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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Steve Michael Beylund,

Petitioner and Appellant,

v.

Grant Levi, Director of the North Dakota Department of Transportation,

Respondent and Appellee

in consolidation with

Douglas Dale Wojahn,

Petitioner and Appellant,

v.

Grant Levi, Director of the North Dakota Department of Transportation,

Respondent and Appellee

Supreme Court Case No. 20140133
District Court Case No. 06-2013-CV-00095

APPELLANT'S BRIEF ON REMAND

APPEAL FROM THE JUDGMENT OF THE BOWMAN COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

Supreme Court Case No. 20140315
District Court Case No. 04-2014-CV-00008

APPELLANT'S BRIEF ON REMAND

APPEAL FROM THE JUDGMENT OF THE BILLINGS COUNTY DISTRICT COURT, THE HONORABLE ZANE ANDERSON, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

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[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The North Dakota Supreme Court has directed the parties to submit further briefing. N.D.R.App.P. 2.

[¶5] **ISSUES TO BE ADDRESSED ON FURTHER BRIEFING**

I. What forum should determine the findings of fact regarding the voluntariness of consent, given the United States Supreme Court's remand for the state court to reevaluate consent, and taking into consideration the language of N.D.C.C. § 39-20-05(2)?

II. If the fact finder determines the consent was not voluntary, must the evidence obtained be suppressed in an administrative proceeding? See Birchfield v. North Dakota, 136 S.Ct. 2160, 2186 n. 9 (2016).

[¶6] **STATEMENT OF THE CASES**

[¶7] Appellant, Steve Michael Beylund, appealed from the North Dakota Department of Transportation's September 18, 2013 decision suspending his North Dakota driving privileges for 2 years, and the District Court's February 3, 2014 Memorandum and February 10, 2014 Judgment affirming that decision. Beylund Appendix 4, 16, 32. The North Dakota Supreme Court affirmed. The United States Supreme Court granted Mr. Beylund's petition for a writ of certiorari, vacated the judgment and remanded to the North Dakota Supreme Court.

[¶8] Appellant, Douglas Dale Wojahn, appealed from the North Dakota Department of Transportation's January 17, 2014 Order suspending his North Dakota driving privileges for 91 days, the decision of Hearing Officer Sarah Huber dated March 6, 2014 affirming the January 17, 2014 order denying Mr. Wojahn's prayer for relief, and the District Court's July 10, 2014 Memorandum and July 11, 2014 Judgment affirming the Department's Order. Wojahn Appendix 4, 14, 17, 27. The North Dakota Supreme Court affirmed. The United States Supreme Court granted Mr. Wojahn's petition for a writ of

certiorari, vacated the judgment and remanded to the North Dakota Supreme Court.

[¶9] **STATEMENT OF THE FACTS**

[¶10] On August 10, 2013 law enforcement did not observe illegal driving conduct by Mr. Beylund but stopped the vehicle driven by Mr. Beylund and detained him. Beylund Transcript page 5 lines 18-20; page 7 line 11 to page 8 line 9; page 24 lines 1-6, 10-11, 17-25 (BT. 5:18-20; 7:11 to 8:9; 24:1-6, 10-11, 17-25).

[¶11] Law enforcement was unable to perform field sobriety tests on Mr. Beylund. BT. 27:3-6. Law enforcement attempted to search Mr. Beylund by conducting a screening test on him. BT. 13:16 to 14:14. Prior to conducting the search with the screening test law enforcement read Mr. Beylund the North Dakota implied consent advisory. BT. 13:21-25.

[¶12] Mr. Beylund failed to blow a proper air sample for the screening test and was arrested. BT. 14:10-14.

[¶13] Law enforcement read the North Dakota implied consent advisory to Mr. Beylund after his arrest and requested a blood test. BT. 16:2-7. Mr. Beylund agreed to take the test. Id.

[¶14] Law enforcement did not obtain a warrant to search Mr. Beylund. BT. 29:9-10.

