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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Douglas Dale Wojahn, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20140315 District Court Case No. 04-2014-CV-00008 **APPELLANT'S BRIEF** **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**

Thomas F. Murtha IV
North Dakota Attorney ID#06984
PO Box 1111
Dickinson ND 58602-1111
701-227-0146
Attorney for Appellant

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[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. § 27-05-06(4) and N.D.C.C. § 39-20-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 28-27-01 and N.D.C.C. § 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

[¶5] **STATEMENT OF THE ISSUES ON APPEAL**

I. Did the Administrative Hearing Officer err in the Conclusions of Law because the tests taken by law enforcement were warrantless searches and the department failed to establish an exception to the warrant requirement for either search and therefore, the Hearing Officer's decision violated the Appellant's constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota?

II. Did the Administrative Hearing Officer err in the Conclusions of Law because the unconstitutional conditions doctrine articulated in Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) applies to North Dakota's implied consent law making it unconstitutional when a test is sought without a valid search warrant?

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Douglas Dale Wojahn, appeals 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 and 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. Appendix 4, 14, 17, 27.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On December 7, 2013 law enforcement stopped the vehicle driven by Mr. Wojahn and detained him. 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. T. 9:7 to 18:10. Law enforcement arrested Mr. Wojahn after he performed the screening test. T. 18:12-24.

[¶10] After the arrest law enforcement read the implied consent advisory a second time and asked Mr. Wojahn to provide a blood sample. T. 21:9-12. Mr. Wojahn complied with law enforcement's request to search him. T. 21:11-12. Law enforcement then searched Mr. Wojahn by having him provide a blood sample for testing. T. 21:24 to 22:3.

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

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

[¶13] **LAW AND ARGUMENT**

[¶14] **Standard of Review**

[¶15] "[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.

[¶16] N.D.C.C. § 28-32-46 states the standard of review for this matter.

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
>
> 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.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

[¶17] N.D.C.C. § 28-32-24(3) states that

> [u]pon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency, or any person conducting a proceeding for it, may exclude objectionable evidence.

See Richter v. North Dakota Department of Transportation, 2008 ND 105, ¶9, 750 N.W.2d 430.

[¶18] "An agency's decisions on questions of law are fully reviewable." Kiecker v. North Dakota Dep't of Transp., 2005 ND 23, ¶ 8, 691 N.W.2d 266 (citations omitted). The laws at issue in this case are N.D.C.C. § 39-20, § 39-08-01(1)(e) and § 39-08-01(2) (implied consent laws).

[¶19] **Analysis**

I. The Administrative Hearing Officer erred in the Conclusions of Law because the tests taken by law enforcement were warrantless searches and the Department failed to establish an exception to the warrant requirement for either search and therefore, the Hearing Officer's decision violated the Appellant's constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota.

[¶20] In this case Mr. Wojahn was subjected to two searches. The first search occurred before his arrest when he submitted to a screening test of his breath, the second search when he submitted to the taking of his blood after his arrest. Mr. Wojahn's argument is that absent a search warrant or an exception to the warrant requirement those searches were illegal and that any evidence obtained therefrom should be suppressed.

[¶21] "[E]ver since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), evidence obtained by search and seizure violative of the Fourth Amendment is, by virtue of the Due Process Clause of the Fourteenth Amendment, inadmissible in State courts. State v. Manning, 134 N.W.2d 91 (N.D. 1965)." State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974). Because in this case samples of breath and blood were obtained without a warrant, and in the absence of any valid exception to the warrant requirement of the Fourth Amendment to the United States Constitution or Article I Section 8 of the Constitution of the State of North Dakota, the order suspending the Mr. Wohjan's driving privileges that relies on those search results results violates his constitutional rights and should be rescinded. See N.D.C.C. § 28-32-46.

[¶22] On April 17, 2013, the United States Supreme Court affirmed Missouri's Supreme Court ruling in McNeely v. Missouri, 133, S.Ct. 1552 (2013). In McNeely, the U.S. Supreme Court held that the natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment's search warrant requirement for nonconsensual blood testing in all drunk-driving cases, and instead, exigency in this context must be determined case by case based on the totality of the circumstances.

