OF ARGUMENT

The court erred in determining that the stop and search of Defendant's vehicle was not subterfuge. Probation Officer Hoornaert and Agent Gilpin of the Task Force admitted they developed a plan to stop Defendant's vehicle in an effort to discover sufficient evidence to apply for a search warrant for the Tree Service shop.

#### ARGUMENT

- I. THE "PROBATION SEARCH" OF DEFENDANT WAS SUBTERFUGE TO ADVANCE A CRIMINAL INVESTIGATION.

The North Dakota Supreme Court has addressed the issue of probation searches on several occasions. See *State v. Smith*, 1999 N.D. 9, 589 N.W.2d 546; *State v. LaFromboise*, 542 N.W.2d 110 (N.D. 1996); *State v. Perbix*, 331 N.W.2d 14 (N.D. 1983).

The *Perbix* case allowed a search by a probation officer or any police officer. *Id.* The officers in that case decided to search Perbix's home and discovered controlled substances *Id.* at 14-15.

On appeal, the Supreme Court noted the search provision was useful to regulate the "probationer's activities to help in his rehabilitation and at the same time guard against continued criminal behavior". *Id.* (Citation omitted); *U.S. V. Knights* 122 S.Ct. 587 (2001). A probationer, however, is "not totally bereft of nor fully invested with constitutional protections. *Id.* The Court held

Therefore, we conclude that conditions of probations requiring probationer to submit to warrantless searches by probation officers or law enforcement officers, to the extent such searches contribute to the rehabilitation process; are not used as a subterfuge for criminal investigations; and are performed in a reasonable manner, are valid and not violative of the Fourth Amendment. *Id.* at 21 (emphasis added, footnote omitted). When *Perbix* was decided police officers were allowed to initiate a probation

search. See *Id.* at 15. After the *Perbix* decision, the legislature removed the words "police officer" from the statute. See *State v. Smith*, 1999 N.D. 9, ¶ 13; NDCC § 12.1-32-07 4(n) (1997 & Supp. 1999), A. 21.

Although a probation search clause is means for a probation officer to help a probationer with rehabilitation issues, the probation search clause should not be used as a means to skirt constitutional protections in an effort to gather evidence for a criminal investigation. In other words the search clause should not be used as subterfuge. See *Perbix*, *LaFromboise*, *Smith*, *supra*.

The State will no doubt refer to *State v. Smith*, as justification for the search in the present case. In *Smith*, this Court stated

While a fine line may exist between the police investigative objectives and the probationary purposes, the district court's finding the search was to determine whether Smith was complying with his probation is supported by the evidence. Because the agents suspected Smith of drug activity, the search was valid to determine his compliance with the probation terms.

*Smith supra* ¶ 19. This court acknowledged that the purpose of the search is to be considered. By doing so, this Court also

implicitly stated that fraudulent purposes cannot be tolerated.

While the facts of the present case are similar to the facts in *Smith*, the distinguishing factors are the motive and the place to be searched.

In *Smith*, the Task Force wanted to use the probation search clause to search Smith's home and vehicles. *Id.* at ¶4. Smith had supplied the probation officer with his address and the vehicles that he drove. *Id.* at ¶23. The scope of the actual search was directed at Smith's home and vehicles. *Id.*

From the outset in the present case, it is clear that the Task Force wanted to get into Defendant's father's shop to investigate if there was a meth lab inside. The following facts indicate that the focus of the investigation was on the shop.

First, Gilpin asked Carrie Iverson if Defendant was complying with his probation. He was told that Defendant was. Second, Gilpin informed Hoornaert and Iverson that there was information that Defendant had a meth lab in Defendant's father's shop. Gilpin asked them to do a probation search of the building. Third, the Task Force conducted surveillance on the shop. Police conduct surveillance for investigative purposes, not for probation purposes. Fourth, the Task Force asked Hoornaert to accompany them to conduct the surveillance

on the shop. It can certainly be presumed that Hoornaert presence was not simply to observe police surveillance techniques (Hoornaert is a former Highway Patrol Trooper). He was there to conduct a probation search if it could be determined that Defendant was present. Fifth, during this time frame Hoornaert did not seek out Defendant at his job site, at his home, ask Defendant to come to Hoornaert's office, nor did Hoornaert perform a routine probationary search of Defendant's car. If Hoornaert was truly concerned if Defendant was violating his probation why wait to confront Defendant, or to take any probationary measures. Hoornaert did not talk with Defendant at all during this investigative process until the night of the stop, approximately three weeks after the investigation began.