[¶15] On December 7, 2013 law enforcement stopped the vehicle driven by Mr. Wojahn and detained him. Wojahn Transcript page 4 lines 18 to 22; page 6 line 3 to page 8 line 12 (T. 4:18-22; 6:3 to 8:12). After questioning Mr. Wojahn and having him perform the horizontal gaze nystagmus test law enforcement read Mr. Wojahn the implied consent advisory and had him perform a screening test. WT. 9:7 to 18:10. Law enforcement arrested Mr. Wojahn after he performed the screening test. WT. 18:12-24.

[¶16] After the arrest law enforcement read the implied consent advisory a second time and asked Mr. Wojahn to provide a blood sample. WT. 21:9-12. Mr. Wojahn complied with law enforcement's request to search him. WT. 21:11-12. Law enforcement then searched Mr. Wojahn by having him provide a blood sample for testing. WT. 21:24 to 22:3.

[¶17] Law enforcement made no attempt to get a search warrant. WT. 29:16-22.

[¶18] Law enforcement used the implied consent advisory and the threat of the crime of refusal to obtain consent to search Mr. Wojahn. WT. 30:1-15; 35:5 to 36:4.

[¶19] **LAW AND ARGUMENT**

[¶20] **Standard of Review**

[¶21] "The [North Dakota Department of Transportation's] authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep't of Transp., 2009 ND 145, ¶ 9, 771 N.W.2d 237." Landsiedel v. Director Dept. of Transp., 2009 ND 196 ¶6, 774 N.W.2d 645, 647.

[¶22] "[R]eview of an administrative agency's suspension of a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28–32." Richter v. N.D. Dep't of Transp., 2010 ND 150, ¶ 6, 786 N.W.2d 716.

[¶23] The North Dakota Supreme Court exercises

> limited review of the administrative revocation of driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 9, 622 N.W.2d 180. [The North Dakota Supreme Court's] standard of review is the same standard applied by the district court. N.D.C.C. § 28-32-49. [The court] must affirm the administrative agency's decision unless:
>
> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the

appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. N.D.C.C. § 28-32-46.

Bell v. North Dakota Dep't of Transp., 2012 ND 102 ¶8, 816 N.W.2d 786.

[¶24] **Analysis**

I. What forum should determine the findings of fact regarding the voluntariness of consent, given the United States Supreme Court's remand for the state court to reevaluate consent, and taking into consideration the language of N.D.C.C. § 39-20-05(2)?

[¶25] In this case Appellants first assert that their consent was involuntary as a matter of law and the North Dakota Supreme Court can address the issue as a matter of law. See Birchfield v. N. Dakota, 136 S. Ct. 2160, 2186, 195 L. Ed. 2d 560 (2016)("we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."). In the alternative the potential forums to determine the findings of fact are the North Dakota Supreme Court, the District Court, or the Agency (North Dakota Department of Transportation Hearing Officer).

[¶26] If the forum of choice is the Agency it should be noted that N.D.C.C. § 39-20-05(2) limits the issues to be determined at a hearing. The voluntariness of consent is not one of the listed issues. The reason for that in part appears to be because N.D.C.C. § 39-

20-05(2) includes as an issue that can be addressed at the hearing to be "whether the individual was tested in accordance with section 39-20-01" and 39-20-01 subsection 1 basically states that by operating a motor vehicle the driver consents to be tested (implied consent). Because consent is assumed or "implied" pursuant to statute it is logical the statute would not require the issue of consent to be addressed at the hearing.