[¶23] McNeely clarified the concepts of exigent circumstances as they relate to search

incident to arrest as an exception to the warrant requirement that was articulated in Schmerber v. California, 384 U.S. 757 (1966). Essentially, McNeely explains that there are no single factor exigencies and in an alcohol case the analysis to apply the exception includes not only the evanescent nature of the evidence but also an analysis of why it was not possible to obtain a search warrant. The United States Supreme Court's clarification of Schmerber in McNeely affects North Dakota's implied consent law because it appears that law allows for a warrantless search based solely on an arrest. It appears from a review of North Dakota case law that North Dakota's implied consent law was considered constitutional because it was at that time thought that Schmerber allowed the warrantless search for alcohol as a search incident to arrest. Cf. State v. Anderson, 336 N.W.2d 634, 639-640 (N.D. 1983)("The issue in Schmerber was whether or not drawing blood from a nonconsenting individual violated the guarantees of the Fourth Amendment against unreasonable searches and seizures. The court stated that the act of drawing blood constitutes a search within the meaning of the Fourth Amendment, but it went on to say that so long as the person from whom the blood is drawn is first placed under arrest and administration of the blood test is justified in the circumstances and performed in a reasonable manner, the person's right to be free of unreasonable searches and seizures is not violated."). The United States Supreme Court explains in the McNeely decision that such a reading of Schmerber is incomplete and that an analysis related to the ability to obtain a search warrant is still required. Because law enforcement did not consider or attempt to obtain a search warrant the exception does not apply in this case.

[¶24] Another exception to the warrant requirement is that the person consented to the search. State v. Swenningson, 297 N.W.2d 405 (N.D. 1974). The Fourth Amendment

requires that consent to a search be voluntary. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Page, 277 N.W.2d 112 (N.D. 1979). To determine what constitutes "voluntary consent" the court considers the totality of the circumstances at the time that consent was given. State v. Metzner, 244 N.W.2d 215 (N.D. 1976). Consent must be the product of an essentially free and unconstrained choice; it cannot be the product of coercion. Schneckloth. However, if in seeking consent law enforcement makes a claim of lawful authority to search then the totality of the circumstances standard does not apply. See Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Florida v. Royer, 460 U.S. 491 (1983).[1]

[¶25] The facts of this case demonstrate that Mr. Wojahn was coerced into giving his consent by the reading of the Implied Consent Advisory which included the threat of criminal charges. Essentially, Mr. Wojahn was allowed the privilege to drive and to not be charged criminally in return for the surrender of his rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the North Dakota Constitution. Mr. Wojahn was not presented a free and unconstrained choice.

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1 The Minnesota Supreme Court has seriously considered the complete elimination of the "consent" exception to warrantless searches because the entire process is inherently coercive. State v. George, 557 N.W.2d 575, 580 (Minn. 1997). Rather than take the drastic step of discarding the concept of consensual searches, the Court stated, "Short of rejecting the concept of consent to search in the context of routine traffic stops, courts can and should demand sufficient proof in an individual case that the consent to search was truly express, clear and voluntary." Id. These concerns with consent were amplified in the special concurrence penned by Justice Tomljanovich, who noted that the courts will continue to face, "an ongoing attempt to come to grips with the increasing use by state troopers and police officers of subtle tactics to get motorists and others to 'consent' to searches." Id. at 581. She went on to add that, "[w]e are not dealing with vacuum cleaners in this case but with the liberty and privacy interests of all the people of the State of Minnesota, and we have an obligation to ourselves and to the Constitution of this State to do what we can, in our limited role as a court of last resort, to provide reasonable protection to those interests." Id.

[¶26] Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker, rather than the product of duress or coercion, express or implied." Schneckloth, 412 U.S. at 222. Consent is involuntary if it results from circumstances that overbear the consenting party's will and impairs his or her capacity for self-determination. Id. at 233.

[¶27] The Department cannot prove consent simply by showing an individual acquiesced to a claim of lawful authority or submitted to a show of force. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Fourth Amendment consent does not lie where the police claim to have a right to the result. Bumper at 550. In Bumper, the police showed up at the defendant's home with a search warrant, and upon showing it to the defendant's grandmother, she consented to allow them to search the defendant's home. The Court in Bumper said:

> One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant rather than an invitation to search.
>
> One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law …. The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law. (Citations omitted).

Bumper at 549, fn. 14.