During the surveillance of the shop neither Hoornaert nor Gilpin could identify Defendant as being present. Thus, they could not established any reason to conduct a probation search of the building or get a search warrant.

What is subterfuge? Subterfuge means "That to which one resorts for escape or concealment; an artifice employed to escape censure or the force of an argument, or to justify opinions or conduct; a shift; an evasion." [www.afen.onelook.com](http://www.afen.onelook.com)

When the surveillance proved fruitless, a directive was issued to the Task Force agents to stop Defendant's vehicle

after he left the Tree Service shop. The goal was to discover evidence from the car that could be linked to the shop. Hoornaert did not issue a directive to pull the Defendant in for questioning, or to visit him at his job sight, or to stop his vehicle at any time day or night. The only instructions that were made centered around the Tree Service shop.

The key to stopping the vehicle was whether any officer saw awkward or suspicious activity, or a vehicle present at the shop when it should not be. An officer saw Defendant's car at the shop at 8:10 p.m. At 8:15 p.m. Defendant was mowing the lawn. Nothing awkward or suspicious or criminal in those activities.

Following orders to stop the vehicle once it left the shop, officers did just that. The vehicle was stopped and one or more officers immediately went to secure the shop and to check the address for the warrant application. The plan was in action

Here, the police sought to use the probation clause as a manner of circumventing the Fourth Amendment to conduct an exploratory search of the shop. Using the search clause in this manner is subterfuge, which this court stated was prohibited. See *Perbix, supra*.

II MOTIVE FOR THE PROBATION SEARCH MUST BE CONSIDERED IN DETERMINING VIOLATION OF THE FOURTH AMENDMENT.

The United State Supreme Court recently ruled on a Ninth Circuit case regarding probation searches. See *U.S. v. Knights*, 122 S.Ct. 587 (2001).

In *Knights*, the Court held that a police officer's search of a probationer apartment was legal because the officer had reasonable suspicion of criminal activity and was authorized to search via a condition of probation. *Id.* at 593.

Knights was placed on probation in California and acknowledged that he had reviewed and received a copy of the probation conditions. *Id.* at 589. Knights probation conditions allowed a search of his person, residence and vehicle at anytime day or night by a probation officer or a law enforcement officer. *Id.*

After Knights was placed on probation, he soon became a suspect in several vandal cases. *Id.* at 589.

One time, Knights and a friend were stopped by a sheriff's deputy near the gas company. *Id.* After another incident occurred, a sheriff's deputy drove by Knights' residence and subsequently set up surveillance of Knights' apartment. *Id.* While watching Knight's apartment the officer saw Knights and his friend, Simoneau, arrive at the apartment in Simoneau's pick-up truck. *Id.* At about 3:10 a.m. Simoneau left the apartment carrying three cylindrical items and placed a jar like item in his truck. *Id.* Based upon his training,



officer Hancock thought the items to be pipe bombs. Carrying the cylindrical items Simoneau walked across the street and disappeared from view. The officer then heard three splashes believing that Simoneau, threw those objects in the river. Simoneau returned to the truck from the river without the cylinders and left. *Id.*

With all this information, officer Hancock decided to conduct a warrantless "probation" search of Knights' home. He found numerous items indicating illegal activity. *Id.* at 589.

Knights was arrested and subsequently brought a suppression motion. *Id.* at 590. Although the District Court determined that the officer had a "reasonable suspicion to believe that Knights was involved" in illegal activity, the court granted Knights motion. *Id.* The Ninth Circuit affirmed noting that the search was really an investigatory search and not a probation search. *Id.* See *U.S. v. Knights*, 219 F.3rd 1138, 1142 (9<sup>th</sup> Cir. 2000) (affirming lower court finding probation search as subterfuge for an investigative search).

