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March 16, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| State of North Dakota,<br><br>Plaintiff and Appellee,<br><br>vs.<br><br>James Christian Bauer,<br><br>Defendant and Appellant. | ) | Supreme Court No. 20140453<br><br>McKenzie Co. No. 27-2014-CR-00225 |

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**BRIEF OF PLAINTIFF-APPELLEE**

APPEAL FROM ORDER DENYING MOTION TO DISMISS OR SUPPRESS

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE ROBIN A. SCHMIDT, PRESIDING

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## STATEMENT OF THE ISSUES

[¶1] Was the court correct in holding that post-arrest, post-Miranda silence can be used as evidence of Refusal to Submit to a Chemical test?

## STATEMENT OF THE CASE

[¶2] The State would agree with the Statement of the Case as laid out by Respondent-Defendant.

## STATEMENT OF THE FACTS

[¶3] The State would agree with the Statement of Facts as laid out by the Respondent-Defendant.

## STANDARD OF REVIEW

[¶4] The State would agree with the Standard of Review as laid out by the Respondent-Defendant.

## ARGUMENT

*I. The District Court properly held that Defendant's post-arrest, post-Miranda silence can be used to prove Refusal to Submit to a Chemical Test.*

[¶5] "The Fifth Amendment to the United States Constitution proclaims: "No person ... shall be compelled, in any criminal case, to be a witness against himself...." State v. Fasching, 453 N.W.2d 761, 762 (N.D. 1990). "Concurrent with its Miranda decision, the United States Supreme Court ruled in Schmerber v. California, 384 U.S. 757, 764–65, 86 S.Ct. 1826, 1832–33, 16 L.Ed.2d 908 (1966), that the Fifth Amendment privilege against self-incrimination did not protect an accused from compulsion as the source of "real or physical evidence," such as blood tests, fingerprints, photographs, measurements, and identification through writing, speaking, or physical activity." Fasching at 763. "Non-testimonial, "physical" evidence can be obtained and used without regard to the Fifth Amendment privilege against self-incrimination." Id.

[¶6] This Court has stated that "there is no Federal constitutional right to be entirely free of intoxication tests." State v. Murphy, 516 N.W.2d 285, 287 n.1 (ND 1994) (citing Schmerber v. California, 384 U.S. 757 (1966)). The same Court also clarified that "the operator of a motor vehicle on a highway or area to which the public has a right of access to for vehicular use is deemed to have consented to a chemical test to determine the alcohol content of his blood if arrested for driving or being in actual physical control of a vehicle while under the influence of

intoxicating liquor." State v. Murphy, 527 N.W.2d 254, 255 (ND 1995); see also N.D.C.C. § 39-20-01. Giving drivers the ability to refuse to submit to testing is a manner of legislative grace. Id.; see also South Dakota v. Neville, 459 U.S. 553, 559-60 (1983). "Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." South Dakota v. Neville, 459 U.S. 553, 563-64 (1983).

[¶7] In order for the protections of Miranda to apply, the evidence must be testimonial and compelled, neither of which occurs in an implied consent environment. As stated in Neville, the request for a chemical test, be it blood, breath, or urine, is non-testimonial and unprotected by the Fifth Amendment. Neville at 559. More so, the fact that nothing was said by Bauer in this case also makes it non-testimonial in nature. "[F]ailure to submit to a test, whether by stubborn silence or by a negative answer, can be a refusal." Mayo v. Moore, 527 N.W.2d 257, 260 (N.D. 1995). "A physical failure to cooperate may also amount to a refusal." Id. citing Jorgenson v. Dep't of Transp., 498 N.W.2d 167 (N.D. 1993); Geiger v. Hjelle, 396 N.W.2d 302 (N.D. 1986). No less than the United States Supreme Court in Neville implied that mere silence can count as refusal. "The situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states "I refuse to take the test," to the respondent here, who stated "I'm

too drunk, I won't pass the test." Id at 561-562.