[¶27] The North Dakota Supreme Court addressed a parallel issue in Herrman v. Dir., N. Dakota Dep't of Transp., 2014 ND 129, ¶ 13, 847 N.W.2d 768, 775, reh'g denied (July 17, 2014) ("Herrman argues he was denied his statutory right to consult with an attorney before deciding whether to submit to the breath test requested at the station after his arrest. Herrman raised the issue before the Department, but the Department may only make limited conclusions of law about whether a law enforcement officer had reasonable grounds to believe the person was driving under the influence, whether the person was placed under arrest and whether the person refused to submit to the test or tests. N.D.C.C. § 39–20–05(3) (2011). The Department is unable to decide whether Herrman was given his statutory right to consult with an attorney. Id. Herrman raised the issue in his specification of error to the district court, but the district court sitting as an appellate tribunal did not address the issue. Under these circumstances, we address the issue based on the facts in the Department's record."). In Herrman because N.D.C.C. § 39-20-05 did not permit the issue of the statutory right to counsel to be addressed at the hearing before the agency and the district court did not address the issue the North Dakota Supreme Court addressed and determined the issue based on the evidence presented at the hearing before the agency.

[¶28] If the forum of choice is the District Court note that N.D.C.C. § 39-20-06 does not

permit additional evidence to be heard in the context of the initial appeal but does allow the District Court to direct the matter to be returned to the hearing officer for rehearing and the presentation of additional evidence. See N.D.C.C. § 28-32-45.

[¶29] Irrespective of the limitations referenced above the North Dakota Supreme Court can order any of the proposed forums to address the issues pursuant to its supervisory powers. N.D. Const. Art. IV § 2. Otherwise, following the current statutory scheme, if the presentation of additional evidence is required then the North Dakota Supreme Court would remand to the District Court to remand to the Hearing Officer for the presentation of additional evidence. Under the current statutory scheme if the presentation of additional evidence is not required then the North Dakota Supreme Court or the District Court could determine the findings of fact based on the evidence presented at the hearing before the agency. Note that nothing in N.D.C.C. § 39-20-06 limits judicial review in the same manner as N.D.C.C. § 39-20-05 limits the issues that can be addressed at the hearing before the agency.

[¶30] **Analysis**

II. If the fact finder determines the consent was not voluntary, must the evidence obtained be suppressed in an administrative proceeding? See Birchfield v. North Dakota, 136 S.Ct. 2160, 2186 n. 9 (2016).

[¶31] Appellants both argue that the evidence must be excluded.

[¶32] In footnote 9 of Birchfield the United States Supreme Court stated that

> If the court on remand finds that Beylund did not voluntarily consent, it will have to address whether the evidence obtained in the search must be suppressed when the search was carried out pursuant to a state statute, see Heien v. North Carolina, 574 U.S. ——, —— – ——, 135 S.Ct. 530, 537–539, 190 L.Ed.2d 475 (2014), and the evidence is offered in an administrative rather than criminal proceeding, see Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 363–364, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). And as Beylund notes, remedies may be available to

him under state law. See Brief for Petitioner in No. 14–1507, pp. 13–14.

[¶33] Heien addressed mistakes of law applied to reasonable articulable suspicion to stop. In Beylund and Wojahn the issue is consent and due process in a civil proceeding and therefore Heien is inapplicable. If the fact finder determines consent was not voluntary then the Appellants' due process rights have been violated by the Department's taking of their driving privileges based on a violation of their constitutional rights. Any mistake of law in Beylund and Wojahn does not change the consent analysis because a consent analysis is a determination of the conduct of the arrestee in consenting irrespective of the legality of the conduct of law enforcement. See Bumper v. N. Carolina, 391 U.S. 543, 550, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797 (U.S. 1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."). Because there was coercion whether lawful or unlawful in Beylund and Wojahn there can be no consent and ultimately the North Dakota Agencies Practices Act requires exclusion. N.D.C.C. 28-32-46(2)("The order is in violation of the constitutional rights of the appellant.").

