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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, Plaintiff/Appellee, v. RUTHIE MANN, Defendant/Appellant.	)))))))))	Supreme Court No. 20150069 Burleigh Co. No. 08-2014-CR-02566

BRIEF OF APPELLANT

Appeal from the Criminal Judgment, dated February 17, 2015, and filed March 2, 2015, entered by the Court following a jury verdict of guilty on the charge of Refusal to Submit to a Chemical Test

Burleigh County District Court

South Central Judicial District

The Honorable James Hill

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Ruthie Mann

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

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II. By not granting the Motion to Enter Judgment to Conform with Jury Verdict and by not acquitting Mann on felony DUI, the trial court violated the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; as well as Article I, sections 12 and 13 of the North Dakota Constitution

[¶3] STATEMENT OF THE CASE

[¶4] On June 16, 2014, Ruthie Mann's vehicle was approached by a Bismarck Police Officer in Burleigh County, North Dakota. Mann was subsequently arrested and charged with felony refusal to submit to a warrantless blood draw. (Appendix ("App.") at 5).

[¶5] On November 12, 2014, Mann filed a Motion to Dismiss the refusal charge as it related to her particular prosecution and to also strike down the new refusal law that criminalizes a driver's refusal to "submit" to a warrantless chemical test at the direction of a law enforcement officer, because both violate the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. (App. 6-19). Mann served her Motion upon both the Burleigh County State's Attorney and the North Dakota Attorney General. (App. 20-21). On November 21, 2014, the North Dakota Attorney General filed an Amicus opposition brief. (App. 22-51). On

November 24, 2014, the Burleigh County State's Attorney filed a response brief opposing the Motion. (App. 52-61).

[¶6] No evidentiary hearing was held and the trial court decided the Motion on briefs submitted by the parties. On December 17, 2014, the trial court denied Mann's Motion to Dismiss. (App. 72-92).

[¶7] On February 11, 2015, Ms. Mann went to trial on the charge of Refusal to Submit to a Chemical Test. Mann was not allowed to instruct the jury that she had a statutory right to refuse a chemical test. The State was allowed to instruct the jury that Mann had no right to refuse the test.

[¶8] The State introduced four exhibits alleging they were qualifying prior offenses. (App. 96-106). A jury found Mann guilty of Refusal to Submit to Chemical Testing; the jury did not find that Mann was guilty of fourth-offense DUI. (App. 121).

[¶9] The trial court believed that it was proper to instruct the jury that Mann had prior offenses, receive testimony that she had prior offenses, and admit exhibits purporting to be prior offenses for the jury to view. Concomitant with that belief, the trial court believed it was not, thereafter, the province of the jury to adjudicate prior offenses – that was for the Court.

[¶10] Mann filed a Motion for Judgment of Acquittal (App. 122) and also filed a Motion to Enter Judgment to Conform with Jury Verdict. (App. 126-128). After several hearings, the Court denied both motions (Transcript of February 27, 2015, Sentencing Hearing, Part Two ("S-2 Tr.") at 22, lines ("L.") 7-8; and at 23, L. 22-23), and sentenced Mann to eighteen (18) months in prison. (App. 137-138).

[¶11] On March 11, 2015, Ms. Mann filed a Notice of Appeal to this Court. (App. 143-148A). The parties stipulated to a partial transcript. (App. 149-151). Mann appeals and argues that her prosecution, for refusal to submit to chemical testing when no exception to the warrant requirement existed, alleging that it was a crime for her to refuse an officer's warrantless request for testing, as well as the statute this matter is charged under, N.D.C.C. § 39-08-01(1)(e), are both unconstitutional under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Mann also argues that the trial court erred by not entering a Judgment to conform with her jury's verdict of guilty of misdemeanor, first-offense DUI and by not acquitting Mann on felony DUI.

[¶12] Ms. Mann asks this court to vacate the Criminal Judgment and conviction in this matter, reverse the district court's denial of her Motion to Dismiss, order N.D.C.C. § 39-08-01(1)(e) be struck down, and order that Mann's refusal charge in this case be dismissed. If this Court does not provide the aforementioned relief, Mann asks that her felony conviction be vacated and that this matter be remanded for sentencing only as a misdemeanor, first-offense DUI.