[¶28] Mr. Wojahn's case is analogous to Bumper because law enforcement informs him that if he refuses to take the test it is a separate crime, just like the presentation of a

search warrant stating that the court requires that the suspect submit to a search law enforcement informed Mr. Wojahn that the law of the State of North Dakota requires him to submit to a search or it is a crime. Under these rules, the Department has the burden to prove that consent was freely and voluntarily given. Bumper, 391 U.S. at 548. But to do so the standard is NOT the totality of the circumstances from Schneckloth but rather because Mr. Wojahn acquiesced to the lawful authority invoked against him "submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law." Bumper at 549, fn. 14. Law enforcement in this case used North Dakota's implied consent law and the threat of the crime of test refusal to circumvent the warrant requirement. Mr. Wojahn had two choices when he was asked to consent to a test: consent to a warrantless search or lose his privilege to drive and be charged with a crime.

[¶29] In United States v. Biswell, 406 U.S. 311, 314-315 (1972) the United States Supreme Court found that when a statute authorizes a search the legality of the search does not depend on consent because the consent is only the lawful submission to authority and it is the legality of the statute that determines the legality of the search. Despite the United States Supreme Court's rulings in Bumper and Biswell the North Dakota Supreme Court issued its ruling in McCoy v. North Dakota Department of Transportation, 2014 ND 119, 848 N.W. 2d 659 based on the Minnesota Supreme Court decision in State v. Brooks, 838 N.W.2d 563 (Minn. 2013) and the Oregon Supreme Court in State v. Moore, 318 P.3d 1133 (Or. 2013). The McCoy decision is not in alignment with either Bumper or Biswell.

[¶30] The Brooks decision is not constitutionally sound. In his concurring opinion in

Brooks Minnesota Supreme Court Justice Stras wrote that the "particular theory of consent advanced by the court cannot withstand constitutional scrutiny" and explained that the Minnesota Supreme Court

> is mistaken when it concludes that Brooks voluntarily consented at the scene to any of the three searches conducted in this case. In each of the three encounters, a police officer read Minnesota's implied-consent advisory, which informed Brooks that refusal to consent to a blood-alcohol test is a crime. Perhaps contemplating this moment, we observed in Prideaux v. State that "[t]he obvious and intended effect of the implied-consent law is to *coerce* the driver suspected of driving under the influence into 'consenting' to chemical testing, thereby allowing scientific evidence of his blood-alcohol content to be used against him in a subsequent prosecution for that offense." 310 Minn. 405, 409-10, 247 N.W.2d 385, 388 (1976) (emphasis added). Since Prideaux, Minnesota's implied-consent law has become even *more* coercive because it now imposes criminal liability for test refusal. It is hard to imagine how Brooks's consent could have been voluntary when he was advised that refusal to consent to a search is a crime. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (stating that consent must be voluntary, not "the product of duress or coercion, express or *implied*" (emphasis added)); Bumper v. North Carolina, 391 U.S. 543, 550 (1968) ("Where there is coercion there cannot be consent.").

Justice Stras went on in footnote 10 of his concurring opinion in Brooks to explain how the Minnesota Supreme Court's reliance on South Dakota v. Neville, 459 U.S. 553 (1983) was misplaced writing that

> [c]ontrary to the court's assertion, neither South Dakota v. Neville, 459 U.S. 553 (1983), nor McDonnell v. Commissioner of Public Safety, 473 N.W.2d 848 (Minn. 1991), undermines Prideaux. Nor does either case support the court's conclusion that Brooks voluntarily consented to any of the three searches. Neville held that "no impermissible coercion is involved when [a] suspect refuses" to take a blood-alcohol test, even when the legal consequences for his refusal included the loss of his driver's license and use of the test refusal against him in a criminal trial. Neville, 459 U.S. at 562 (emphasis added). The issue in Neville—whether a suspect's refusal to submit to a test was coerced—is the exact opposite of the issue presented in this case and in Prideaux—whether a suspect's submission to a test was coerced. Similarly, McDonnell (following Neville) held that "[t]he fact that certain individuals may face criminal charges for refusing to undergo testing in no way compels those

> individuals to refuse." 473 N.W.2d at 855-56 (emphasis added); see also id. at 854 (citing Prideaux with approval). It is a mystery how the court starts from the premise that the penalties for test refusal in the implied-consent statute do not compel test refusal—the holdings of Neville and McDonnell—to reach the conclusion that the penalties for test refusal in the implied-consent statute do not compel submission to testing—the very purpose of the criminal penalties.

Mr. Wojahn argues the North Dakota Supreme Court should abandon its reliance on the majority decision in Brooks as that decision is not constitutionally sound.