[¶34] Scott addressed application of the exclusionary rule to State Parole Board hearings and references generally instances where the United States Supreme Court has determined that federal law does not require application of the exclusionary rule in civil proceedings. However, evidence obtained in violation of a person's Fourth Amendment or Article 1 Section 8 rights should be suppressed or excluded, regardless of whether the proceeding against the person is criminal or civil in nature. Compare the Minnesota case

of Harrison v. Comm'r of Pub. Safety, 781 N.W.2d 918 (Minn. App. 2010); see also Haase v. Comm'r of Pub. Safety, 679 N.W.2d 743 (Minn. App. 2004); Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183 (Minn. 1994). That is because the text of the Fourth Amendment (and Article 1 Section 8), unlike that of its Fifth and Sixth Amendment counterparts, does not limit the Amendment's protections to criminal cases. "By its terms, however, the Fourth Amendment-unlike the Fifth and Sixth-does not confine its protections to either criminal or civil actions. Instead, it protects generally '[t]he right of the people to be secure.'" Skinner v. Ry. Labor Executives' Ass'n., 469 U.S. 602, 641 (1989) (Marshall, J. dissenting); New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

[¶35] If drivers cannot be prosecuted for exercising the constitutional right to refuse to consent to a warrantless request to submit to a blood test, what is the effect of law enforcement threatening in an advisory an offense that cannot be prosecuted? In Beylund and Wojahn law enforcement wanted to extract evidence of alcohol concentration and invoked the North Dakota implied consent law that required submission to a blood test on pain of prosecution for refusal.

[¶36] By way of comparison, in Minnesota the case of McDonnell v. Comm'r of Pub. Safety, 473 N.W.2d 848 (Minn. 1991) was a consolidated case involving four different drivers. One of those drivers was Cindy Moser. In that case, an officer read Moser an implied consent advisory that included the statement that refusal to take a chemical test "may" result in criminal penalties. At that time, in Minnesota, the crime of refusal was only applicable if the driver had a previous license revocation on record. Id. at 853. Because Moser did not have a previous revocation, any refusal by her could not have been a crime. Id. The Minnesota Supreme Court held that Moser's due process rights

were violated because the implied consent advisory misinformed the driver that refusal may be a crime despite the fact that for her, it could not.

[¶37] In the wake of McDonnell, the Minnesota Commissioner of Public Safety argued that a number of appeals pending in the Minnesota Court of Appeals should be resolved in the Commissioner's favor because, unlike Moser, none of the drivers in those cases testified that it was the unlawful threat of criminal prosecution that caused them to submit to testing. The court disagreed with the Commissioner's narrow interpretation of the McDonnell holding. In Olinger v. Comm'r of Pub. Safety, 478 N.W.2d 806 (Minn. Ct. App. 1991), the Minnesota court stated "the supreme court held that a constitutional violation occurred because police 'threatened criminal charges the state was not authorized to impose."' Id. at 807-808. The court then made clear that "***the improper threat constitutes the violation, and no showing of actual prejudice is required***." Id. at 808 (emphasis added). Accordingly, it is clear that a due process violation is complete upon the utterance of the unlawful threat, regardless of the decision that follows.

[¶38] That point was made abundantly clear in a separate case issued by the Minnesota court of appeals the same day as Olinger. In Steinolfson v. Comm'r of Pub. Safety, 478 N.W.2d 808 (Minn. Ct. App. 1991), the driver was read the defective advisory threatening everyone with prosecution, regardless of their record. But in Steinolfson's case, he refused the test. The Commissioner argued that Steinolfson could not claim his due process rights were violated when the unlawful threat obviously did not coerce him into testing. The Minnesota court again rejected the Commissioner's argument, noting that "the focus of the supreme court's concern was the inaccuracy of the advisory. The advisory gives misleading and inaccurate information to every first-time offender, ***and***

the driver's subsequent decision regarding testing does not diminish the violation." Id. at 809 (emphasis added) (citations omitted).

[¶39] Now that the crime of blood test refusal is rendered unconstitutional under Birchfield, the North Dakota implied consent advisory threatens a crime the state cannot lawfully pursue and threatening that crime violates a driver's due process rights. Compare McDonnell. That violation was complete on the reading of the defective advisory, regardless of whether Mr. Beylund or Mr. Wojahn ultimately submitted to testing. Compare Steinolfson.

