ORIGINAL (faxed)

20050129

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kjerstin Thora Eriksmoen, Plaintiff/Appellant, vs. Director, North Dakota Department Of Transportation, Defendant//Appellee.	Rule 40 N.D.R.App. P. Motion for Rehearing Supreme Court No. 20050129 Grand Forks County No. 18-04-1328

COMES NOW THE PLAINTIFF/APPELLANT KJERSTIN THORA ERIKSMOEN, by and through counsel, who in support of the within motion to reconsider the decision of the Court, on the basis set out herein.

Motion for Rehearing

It was recognized in the Court's decision that the principal case applicable to the facts in Eriksmoen. was Bickler v. N.D. State Highway Comm'r, 423 N.W.2d 146 (N.D. 1988). In deciding the present case, the Court acknowledged the limited statutory right that a defendant has to consult with counsel before deciding to take a chemical test under the implied consent laws, as that was set out in Bickler, and a series of intervening cases. The requirement – and the duty for Law Enforcement -- established from Bickler. was that:

> **We believe out-of-earshot consultation adequately protects both the confidentiality of attorney-client consultation and the integrity of chemical tests. We hold that when an arrested person asks to consult with counsel before electing to take a chemical test he must be given the opportunity to do so out of police hearing, and law enforcement must establish that such opportunity was provided.**

In Eriksmoen, the Court held that what was offered by the Officer ..."was unsatisfactory to her attorney. Whether the attorney was satisfied with the arrangements to consult with his client in private is not the relevant inquiry. As we explained in Jewett, the ability to consult only has to be reasonable" with "the reasonableness of the opportunity ...viewed objectively in light of the totality of the circumstances, a test approved in State v Berger, 2001 ND 44 ¶ 18, 623 N.W. 2d 25 [..."reasonableness under the circumstances"].

In Mirada v. Arizona, 384 U.S. 436 (1966), also cited in Bickler, the USSC addressed, at great length, the necessity for there to be more than an amorphous recitation of rights to ensure the protection of the rights of a citizen – that while maintaining flexibility, there were, nevertheless, express, minimum requirements that must be provided and that:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.
>
> At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply

> to make them aware of it — the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[fn37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

Mirada v. Arizona, 384 U.S. 436, 468-69 (1966).

More than 16 years had elapsed between the holding in Bickler and the arrest in Erikmoen. Despite the intervening years, and cases, it is evident from the record of the case that neither the arresting officer – an experienced member of the North Dakota Highway Patrol – nor the Grand Forks Police Department, had taken any action to determine what it was that they were required to do so meet the express requirements of Bickler: to establish that a person asking to consult with counsel before electing to take a chemical was given the opportunity to do so "out of earshot" of the police was afforded that opportunity.

The problem for the police – and for the arrested citizen – and for the society as a whole -- is that a "totality of the circumstances" analysis, in the absence of any precise direction to the police about the minimum requirements for what it is that they are required to do, is simply inadequate to establish any objective standard by ***which the opportunity to consult with an attorney out of earshot of the police that is to be provided by the police*** can be reviewed, considered, or measured.

From 1990 through 2003, there have been 64,309 DUI arrests in the state of ND. [Sec:

Attachment 1 – From the ND Bureau of Criminal Investigation: www.ag.state.nd.us/Reports/BCIReports/Crime03.pdf]. The absence of any objective guideline of standard, cannot be shown more clearly than the testimony given by the – experienced - officer in Eriksmoen, in his ad hoc attempts to meet a requirement with which he was clearly unfamiliar, starting with his suggestion that another officer could stand next to Eriksmoen while she talked to her attorney. The amorphous and imprecise nature of the standard is further illustrated by the fact that there has not, since [and including] Bickler a single case where there has been a holding by the Supreme Court, arising from more than 64,000 arrests, that the police have not met the standard of "reasonableness under the circumstances" in a particular case. Simply the sheer numbers of DUI arrests between 1990 and 2003 evokes the necessity recited in the USSC analysis in Miranda, in their contemplation of the necessity to impose an express standard for the advisory to be given to arrestees:

> ***In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in Weems v. United States, 217 U.S. 349, 373 (1910):***
>
> > ***'. . . our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.*** And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.'
>
> This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. ***It was necessary in Escobedo, as here, to insure that what was proclaimed in the Constitution had not become but a "form of***

> *words,"* Silverthorne Lumber Co. v. United States, 251 U.S. 385, *392 (1920), in the hands of government officials.* And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Mirada v. Arizona, 384 U.S. 436, 444-45 (1966). [Emphasis added].

As a further admonition, the Miranda Court ruled that:

> Unless a proper limitation upon custodial interrogation is achieved — such as these decisions will advance — there can be no assurance that practices of this nature will be eradicated in the foreseeable future.

Id. at 447.

Without the delineation of a clear and definite standard to guide, direct – and measure – police compliance with the requirements set forth in Bickler, the "right to consult with an attorney" will constitute a mere – and meaningless – "form of words", that will continue to be disregarded, ignored, misunderstood, and misapplied by the police, effectively denying arrested citizens their "right" to consult with counsel before deciding whether to take a chemical test: a decision of great importance since it may result in a license suspension of 3 or more years.

