

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

|                        |   |                                   |
|------------------------|---|-----------------------------------|
| STATE OF NORTH DAKOTA, | ) |                                   |
|                        | ) |                                   |
| Plaintiff/Appellee,    | ) |                                   |
|                        | ) |                                   |
| v.                     | ) | Supreme Court No. 20140454        |
|                        | ) |                                   |
| BRANDON MOREL,         | ) |                                   |
|                        | ) |                                   |
| Defendant/Appellant.   | ) | Burleigh Co. No. 08-2014-CR-01125 |

## REPLY BRIEF OF APPELLANT

Appeal from the Order (for DUI Judgment), dated and filed November 19, 2014,  
(which complies with the requirements of N.D.R.Crim.P. 32(b) for criminal judgments  
and no separate judgment of conviction has been entered), entered by the Court  
following a jury verdict of guilty on the charge of Refusing a Chemical Test, and  
the adverse determination within the September 29, 2014, Order on Motion to Dismiss

Burleigh County District Court, South Central Judicial District

The Honorable David E. Reich

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[¶1] TABLE OF AUTHORITIES

Constitutional provisions

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State Supreme Court cases; other jurisdictions

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United States Supreme Court cases

*Camara v. Municipal Court of the City and County of San Francisco*,  
387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) ..... ¶6

*Missouri v. McNeely*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1552 (2013) ..... ¶¶3-4

## [¶2] LAW AND ARGUMENT

[¶3] The Attorney General argues that *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) did not hold that the driver has a constitutional right to refuse a chemical test. *See* Amicus Brief at page 6, ¶26. But, where else did McNeely’s authority to refuse arise, but the Fourth Amendment? McNeely’s right to refuse did not spring from legislative grace, divine grace, or implied grace. McNeely’s right to refuse was of constitutional magnitude, and it was his saving grace. The criminal bar on both sides would like this Court to articulate whether a driver has a constitutional right to refuse a chemical test.

[¶4] The Attorney General also argues that *McNeely* recognized “implied consent laws as” an “exception to the warrant requirement.” *See* Amicus Brief at page 7, ¶32. *McNeely* never said this. The Attorney General should take the podium at oral argument and explain this misstatement. The criminal bar on both sides would like this Court to articulate whether implied consent is the equivalent of Fourth Amendment consent and whether implied consent is a categorical exception to the warrant requirement.

[¶5] Even in the face of *Bernard*, both the Burleigh County State’s Attorney and the Attorney General continue to cling to the belief that probable cause nullifies the Fourth Amendment requirement that officers first seek a warrant. *See* Amicus Brief at page 13-14, ¶¶57-60. The Minnesota Supreme Court found this rationale absurd. *See State v. Bernard*, 859 N.W.2d 762 (Minn. 2015) (“there is no probable cause exception to the warrant requirement”). It is absurd.

[¶6] Drunk driving is a problem. Meth labs are a problem too. This Court would be equally wrong to hold that the Fourth Amendment has no application in drug

cases because of the scourge of drugs on our society. The criminalization of a homeowner's refusal to permit a warrantless search of his residence, where probable cause exists to believe it contains a meth lab, would similarly violate the Fourth Amendment to the United States Constitution, under *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), as well as Article I, Section 8 of the North Dakota Constitution.

[¶7] Mr. Morel's prosecution under N.D.C.C. § 39-08-01(1)(e) is unconstitutional. Also, the statute, itself, is unconstitutional and must be struck down.

[¶8] CONCLUSION

[¶9] For the foregoing reasons, and those advance in his initial brief, Mr. Morel asks this court for relief.

Respectfully submitted  
this 11th day of May, 2015.

*/s/ Dan Herbel*

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[¶10] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 11, 2015, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Alexander Stock, Assistant Burleigh County State's Attorney, and Ken R. Sorenson, Assistant Attorney General, opposing counsel, at the following:

Electronic filing to: < bc08@nd.gov >

Alexander Stock, Assistant Burleigh Co State's Attorney

Electronic filing to: < ksorenso@nd.gov >

Ken R. Sorenson, Assistant Attorney General

Dated this 11th day of May, 2015.

*/s/ Dan Herbel*

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Dan Herbel