[¶40] In Frost v. R.R. Comm'n, 271 U.S. 583, 596, 46 S. Ct. 605, 608, 70 L. Ed. 1101 (1926) the United States Supreme Court articulated the doctrine of unconstitutional conditions stating that

> as a general rule, the state, having the power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution * * * may thus be manipulated out of existence.

Id. at 593-94. Because the doctrine of unconstitutional conditions applies in North Dakota just as it did in California Mr. Beylund and Mr. Wojahn did not have to relinquish a Constitutional Right in order to obtain a privilege. But North Dakota's implied consent law does just that by conditioning the grant of the privilege to drive upon a driver's surrender of his Constitutional right to be secure against unreasonable searches by requiring that the driver submit to a blood test without a warrant. The condition becomes even more egregious when the State threatens to charge a crime for failure to consent to a warrantless search.

[¶41] Mr. Beylund and Mr. Wojahn have a constitutional right to refuse to consent to a warrantless request to submit to a blood test. See Birchfield. North Dakota's implied consent laws are designed to circumvent the warrant requirement and coerce a driver to provide consent to a warrantless search. To pursue its purpose, to compel drivers to consent to a chemical test, the North Dakota legislature has violated the doctrine of unconstitutional conditions by drafting laws that require drivers to consent to warrantless searches (blood tests) in order to obtain the privilege to drive and by making it a crime to refuse a warrantless search (blood test). It is a violation of due process to deny a privilege based on the invocation of a constitutional right.

[¶42] Article I, Section 20 of North Dakota's Constitution states that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." This concept embedded in our State Constitution is basically the doctrine of unconstitutional conditions that was articulated by the United States Supreme Court in Frost, at 596, previously quoted above. In North Dakota therefore the doctrine of unconstitutional conditions applies not only as applied through the fourteenth amendment of the U.S. Constitution but also as a mandate of the State Constitution. As such the search warrant requirement found in the Fourth Amendment and Article I Section 8 and the right to refuse a warrantless search (blood test) cannot be excepted by North Dakota's implied consent law that conditions the privilege to drive on the surrender of the right to refuse a warrantless search. See also State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996) ("Unlike the United States Constitution, which "is an instrument of grants of authority" to enact legislation (see Art. I, § 8, U.S. Const.), our North Dakota Constitution "is an

instrument of limitations of authority" to enact legislation (see Art. IV, § 13, N.D. Const.). State v. Anderson, 427 N.W.2d 316, 318 (N.D.), cert. denied, 488 U.S. 965 (1988). "The North Dakota Legislature thus has plenary powers except as limited by the state constitution, federal constitution, and congressional acts, [ ], and treaties of the United States." Id.").

[¶43] Because North Dakota's implied consent law requires that a driver relinquish their Article I Section 8 and Fourth Amendment rights by consenting to a search (blood test) in return for the privilege to drive, thereby forcing the exchange of a mere privilege for a constitutional right, North Dakota's implied consent law is unconstitutional. See Frost at 593 ("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."); Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir., 2004)("The City may contend that the searches are permissible because they are entirely voluntary. No protestors are compelled to submit to searches; they must do so only if they choose to participate in the protest . . .. This is a classic "unconstitutional condition," in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right."); Hillcrest Prop., LLP v. Pasco Cnty., 939 F.Supp.2d 1240, 1255 (M.D. Fla. 2013)("A government is generally prohibited from enforcing an "unconstitutional condition," that is, from conditioning a governmental accommodation on a citizen's relinquishing a constitutional right. For example, the Fourth Amendment prevents a state's conditioning the issuance of a driver's license on a citizen's waiving the

prohibition against unreasonable search and seizure of the citizen's automobile.").