[¶13] STATEMENT OF THE FACTS

[¶14] On June 16, 2014, Ms. Mann's vehicle was approached by a Bismarck Police Officer in Burleigh County, North Dakota. Subsequently, the officer arrested Mann, read her the implied submission advisory, and asked if she would submit to his demand; that being to provide a blood sample. (February 11, 2015, Partial Transcript of

Jury Trial ("Tr.") at 37, lines ("L.") 5-23). Mann "did not say no." (Tr. at 51, L. 16-19). Instead, Mann argued with the officer and asked questions. (Tr. at 52, L. 17-21). Mann argued and asked questions in response to the advisory, which "is somewhat legalese." (Tr. at 49, L. 15-20). The officer told Mann he "would count her arguing as a refusal." (Tr. at 38, L. 11-12).

[¶15] Mann was charged with refusal to submit to a warrantless chemical test search. (App. 5). The officer did not have a search warrant, nor did he seek a warrant. Also, no exigent circumstances existed in Mann's prosecution and there was no other exception to the warrant requirement.

[¶16] After the trial court denied Mann's Motion to Dismiss, without much analysis, Mann then proceeded to jury trial. On February 8, 2015, Mann submitted proposed jury instructions wherein she requested the following instruction, taken from *State v. Murphy*:

> "A person has a right under North Dakota law to refuse to submit to a chemical test for blood alcohol evaluation."

(App. 94) (citing *State v. Murphy*, 527 N.W.2d 254, 256 (N.D. 1995) (instruction approved by the North Dakota Supreme Court over Mr. Murphy's proposed instruction); *see also State v. Smith*, 2014 ND 152, ¶9, 849 N.W.2d 599 (citing N.D.C.C. § 39-20-04 as "a person's statutory right to refuse to take the test"); *see also McCoy v. N.D. Dep't of Transportation*, 2014 ND 119, ¶12, 848 N.W.2d 659 (a driver has a "statutory right to refuse testing"). The trial court denied Mann's requested instruction that she had a right to refuse. (Tr. at 23, L. 6-8).

[¶17] The State did not submit any proposed written instructions, but on February 11, 2015, the morning of trial, the State orally requested that the jury be instructed on the implied consent advisory. (Tr. at 5, L. 4-10). Mann's counsel objected, stating:

> "… part of my concern is that that would somewhat confuse the jury …
>
> … if we inform -- or essentially read the statute to the jury, we are almost instructing the jury that the officer has a right to take a blood test without giving any kind of instruction that a person has a right to refuse.
>
> There's no case law indicating that an officer has a right to a blood test. There is case law saying that there is a statutory right to refuse a blood test."

(Tr. at 7, L. 11 – 8, L. 1). The Court ruled that the jury should be instructed on, and essentially read, the implied consent statute. (Tr. at 9, L. 17-21).

[¶18] Then, Mann's counsel asked "that the jury [not be instructed and] not be informed of the prior offenses or that this is a fourth offense," citing *State v. Gahner*, 413 N.W.2d 359, 362 (N.D. 1987) and the "the prejudicial affect that proof of prior convictions may exert on a jury." (Tr. at 11, L. 23 – 13, L. 1). Mann's counsel recited the advice from *Gahner* that "charging the more serious offense without stating the prior convictions may be the more desirable alternative." (Tr. at 12, L. 8-9) (citing *Gahner*, 413 N.W.2d at 362). Essentially, Mann asked that the prior offenses be made a sentencing issue and not a jury issue. (Tr. at 13, L. 2-9). The State would not agree to make the priors a sentencing issue for the Court and asked Mann to stipulate to the priors. (Tr. at 13, L. 16-20).

[¶19] Mann informed the Court that she would like "to see if there's a conviction on the particular facts of the instant case and not allow them [the jury] to make a

determination that this particular person has a propensity so, therefore, she's going to be guilty as she's been guilty on prior occasions." (Tr. at 14, L. 10-13). The State again asked Mann "to stipulate to the prior offenses." (Tr. at 15, L. 23-24). Mann would not stipulate.

[¶20] After jury selection, the parties convened in open court, outside the presence of the jury, to again discuss the prior offense issue. The Court informed Mann that it would not remove the language "fourth or subsequent offense" from the jury instructions unless Mann stipulated to the alleged priors. (Tr. at 26, L. 14 - 27, L. 10). So, now we have the Court and the State asking the Defendant to stipulate. Mann would not stipulate. The Court denied Mann's request to take the prior offense issue from the jury and informed the State that they would have to produce the prior offense exhibits during the jury trial. (Tr. at 27, L. 19 - 28, L. 1).