[¶31] The North Dakota Supreme Court's reliance on the decision in State v. Moore, 318 P.3d 1133 (Or. 2013) is misplaced because the penalty imposed by the State of North Dakota is constitutionally impermissible (crime for refusal and loss of driving privileges). The quote from Moore, at 1139 ("[I]t is difficult to see why the disclosure of accurate information about a particular penalty that may be imposed—if it is permissible for the state to impose that penalty—could be unconstitutionally coercive."), used to support the opinion in McCoy, at ¶18 reveals a fatal flaw in applying the Oregon Supreme Court's reasoning to the facts of McCoy to determine that consent was free and voluntary. Mr. Wojahn argues that it is constitutionally impermissible to penalize the exercise of a constitutional right. North Dakota law however does just that by penalizing the refusal to consent to a warrantless request to submit to a chemical test thereby penalizing a refusal to consent to a warrantless search. Because it is not permissible for the State to impose a penalty for a refusal to consent to a warrantless search (See Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 540 (1967); See v. City of Seattle, 387 U.S. 541, 546 (1967)) the reasoning in Moore would actually dictate a result in favor of finding that the driver threatened with a crime for refusing to test and loss of the privilege to drive did not freely and voluntarily consent to a warrantless search.

[¶32] It is the North Dakota Department of Transportation that has the burden to prove that consent was freely and voluntarily given. Bumper, 391 U.S. at 548. To do so, the Department must prove that the driver's performance of the test was not the product of submission to the officer's legal authority. Id. To make that determination, the hearing officer must examine the totality of circumstances that led to the driver performing the test. Schneckloth, 412 U.S. at 224-27. Law enforcement in this case used North Dakota's implied consent law and the threat of the crime of test refusal to circumvent the warrant requirement. Mr. Wojahn had two choices when he was asked to consent to a test: consent to a warrantless search or lose his privilege to drive and be charged with a crime. This reasoning is analogous to Bumper where instead of submitting to the authority of a search warrant Mr. Wojahn submitted to the authority of North Dakota law making it a crime to refuse the search.

[¶33] In Bumper it was never determined if the search warrant was valid or not because the State in that case only relied on consent. That being said however Mr. Wojahn argues the crime of test refusal used to coerce his consent is invalid by being unconstitutional. State of North Dakota v. Jaskowiak, 42-2014-CR-00020, Doc ID#31 (District Court Order declaring N.D.C.C. § 39-08-01(1)(e) unconstitutional), Appendix 31. "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camara, 387 U.S. 523, 528-29 (1967). Searches that impose "significant intrusions upon the interests protected by the Fourth Amendment," and are "authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." Id. at 534. It is unconstitutional to require 'consent' to

such searches by imposing criminal sanctions for refusal. Id. at 525-534.

[¶34] In Camara, the United States Supreme Court analyzed a housing code which required an occupant to allow a city inspector to enter the occupant's building, without a warrant. Id. at 526. The defendant refused to allow a warrantless inspection, and was charged with a misdemeanor for such refusal. Id. at 526-527. The Court, overruling its own precedent, held that such searches were a significant invasion of privacy, requiring Fourth Amendment protections. Id. at 525-34. The Court reasoned that the defendant should not be subject to criminal sanctions for requiring a warrant as was Defendant's Fourth Amendment right. Id. at 531-534. Like the administrative code in Camara, North Dakota's implied consent law and criminal statute making refusal a crime are unconstitutional.

[¶35] Law enforcement used the threat of a loss of license and a crime to coerce Mr. Wojahn to consent to a search. The North Dakota Supreme Court has stated that the "purpose of the implied consent law is to discourage individuals from driving an automobile while under the influence of intoxicants; to revoke the driving privileges of those persons who do drive while intoxicated; and to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication." Asbridge v. North Dakota State Highway Commissioner, 291 N.W.2d 739, 750 (N.D. 1980). The implied consent law gathers evidence by coercing drivers to consent to a search. See Prideaux v. State Department of Public Safety, 247 N.W.2d 385, 388 (Minn. 1976)("The obvious and intended effect of the implied-consent law is to coerce the driver suspected of driving under the influence into 'consenting' to chemical testing, thereby allowing scientific evidence of his blood-alcohol content to be used against him in a subsequent prosecution

for that offense."); Rodewald v. Kan. Dep't of Revenue, 297 P.3d 281, 287 (Kan. 2013)("the purpose of the implied consent law is to coerce a driver's submission to chemical testing through the threat of statutory penalties, including license revocation for refusing the test"); People v. Superior Court (Hawkins), 493 P.2d 1145, 1149 (Cal. 1972)("the Legislature devised an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such person will lose his automobile driver's license for a period of six months if he refuses to submit to a test for intoxication."); Garrity v. State of New Jersey, 385 U.S. 493 (1967)("The choice imposed . . .was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. State of Florida, 309 U.S. 227 . . . can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242. Subtle pressures (Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513) may be as telling as coarse and vulgar ones.").

