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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 Douglas Dale Wojahn, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation,	Supreme Court Case No. 20140133 District Court Case No. 06-2013-CV-00095 **APPELLANT'S PETITION FOR REHEARING** **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. 20140~~135~~315 District Court Case No. 04-2014-CV-00008 **APPELLANT'S PETITION FOR REHEARING** **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] **LAW AND ARGUMENT**

[¶4] **The North Dakota Supreme Court should reconsider Beylund v. Levi, 2017 ND 30, -- N.W.2d -- because North Dakota's implied consent law denies substantive and procedural due process by erroneously informing drivers that it is a crime to refuse to consent to a blood test and providing the driver no opportunity to challenge the illegal coercion.**

[¶5] According to the United States Supreme Court the continued possession of a driver's license may become essential to earning a livelihood; as such, it is an entitlement which cannot be taken without the due process mandated by the Fourteenth Amendment. See Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 535 (1971).

> Individuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property. The Fourteenth Amendment guarantees that individuals are not to be deprived of their property without due process of law, a protection that has been viewed as guaranteeing procedural due process and substantive due process. Procedural due process promotes fairness in government decisions "[b]y requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.' " Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Substantive due process, "by barring certain government actions regardless of the fairness of the procedures used to implement them, [ ] serves to prevent governmental power from being 'used for purposes of oppression.' " Id. (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 15 L.Ed. 372 (1856)).

John Corp. v. City of Houston, 214 F.3d 573, 577 (5th Cir. 2000).

[¶6] North Dakota's implied consent law requires that drivers be informed that it is a crime to refuse to submit to a blood test. N.D.C.C. § 39-20-01. The United States Supreme Court however has ruled that it is not a crime to refuse to submit to a blood test. Birchfield v. N. Dakota, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). The North Dakota Supreme Court should reconsider its decision in Beylund v. Levi, 2017 ND 30, -- N.W.2d -- because the North Dakota implied consent law is unconstitutional and denies procedural due process by requiring law enforcement to use a procedure that misinforms

drivers regarding their rights. The North Dakota law is unconstitutional and denies substantive due process because it is unfair to use unconstitutional means to deprive driving privileges.

[¶7] The Beylund decision denies drivers the opportunity afforded by North Dakota law (N.D.C.C. § 28-32-24(3)) to challenge unconstitutional actions by the State. Beylund explains and cites Holte v. N.D. State Highway Comm'r., 436 N.W.2d 250 (N.D. 1989) for the proposition that N.D.C.C. § 39-20-07(5) requires admission of blood test results irrespective of how the sample was obtained despite that subsection specifically requiring that "results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained." To be clear, to fulfill its due process burden the Department must prove that the blood sample was properly obtained. The Department failed to make this proof because the blood samples in Beylund and Wojahn were not properly obtained because the Department used an unconstitutional law to coerce consent to illegally obtain the blood from Mr. Beylund and Mr. Wojahn. N.D.C.C. § 28-32-24(3) is the mechanism to exclude the evidence if the burden stated in N.D.C.C. § 39-20-07(5) is not met.

[¶8] Subsequent to the decision in Holte the legislature passed N.D.C.C. § 28-32-24(3) providing for evidence to be excluded on constitutional grounds in an adjudicative agency proceeding. N.D.C.C. § 28-32-24(3) provides the procedure for due process compliance with N.D.C.C. § 39-20-07(5). N.D.C.C. § 1-02-07 states

> Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest

legislative intent that such general provision shall prevail.

In interpreting the two statutes Beylund fails to follow the requirements of N.D.C.C. § 1-02-07 because the two statutes can be reconciled not to conflict and are otherwise reconcilable and further N.D.C.C. § 28-32-24(3) was enacted after N.D.C.C. § 39-20-07(5). To be clear, the Beylund court should not have found the two statues to be irreconcilable so as to give effect to the specific over the general when in fact the two statues can be read to be reconcilable. The Beylund decision disharmonizes the two statutory provisions. Previously, the North Dakota Supreme Court has reiterated that statutes should be harmonized to give meaning to related provisions and avoid conflicts between statutes. See State, ex rel. Roseland v. Herauf, 2012 ND 151, ¶ 7, 819 N.W.2d 546, 549 ("Statutes should be harmonized to give meaning to related provisions and to avoid conflicts between statutes. Great Western Bank v. Willmar Poultry Co., 2010 ND 50, ¶ 7, 780 N.W.2d 437; N.D.C.C. § 1–02–07.").

[¶9] The North Dakota Supreme Court should reconsider its decision in Beylund because the North Dakota law used to deprive Mr. Beylund and Mr. Wojahn deprived them of procedural and substantive due process and unnecessarily found N.D.C.C. § 28-32-24(3) and N.D.C.C. § 39-20-07(5) to be in conflict.