[¶21] Since the trial court would not shield the propensity exhibits from the jury, Mann's counsel then asked that the trial be bifurcated into trial and sentencing phases, so that the jury would not be tainted with propensity evidence in the guilt phase; but, that the jury could consider the exhibits at the sentencing phase, if reached. (Tr. at 28, L. 6-15). The Court denied Mann's request for bifurcation and ordered the State to prove the prior offenses to the jury. (Tr. at 29, L. 1-8).

[¶22] During trial, the State offered the prior offense exhibits in the presence of the jury and Mann objected to their introduction. (Tr. at 40, L. 1-19). Mann informed the Court that the exhibits did not evidence qualifying prior offenses. (Tr. at 40, L. 3 – 42, L. 3). The Court overruled Mann's objections and received the exhibits for the jury to review. (Tr. at 41, L. 5-9). The State then offered the propensity exhibits as follows:

"Q. (Mr. Stock continuing) Showing you what's been marked as State's Exhibits 1-4, could you review those briefly. Do you know what I've handed you?

A. Yes.

Q. What are they?

A. Certified copies of the Criminal Judgments.

Q. Who are they for?

A. Ms. Mann.

Q. And what are they for?

A. DUI's."

(Tr. at 43, L. 3-16). The judge then drew additional attention to Exhibits 1-4 by addressing the jury and explaining to them directly (and for the fourth time) that the exhibits "are received." (Tr. at 44, L. 2-4). The jury found Mann guilty of refusal to submit to chemical testing. (App. 121).

[¶23] After the guilty verdict, the parties remained in the courtroom to consider sentencing. Mann informed the Court that at least two of the propensity exhibits, which were shown to the jury, were invalid to be considered a qualifying offense. (Partial Transcript of the Proceedings Post-Jury Verdict ("P-JV Tr.") at 5, lines ("L.") 3 – 8, L. 19). The State seemed to agree. (P-JV Tr. at 7, L. 12-14; and 8, L. 17-19). The Court ruled against Mann and found that there were at least three qualifying offenses. (P-JV Tr. at 10, L. 12-19). No judgment was filed.

[¶24] On February 15, 2015, Mann filed a Motion for a Judgment of Acquittal, on behalf of both parties, requesting an acquittal as to the charge of fourth-offense felony DUI, because the "parties to this action are in agreement that one or two of the exhibits in evidence are insufficient for enhancement purposes, thereby taking the instant offense out of felony status." (App. 122). Mann also requested an immediate hearing. (App. 123).

[¶25] On February 17, 2015, an immediate hearing was held wherein the parties informed the Court that they were in agreement that Exhibits 2 and 3 were insufficient to establish qualifying prior convictions. The State informed the Court: "I think it should not be a felony DUI." (Transcript of Immediate Hearing (I-H) on Motion for Judgment of Acquittal ("I-H Tr.") at 5, lines ("L.") 3 – 8, L. 19). The Court rightly told the State prosecutor that he did the ethical thing by contacting Mann's counsel and informing of the insufficient exhibits. (I-H Tr. at 12, L. 8-12). The Court and the State then had the following exchange:

"THE COURT: … This is either a second in seven or a third in seven at best. At best we have --

MR. STOCK: I don't even believe it's a third, Your Honor. I believe it's a second.

THE COURT: I think it's a second in seven."

(I-H Tr. at 13, L. 22 – 14, L. 2). The Court set up another hearing to again review the exhibits.

[¶26] On February 19, 2015, the Court held a sentencing hearing where the Court focused on Exhibits 2 and 3, both revocation of probation exhibits. (App. 98-103). With respect to Exhibit 2, Mann's counsel informed the Court:

> "Exhibit 2 is an Order For Revocation … Ms. Mann waived counsel on the Revocation matter, on her appearance on the Revocation matter. There's no evidence in Exhibit 2 that indicates that she had counsel or waived her right to counsel on the original offense."

(Transcript of Sentencing Hearing, Part One ("S-1 Tr.") at 11, lines ("L.") 10-17). Mann's counsel argued that Exhibit 3 was insufficient for the same reasons. (S-1 Tr. at 14, L. 21-23).