[¶36] In Schneckloth, 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 v. Bustamonte, 412 U.S. at 228 – 29. North Dakota's Constitution forbids the North Dakota legislature or a North Dakota agency to draft a law or rule to circumvent the warrant requirement found in Article I section 8. Article I, Section 20 explicitly 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." As such Article I Section 8 cannot be excepted by the Department and the search warrant requirement cannot be excepted by North Dakota's implied consent law.

[¶37] North Dakota's "implied consent" cannot substitute for the consent necessary for an exception to the warrant requirement. See State v. Hayes, 2012 ND 9, ¶39, 809 N.W.2d 309 ("Hayes had two choices when confronted by the officers asking whether they could search her residence: consent to a warrantless search or violate her release conditions and be subject to an arrest warrant for failing to comply with the district court's order. Consent based upon duress or coercion is not voluntary. Id. Under the circumstances, Hayes did not provide voluntary consent to search 210 Adams Street."); Weems v. State, 04-13-00366-CR, at page 14 (Tex. App. May 14, 2014)("[W]e hold that the implied consent and mandatory blood draw statutory scheme found in the Transportation Code are not exceptions to the warrant requirement under the Fourth

Amendment. To be authorized, the State's warrantless blood draw of Weems must be based on a well-recognized exception to the Fourth Amendment."); Holidy v. State, 06-13-00261-CR, at page 2-3 (Tex. App. 2014) (In declaring the Texas implied consent statute unconstitutional the court stated that "[f]rom Holidy's interaction with officers, Holidy believed he had no choice but to submit to their directives of having his blood drawn and tested for alcohol."); but see McCoy . Like the appellant in Hayes Mr. Wojahn was coerced into giving his consent to a search. In Hayes it was the threat of violating a condition of release and in Mr. Wojahn's case it was the threat of violating North Dakota law that caused him to consent to the search. Under the circumstances of this case the State cannot prove that Mr. Wojahn freely and voluntarily consented to what would otherwise be a unconstitutional warrantless searches and the North Dakota Constitution forbids the drafting of a law that circumvents the warrant requirement by making it a crime to invoke the right to refuse a warrantless search.

[¶38] **Analysis**

II. The Administrative Hearing Officer erred in the Conclusions of Law because the unconstitutional conditions doctrine articulated in Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) applies to North Dakota's implied consent law making it unconstitutional when a test is sought without a valid search warrant.

[¶39] 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. Wojahn does 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 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.

[¶40] Mr. Wojahn argues that he has a constitutional right to refuse to consent to a warrantless search and that he therefore has a constitutional right to refuse to consent to a warrantless request to take a breath, blood or urine test. As explained above Mr. Wojahn argues that 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 in order to obtain the privilege to drive and by making it a crime to refuse a warrantless search.

[¶41] Mr. Wojahn had a constitutional right to refuse to consent to a warrantless request to take a breath test. The United States Supreme Court has repeatedly recognized that the Fourth Amendment protects a person's right to refuse to consent to a warrantless search under various circumstances. For example, in District of Columbia v. Little, 339 U.S. 1 (1950), the Court held that refusing to unlock the door to one's home does not constitute

misdemeanor interference with a health inspection. Emphasizing that the defendant "neither used nor threatened force of any kind," the Court observed that a prohibition against "interfering with or preventing any inspection" to determine a home's sanitary condition "cannot fairly be interpreted to encompass" a person's mere failure to unlock a door and permit a warrantless entry. Id. at 5, 7. The Court reasoned that "[t]he right to privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than" refuse to unlock a door. Id. at 7. Similarly, in Camara, 387 U.S. 523, 540 (1967), the Court recognized an individual's constitutional right to resist a warrantless housing inspection, noting that the "appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." Likewise, in See, 387 U.S. 541, 546 (1967), the Court recognized a person's constitutional right to resist a warrantless fire inspection, observing that the "appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse."