[¶10] The Beylund decision focused on the inapplicability of the exclusionary rule to civil proceedings and mentioned that a majority of courts have considered similar provisions and concluded the exclusionary rule does not apply to civil administrative license suspension proceedings. Mr. Beylund and Mr. Wojahn are requesting reconsideration for the North Dakota Supreme Court to consider that none of the decisions cited involved that application of an unconstitutional law as does the decision

in Beylund and therefore the provisions are not at all similar. Further, there is a split of authority between the States cited in Beylund and the States of Minnesota (Olson v. Comm'r of Pub. Safety, 371 N.W.2d 552, 556 (Minn.1985)), Oregon (Pooler v. Motor Vehicles Div., 306 Or. 47, 755 P.2d 701 (1988)), and Vermont (Vermont v. Lussier, 171 Vt. 19, 757 A.2d 1017 (2000); State v. Nickerson, 170 Vt. 654, 756 A.2d 1240 (2000)).

[¶11] Mr. Beylund and Mr. Wojahn request reconsideration because, as previously argued, a civil administrative license suspension proceeding works to deprive a person of an important property interest and therefore the proceeding is more like a forfeiture proceeding where the exclusionary rule does apply. See One 1995 Corvette VIN No. 1G1YY22P585103433 v. Mayor & City Council of Baltimore, 353 Md. 114, 128, 724 A.2d 680, 687 (1999)("Although the purpose of the exclusionary rule may be to curb improper police conduct, the purpose of the Fourth Amendment is to insure "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." It protects everybody, not just those of the criminal milieu, and, thus, is not limited to criminal proceedings. This issue was discussed by the Supreme Court in Austin, 509 U.S. at 608 n. 4, 113 S.Ct. at 2804–05 n. 4, 125 L.Ed.2d 488: "As a general matter, this Court's decisions applying constitutional protections to civil forfeiture proceedings have adhered to th[e] distinction between [constitutional] provisions that are limited to criminal proceedings *and provisions that are not.* Thus, the Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings, [citing Plymouth Sedan and Boyd] . . .."").

The North Dakota Supreme Court should reconsider its decision in Beylund to consider applying the exclusionary rule to civil administrative license suspension proceedings for

the same reason the exclusionary rule applies to forfeiture proceedings. See In re 650 Fifth Ave. & Related Properties, 830 F.3d 66, 98 (2d Cir. 2016)("It is well-established that the Fourth Amendment's exclusionary rule applies in forfeiture cases. See 500 Delaware Street, 113 F.3d at 312 n. 3; see also One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (holding that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings); Austin v. United States, 509 U.S. 602, 608 n. 4, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (observing that "the [Supreme] Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings"); Krimstock v. Kelly, 306 F.3d 40, 49 (2d Cir. 2002) (explaining that "[t]he Supreme Court has held that the Fourth Amendment protects claimants against unreasonable seizures of their property in the civil forfeiture context"); Olson v. Comm'r of Pub. Safety, 371 N.W.2d 552, 556 (Minn. 1985)("The fourth amendment stands as a protection against unreasonable intrusions on an individual's privacy and personal security, and if this protection is to have any efficacy, it applies here."); Farrell v. United States Army Brigadier Gen., 784 S.E.2d 657, 661–62 (N.C. Ct. App.), appeal dismissed sub nom. Farrell v. Thomas, 793 S.E.2d 214 (N.C. 2016), and appeal dismissed sub nom. Farrell v. Thomas, 794 S.E.2d 318 (N.C. 2016)("We agree with our dissenting colleague that there are strong policy reasons for applying the exclusionary rule in civil license revocation cases.").

[¶12] **CONCLUSION**

[¶13] As previously argued the North Dakota Supreme Court should reconsider its decision in Beylund because N.D.C.C. § 28-32-24(3) and N.D.C.C. § 39-20-07(5) are

not irreconcilable and absent the application of N.D.C.C. § 28-32-24(3) North Dakota drivers have no procedure available to challenge an unconstitutional act by the State in a civil administrative license suspension proceeding which itself amounts to a denial of due process.

[¶14] Because North Dakota's implied consent law is unconstitutional the North Dakota Supreme Court should reconsider its decision in Beylund because it is a violation of due process to use an unconstitutional law to deprive a person of an important property interest and the North Dakota Supreme Court should reconsider applying the exclusionary rule to civil administrative license suspension proceedings for the same reasons the exclusionary rule applies to forfeiture proceedings.

[¶15] Based on the forgoing arguments and law Mr. Beylund and Mr. Wojahn respectfully request that this petition for rehearing be granted.

Dated: March 6, 2017

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Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on March 6, 2017 he electronically served the following on Douglas Anderson, and Michael Pitcher, Assistant North Dakota Attorney Generals representing the North Dakota Department of Transportation:

APPELLANTS' PETITION FOR REHEARING

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

Dated: March 6, 2017

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