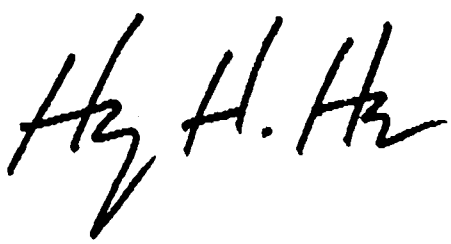
As the facts presented in Eriksmoen, would appear to confirm a test of the "totality of the circumstances" may be appropriate for a case by case analysis in a court review setting, but does not, and cannot provide adequate guidance, notice or direction to the police as to what they are actually required to do, in the context of an actual arrest situation, to appropriately protect the interests of the citizen, and society in general. It is submitted that this Court should provide a clear, objective, standard for what it is

that the police are required to do in a Bickler / Eriksmoen arrest situation to ensure that they have met their duty of ensuring that the required opportunity to consult "out of earshot" has been provided. To do any thing less fails to provide due process of law, disregards the statutory requirement permitting a right to counsel, and disregards the importance to society that there be a clear and understandable standard regarding the rights of arrestees.

Wherefore, Appellant submits the following request for relief.

1. That the Court grant the Appellant's motion for reconsideration, pursuant to Rule 40, N.D. R. App. P.
2. For such other and further relief as is deemed fitting, proper and appropriate.

DATED THIS 15 December 2005.



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DUI Arrest Analysis

DUI arrests declined slightly from 5,187 in 1998 to 5,179 in 1999. The arrest totals should not be interpreted as the number of individuals arrested for DUI offenses because it is possible that some individuals may have been arrested on more than one occasion.

Eighty percent of the DUI arrests in 1999 were arrests of males.

Juveniles, persons under the age of 18, made up about 3.3 percent of the total in 1999.

DUI Arrests, 1990-1999

Year	DUI Arrests Reported	Percent Change from Previous Year
1990	4,322	4.8 %
1991	4,607	6.6
1992	4,781	3.8
1993	4,418	-7.6
1994	4,206	-4.8
1995	4,439	5.5
1996	4,467	0.6
1997	4,777	6.9
1998	5,187	8.6
1999	5,179	-0.2

DUI Arrests, 1990-1999

DUI Arrests by Gender, 1990-1999

Year	Male	% of Total	Female	% of Total	Total
1990	3,639	84.2 %	683	15.8 %	4,322
1991	3,830	83.1	777	16.9	4,607
1992	3,987	83.4	794	16.6	4,781
1993	3,651	82.6	767	17.4	4,418
1994	3,481	82.8	725	17.2	4,206
1995	3,672	82.7	767	17.3	4,439
1996	3,652	81.8	815	18.2	4,467
1997	3,917	82.0	860	18.0	4,777
1998	4,185	80.7	1,002	19.3	5,187
1999	4,149	80.1	1,030	19.9	5,179

www.ag.state.nd.us/Reports/SCIReports/crime99.pdf)

DUI Arrest Analysis

Reported DUI arrests increased 8.7 percent from 4,467 in 2002 to 4,854 in 2003. The arrest totals should not be interpreted as the number of individuals arrested for DUI offenses because it is possible that some individuals may have been arrested on more than one occasion.

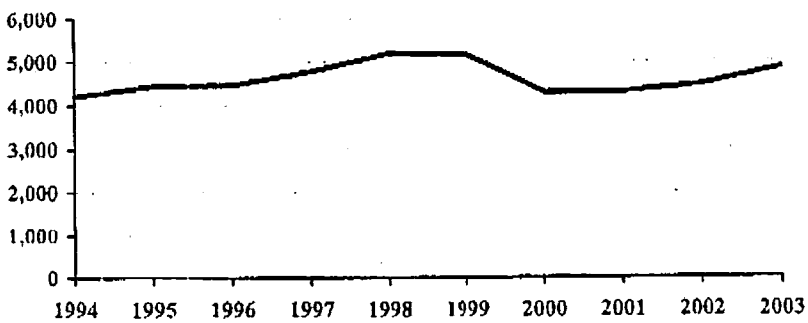
Approximately 77 percent of the DUI arrests in 2003 were arrests of males.

Juveniles, persons under the age of 18, made up 1.9 percent of the total in 2003.

DUI Arrests, 1994-2003

Year	DUI Arrests Reported	Percent Change from Previous Year
1994	4,206	-4.8%
1995	4,439	5.5
1996	4,467	0.6
1997	4,777	6.9
1998	5,187	8.6
1999	5,179	-0.2
2000	4,304	-16.9
2001	4,301	-0.1
2002	4,467	3.9
2003	4,854	8.7

DUI Arrests, 1994-2003



AFFIDAVIT OF SERVICE

Eriksmoen [Plaintiff/Appellant] v Commissioner,
North Dakota Department of Transportation [Defendant/Appellee]
Grand Forks County Case: 18-04-1328
North Dakota Supreme Court Case: 20050129

The Undersigned affirms, under penalty of perjury, that a copy of:

1. Rule 40 N.D.R.App.P. Motion for Rehearing
2. Motion to Permit Filing of Appellant's Rule 40 N.D.R.App.P. Motion for Rehearing

Was served upon:

Andrew Moraghan Assistant Attorney General Office of Attorney General 600 E Boulevard Ave Dept 125 Bismarck ND 58505-0040	

All in accordance with the Rules of Civil Procedure [check one]:

☒ by mailing the same, with postage affixed, to the address listed above, in Grand Forks ND on 20 December 2005.

☐ by faxing the same to the fax number, above, listed for said person in the current attorney directory, or published on the Attorney's office stationery, on 20 December 2005 before 5:00 prn.

Holly Bicker

Subscribed and sworn to before me this 20 December 2005.

Henry H. Howe

HENRY H. HOWE
Notary Public
State of North Dakota
My Commission Expires 19 Feb 2011

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