[¶8] The evidence must also be compelled under Miranda, but as multiple courts have stated, there is no compulsion under the implied consent framework. As the United States Supreme Court has stated:

> In contrast to these prohibited choices, the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace…that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.
>
> We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.

Neville, 563-564. Far from being coercive, the implied consent gives defendants a choice as to whether to take the test or not.

[¶9] The Defendant tries to distinguish the cases relied on by the District Court by stating they never relied on silence alone. Which is why Deering v. Brown, 839 F.2d 539 (9th Cir. 1988), is illustrative for this case. In Deering, the Defendant refused to submit to a breathalyzer test and was charged criminally for it. Id at

540. Specifically the Defendant did not respond and maintained his silence even when told said silence would be deemed a refusal. Id at 541. The 9th Circuit examined whether admission of that silence violated the Fifth Amendment and/or Miranda. The Court found that the evidence was not testimonial by nature and not compelled. Id at 541-544. The Court again pointed to the fact that a Defendant is offered a choice of whether to take the test and the State actually incentives the Defendant to take the test. Id at 543. "In fact, a criminal penalty for refusal arguably compels a refusal less than the civil penalty present in Neville did. Although the imposition of a criminal penalty for refusal may create an inherently more coercive situation than imposition of a civil penalty for the same behavior, the compulsion it increases is the compulsion to submit to the breathalyzer test, not the compulsion to refuse, and refusal is the conduct made criminal in the statute." Id. The Court continued to find that because the refusal was non-testimonial, Miranda did not apply. Id at 544.

[¶10] Bauer also places great weight on Doyle v. Ohio for the proposition that post-Miranda silence cannot be used against a Defendant. 426 U.S. 610 (1976). But Neville analyzed the Due Process argument raised in Doyle and still allowed evidence of refusal to be used at trial. Neville at 564-66. It is not so much the silence but the act of refusal itself that is being admitted into evidence. As stated in Deering, "It is abundantly clear that Deering's silence was a refusal in this case; he did not, after all is said and done, take a breathalyzer test. His failure to

do so is not rendered any more legitimate by cloaking it in the due process protections traditionally afforded a defendant's silence." Id at 544.

[¶11] This Court has already stated that the Fifth Amendment privilege against self-incrimination doesn't apply under implied consent. In State v. Fields, 294 N.W.2d 404 (N.D. 1980), this Court stated "there is no impingement of Fifth Amendment rights in requiring a person to respond to an officer's request to submit to a blood-alcohol test." Id. The Court further stated that refusal could be by silence or negative answer. Id. The Defendant in this case attempts to narrow Fields because in that case he didn't remain silent but actually provided a response. Again, courts have viewed refusal as both an actual response and silence, but it is the act itself that forms the basis for the charge. Whether one speaks or not, the refusal to take the test is what is used in evidence.

[¶12] Further, the protections and procedures of Miranda do not sensibly apply to this situation. Miranda's main goal was protecting "defendants from abusive police practices used to obtain confessions." State v. Morale, 811 A.2d 185, 189 (Vt. 2002). Such protections are not needed in the implied consent world. "It would be anomalous, to say the least, to suppress evidence gathered by asking the statutorily required question." Id. Second, Miranda was designed to keep defendants from confessing to past crimes. Id. In the implied consent world, the questions are about a future act; there is no confession of a crime. Id. Again, the act of refusal itself is the crime being committed.

## CONCLUSION

[¶13] Post-arrest, post-Miranda silence can be used as evidence of Refusal to Submit to a Chemical Test because it is non-testimonial in nature and there is no compulsion or coerciveness from the State in asking the question. There is also no Due Process issues with using silence as evidence of Refusal because the act itself forms the basis for the crime. This Court should affirm the District Court's Denial of the Motion to Suppress or Dismiss.

[¶14] Dated this 16th day of March, 2015.

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I certify that a true and correct copy of the **Brief of Plaintiff-Appellee** was emailed to the following parties via electronic mail on the 16th of March, 2015:

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