The Supreme Court noted "[t]he Supreme Court of California has rejected this distinction and upheld searches pursuant to California probation condition 'whether the purpose of the search is monitor the probationer or to serve some other law enforcement purpose.'" 122 S.Ct. At 590. Similar to the probation search clause in *Perbix*, Knights

clause allowed law enforcement officers to search. The Court noted that the search condition "does not mention anything about purpose." *Id.* The Supreme Court framed the question as "whether the Fourth Amendment limits searches pursuant to this probation condition to those with a "probationary" purpose.

*Id.*

The government argued that Knights consented to the probation search clause. *Id.* at 591. The Court dismissed that notion quickly stating that

we need not decide whether Knight's acceptance of the search conditions constituted consent ... because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances' . . . with the probation search condition being a salient circumstance.

*Id.* (Citation omitted). The Fourth Amendment is based upon reasonableness "and the reasonableness of a search is determined 'by assessing, on one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.*

In a short handed analysis, the Supreme Court addressed the dual purposes of probation. First is to rehabilitate the

probationer. Second to provide safety for the community. *Id.* at 592. See also *Perbix*, 331 N.W.2d at 15.

We hold that the balance of these considerations require no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is sufficiently high probability that criminal conduct is occurring to make the intrusion on the individuals's privacy interest reasonable.

*Knights, supra at 592.*

The court concluded that since its holding was based on "ordinary Fourth Amendment analysis that considers all the circumstances of the search, there is no basis for examining official purpose." *Id.* at 593. As a result, the Court determined the search was reasonable within the meaning of the Fourth Amendment because it was supported by reasonable suspicion and an authorized condition of probation. *Id.*

Interestingly enough, this court rejected the above rationale in *State v. Smith, supra*, ¶18. Additionally, this court has clearly enunciated that a probation search should not be based upon subterfuge. See *Perbix, supra*. The subjective intention of the officers does make a difference under current North Dakota law. Thus, it would appear that

the holding in *Knights* does not apply to North Dakota statutes or case law.

Interesting as well is the North Dakota legislature's removal of the term "police officer" from earlier probation search condition. See *Perbix, supra*. It would necessarily indicate that police officers could not initiate a search of a probationer on a whim. Make no mistake, however that the police think that they can still search the probationer if a probation officer is present. No reason need be given. While that may be true in most instances, it is also true that the officers cannot use the probation officer as a shield for an illegal search, such as the one here. According to *Perbix* and its progeny, a probationer is not devoid of all constitutional rights.

If this court determines that *Knights* does impact on North Dakota law and this case, the facts and circumstances stated above still must be considered. Additional attention must be given to the observations made just prior to the stop of Defendant's vehicle. Defendant performed no act which could be considered suspicious or awkward, the probation officers starting point. Certainly mowing the lawn would not raise a red flag. Dumping garbage in a garbage bin would not raise a red flag to suspicious activity. Leaving the shop itself would pose no illegality. With none of these factors

equating to reasonable and articulable suspicion, even under *Knights*, a stop and search would not be in line with the Fourth Amendment infringement.

Even if the court was to consider the night the Task Force conducted surveillance on the shop in considering reasonable suspicion, the court must also accept the fact that the Defendant was not identified as being present. Additionally, the officers present during the surveillance could not point to a single instance of illegal conduct by anyone, let alone Defendant. A hunch is not reasonable suspicion. *State v. Sarhegyi*, 491 N.W.2d 284 (N.D. 1992). Thus, if this court adopts the reasoning of the *Knights* decision, the totality of the circumstances based upon reasonable suspicion clearly indicate that the lower court erred in denying Defendant's motion.

The facts and the circumstances found here clearly indicate that the search in this case was an investigatory search to discover evidence and not a probationary search to determine compliance. Using a probation search clause to circumvent a Constitutional requirement should not be tolerated. Curtailing improper police motive is the very reason the exclusionary rule was implemented.

III ARTICLE 1, SECTION 8 OF THE NORTH DAKOTA CONSTITUTION MAY PREVENT THIS SORT OF SEARCH.