[¶42] Reversing a conviction for harboring a fugitive in United States v. Prescott, 581F.2d 1343, 1351 (9th Cir. 1978), the Ninth Circuit held that "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered evidence of criminal wrongdoing." The Prescott court supported its holding with this reasoning:

> "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." When, on the other hand, the officer demands entry but presents no warrant, there is a presumption that the officer has no right to

> enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime.

Id. at 1350-51 (citations omitted).

[¶43] The North Dakota Supreme Court upholds the constitutionality of a statute unless it is "clearly shown to contravene the state or federal constitution." Hoff v. Berg, 1999 ND 115, ¶ 7, 595 N.W.2d 285. 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.

[¶44] 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 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.").

[¶45] 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 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."). The United States Supreme Court

> has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It 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).

[¶46] Previously the Department has argued that Mr. Wojahn must demonstrate an "unconstitutional search" for application of the doctrine of unconstitutional conditions to apply. The case cited by the Department, Council of Independent Tobacco Manufacturers of America v. State, 713 N.W.2d 300 (Minn. 2006), however does not support the Department's claim. In the Tobacco case the Minnesota Supreme Court only indicated that "to invoke this "unconstitutional conditions" doctrine, appellants must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their First Amendment rights." Id. at 306. The Tobacco case does not require that the statute be unconstitutional by itself to apply the doctrine only that the statute requires the surrender of a constitutional right in return for a privilege that could not be obtained any other way. In Tobacco the Court found that the statute did not prevent the plaintiff's from exercising their first amendment rights. Id. at 307 ("Thus, the focus of the unconstitutional conditions doctrine is on whether a governmental entity is denying a benefit to Plaintiffs that they could obtain by giving up their freedom of speech, or is penalizing them for refusing to give up their First Amendment rights."). Compared to Mr. Wojahn's situation however the North Dakota law does condition his driving on the surrender of a constitutional right, specifically requiring him to consent to a warrantless search and making it a crime (punishing him) if he does not. Mr. Wojahn could not otherwise obtain the privilege to drive except by following North Dakota law.

[¶47] 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 at 597. 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.

[¶48] **CONCLUSION**

[¶49] Although the government may have a compelling interest to investigate drinking and driving scenarios North Dakota's current implied consent laws that condition the privilege to drive on the waiver of a constitutional right and further criminalize the exercise of that right are not the least restrictive means to accomplish that goal. The situation could be easily remedied by incorporation of a warrant requirement. Instead of trying to circumvent the warrant requirement North Dakota law should embrace it.

[¶50] Because North Dakota's implied consent laws are unconstitutional as applied to the facts of Mr. Wojahn's case he respectfully requests that the decision to suspend his driving privileges be reversed.

[¶51] Absent a finding that North Dakota's implied consent laws are unconstitutional the Court should still rule in favor of Mr. Wojahn finding he did not freely and voluntarily consent to a chemical test. Although McNeely dealt with a forced blood draw, the question presented was not limited to those specific facts. Rather, McNeely is about whether the Fourth Amendment's warrant requirement may be ignored in a DWI investigation because of alcohol's inherent evanescence in the body. In a resounding eight-to-one decision from one of the most divided and divisive courts in our nation's

history, the Supreme Court's answer is that it must not. The practical holding of McNeely is that the current methods used by law enforcement officers to investigate DWI offenses are unconstitutional under the Fourth Amendment. Here, Mr. Wojahn's test results were obtained illegally because they were obtained without a warrant. Absent a valid exception to the warrant requirement the Department's reliance on those test results would make its order unconstitutional and therefore that order should be rescinded.

[¶52] Accordingly Mr. Wojahn respectfully requests that the Hearing Officer's decision be reversed.

Dated: October 20, 2014

/s/Thomas F. Murtha IV

Thomas F. Murtha IV (06984)
Attorney for Appellant
PO Box 1111
Dickinson ND 58602
701-227-0146
murthalawoffice@gmail.com

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[¶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 20, 2014 he electronically served the following on Michael Pitcher, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S BRIEF AND APPENDIX

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

Dated: October 20, 2014

Thomas F. Murtha IV

Thomas F. Murtha IV
Attorney ID 6984
PO Box 1111
58602-1111
701-227-0146
Murthalawoffice @gmail.com

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Thomas F. Murtha IV

Thomas F. Murtha IV
Attorney ID 6984
PO Box 1111
58602-1111
701-227-0146
Murthalawoffice @gmail.com