[¶44] It is well settled that the unconstitutional conditions doctrine provides that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .." Perry v. Sindermann, 408 U.S. 593, 597 (1972). If it could, the "exercise of those [interests] would in effect be penalized and inhibited." Id. An example of a comparative application of the doctrine of unconstitutional conditions to rights under the fourth amendment can be found in Dearmore v. City of Garland, 400 F. Supp. 2d 894 (N.D. Tex. 2005). In Dearmore, the City of Garland, Texas, imposed an ordinance that provided that owners of residential property must obtain a license in order to rent the property. Id. As a condition of the license, owners were to consent to an inspection of the property from the City of Garland once a year, and failure to do so was an offense. Id. The ordinance, however, also provided authorization for the City of Garland to obtain a search warrant if consent to the inspection was refused or could not be obtained. Id. The court stated:

> [T]he property owner is being penalized for his failure to consent in advance to a warrantless search of unoccupied property. The property owner's consent thus is not voluntary at all. A valid consent involves a waiver of constitutional rights and must be voluntary and uncoerced. The alternatives presented to the property owner are to consent in advance to a warrantless inspection, or to face criminal penalties; thus consent is involuntary. On the other hand, if the owner does not consent to the warrantless search, he does not receive a permit. The whole purpose of receiving a permit is to rent the property for commercial purposes. Without a permit, the owner cannot engage in lawful commercial activity. The owner is thus faced with equally unavailing situations.

Id. at 902-03 (internal citations omitted). Subsequently, the district court enjoined the City of Garland from enforcing any provision of the ordinance that required a person renting property to allow inspection of the property as a condition of issuing a permit, or

penalized a person for refusing an inspection. Id. at 906. The City subsequently amended the ordinance, removing the provisions related to consent and clarifying the circumstances under which the City of Garland may seek a warrant. Dearmore v. City of Garland, 519 F.3d 517, 520 (5th Cir. 2008). As in Dearmore just as an owner's failure to consent is an offense a driver's failure to consent in North Dakota is an offense making the application of the law unconstitutional as it violates the doctrine of unconstitutional conditions.

[¶45] However, irrespective of federal law on the matter as the United States Supreme Court alluded to in footnote 9 in Birchfield the remedy in North Dakota pursuant to the North Dakota Administrative Agencies Practice Act is exclusion. See N.D.C.C. § 28-32-24(3) and § 28-32-46(2).

[¶46] **CONCLUSION**

[¶47] In Schneckloth v. Bustamonte, 412 U.S. 218 (1973) the United States Supreme Court warned us about the consequences of attempting to bypass constitutional commands by creating or relying on a legal fiction when it wrote that

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and

> leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

Schneckloth, 412 U.S. at 228 – 29.

[¶48] In this further briefing the North Dakota Supreme Court asked the parties to address two narrow issues. As argued above, Appellants believe that the issue of the voluntariness of consent is now a matter of law as the United States Supreme Court concluded in Birchfield "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." Because Mr. Beylund and Mr. Wojahn consented to submit to a blood test on pain of committing a criminal offense they cannot be deemed to have voluntarily consented.

[¶49] The second issue was to determine the remedy in the event consent was determined to be involuntary. As argued above, apart from the doctrine of unconstitutional conditions the North Dakota Administrative Agencies Practices Act requires exclusion of the blood test results and reversal of the agency order suspending driving privileges. N.D.C.C. § 28-32-24(3) and § 28-32-46(2).

Dated: October 6, 2016

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Steve Michael Beylund, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee in consolidation with	Supreme Court Case No. 20140133 District Court Case No. 06-2013-CV-00095 **CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF ON REMAND** **APPEAL FROM THE JUDGMENT OF THE BOWMAN COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**
Douglas Dale Wojahn, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation,	Supreme Court Case No. 20140315 District Court Case No. 04-2014-CV-00008 **CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF ON REMAND** **APPEAL FROM THE JUDGMENT OF THE BILLINGS COUNTY DISTRICT COURT, THE HONORABLE ZANE ANDERSON, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

[¶1] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on October 6, 2016 he electronically served the following on Douglas Anderson and Michael Pitcher, Assistants to the North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S BRIEF ON REMAND

by sending an electronic copy to the email address dbanders@nd.gov and mtpitcher@nd.gov.

Dated: October 6, 2016

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