North Dakota has steadfast held to the idea of individual sovereignty. A state constitution should provide greater protections to it's citizens than does the Federal counterpart. See *State v. Ringquist*, 433 N.W.2d 207, 217 (N.D. 1988) (Levine, J. concurring and dissenting); See *State v. Herrick*, 1997 ND 155, 567 N.W.2d 336, 342 (citing *State v. Matthews*, 216 N.W. 2d 90, 99 (N.D. 1974)). The history of the North Dakota Constitutional Convention clearly indicates this to be so. See e.g., Boughey, An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation, 63 NDL Rev. 157, 247-259 (1987).

At the North Dakota Constitutional Convention it was made clear that the purpose behind the framing of the State Constitution was to provide citizens of North Dakota with more protection against government than was provided in the Federal Constitution. *Id.* at 255. The Federal Constitution, as well as other state constitutions, was available as a guide in the drafting of the State Constitution. The final draft of the North Dakota Constitution provides additional protection to state inhabitants in its declaration of rights than does the Federal Constitution. *Id.* at 256. The language of the State

Constitution is more "expansive" than the federal counterpart.  
*Id.* at 255.

An example of how the North Dakota Supreme Court has decided issues according to State protected rights is *State v. Orr*, 375 N.W.2d 171 (N.D. 1985). (no violation of Orr's Sixth Amendment right to counsel but did violate state constitution); *Schmerber v. California*, 384 U.S. 757 (1966) (no Fifth Amendment right to refuse a blood test; NDCC § 39-20-04-if an accused refuses a chemical test, none will be given). As noted in *Herrick, supra*, "It is the state court's obligation to construe their own constitution in furtherance of the rights of their citizens."

When should the State Constitution provide these greater protection to its citizens? In *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982) Justice Handler stated

The explication of standards such as these demonstrates that the discovery of unique individual rights in a state constitution does not spring from pure intuition but, rather, from a process that is reasonable and reasoned. This process does not require presumptive weight to be accorded the federal experience, just an intelligent awareness and assessment of that experience.

As a result of the above mentioned cases and analysis, the issue in the present case must be looked at to provide the very important state constitutional rights. Doing so would be directly in line with the North Dakota Supreme Courts decision regarding state legislative and constitutional intent. When the North Dakota legislature removed the term "police officer" from the probation search condition it is doubtful that this was done so officers could continue to violate a person's constitutional rights by subterfuge. Or by getting through the back door what they could not get through the front door.

By a very narrow holding, it appears that a probationer has lost some privacy rights under Knights. Knights is incongruent with Article 1, Section 8, and case law. A. 23. Thus, if there is a recognizable right under the state constitution that is not present in the federal constitution, the state should invoke the state constitutional rights and give its citizens greater protections at the framers at the state constitutional convention intended.

#### CONCLUSION

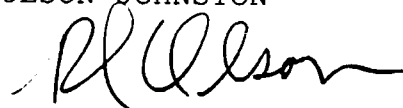
The used of the probation search clause in this case to conduct a criminal investigation was subterfuge. North Dakota law provides that it is appropriate to consider the purpose of the use of the search clause.



WHEREFORE, Defendant respectfully requests this Court reverse the lower court order denying suppression of illegally obtained evidence.

Dated this 9<sup>th</sup> day of February, 2002.

OLSON JOHNSTON



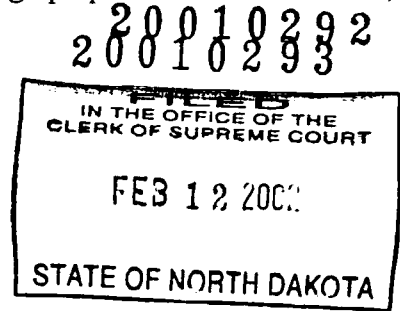
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CERTIFICATE OF SERVICE

State of North Dakota v. Brent Maurstad, Dist. Ct. No. 01-K-193, 194, Supreme Court Nos. 2001092, 2001093.

I, Robin L. Olson, attorney for Defendant, hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF and CERTIFICATE OF SERVICE was on this 12<sup>th</sup> day of February, 2002, MAIL SERVED, postage prepaid from Grand Forks, ND 58201 to:

Ms. Barbara Whalen  
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