[¶27] The Court informed Mann's counsel that he went on an independent fact-finding mission and uncovered documents, never disclosed or offered, showing that Mann was represented by counsel as it related to Exhibits 2 and 3. (S-1 Tr. at 7, L. 9-17). Mann's counsel had the following exchange with the Court:

"MR. HERBEL: Your Honor, I don't have any paperwork relating to Ms. Schmidt.
…
MR. HERBEL: Your Honor, I have no record evidence to show that Ms. Schmidt was even an attorney.
…
THE COURT: … I can take judicial notice of the fact …
…
MR. HERBEL: -- it's -- We, I guess, under substantive due process, we've not received any kind of discovery relating to that being a counseled conviction … I am a bit concerned that I'm operating on a document that doesn't evidence counsel or waiver of the right to counsel. And so, it's hard for me to make an argument on a document that we haven't received through the discovery process.
…
THE COURT: … What I'm telling you, I've taken judicial notice of the fact."

(S-1 Tr. at 12, L. 4 – 15, L. 4).

[¶28] The Court then asked the State for its position. The State honestly and forthrightly informed the Court:

> "Exhibits 2 and 3 are not sufficient, at least the exhibits that were admitted into evidence … the only exhibit provided to the defense and utilized by the State was that -- didn't say Susan Schmidt represented Ms. Patterson at the time. And so, I guess, the State doesn't take a position on this."

(S-1 Tr. at 21, L. 25 – 22, L. 14).

[¶29] Despite the State being incredibly candid and professional, the Court screamed at the State in response:

"THE COURT: I want you to take a position, Mr. Stock. I mean, you prosecuted this case … You gave the jury four exhibits … you undertook as your burden … That's your job to prove it beyond a reasonable doubt.

Now I think -- I'm telling you that I think the Court can go beyond what has been offered … I don't think it's up to the jury to make that decision" [even though the parties did not stipulate, and as a consequence he allowed the State to present the prior exhibits to the jury].

(S-1 Tr. at 22, L. 15 – 23, L. 11).

[¶30] After continuing on for some time and recognizing that he was too personally invested in advocating against Ms. Mann, the Court apologized for screaming at the parties:

> "First of all, I want to apologize to both of you. I don't -- I hated it when judges raised their voice. I didn't mean to do it but I'm still a lot of advocate in me, so I get that and it's flipping back, so I apologize to both of you if it sounded like it. I don't mean to -- I meant for this to be more of a discussion."

(S-1 Tr. at 25, L. 8-13). The Court then asked the parties to submit briefings that focused on "judicial notice" in the context of N.D.C.C. § 39-08-01. (S-1 Tr. at 27, L. 11-18).

[¶31] Mann's counsel informed the Court that an important issue to be resolved was the fact that the jury received the alleged priors exhibits but then made no finding on the priors. (S-1 Tr. at 30, L. 14-24). The Court informed Mann than she was not foreclosed from making those arguments, and then the Court continued the sentencing hearing. (S-1 Tr. at 32, L. 15-25).

[¶32] On February 24, 2015, Mann filed a Motion to Enter Judgment to Conform with Jury Verdict and asked the Court to sentence Mann as a first-offense, class B misdemeanor DUI offender because the jury did not find proof beyond a reasonable doubt that Ms. Mann committed any prior offenses, apart from the instant offense. (App.

125-128). On February 26, 2015, Mann filed a Brief Relating to Judicial Notice, spelling out for the Court that "judicial notice" under N.D.C.C. § 39-08-01(3) does not come into play because "[t]hat section is concerned with matters of pleading rather than matters of proof." (App. 135-136) (citing *State v. Gahner*, 413 N.W.2d 359, 361 (N.D. 1987)).

[¶33] On February 27, 2015, at the continued sentencing hearing, the Court again referenced documents, not in the record, that Mann had counsel in the prior proceedings. These documents were never shown to counsel and were never made part of the record. Mann's counsel argued:

> "Well, we stand on our arguments in the prior proceedings that the two exhibits are insufficient for enhancement purposes. Additionally -- well, we've laid out, in our motions for -- in our motion to enter judgment to conform with a jury verdict, the jury did find her guilty beyond a reasonable doubt of refusing a chemical test. There wasn't a finding beyond a reasonable doubt of prior offenses. And we believe that based upon the record that she cannot be convicted for a felony offense."

(Transcript of February 27, 2015, Sentencing Hearing, Part Two ("S-2 Tr.") at 15, lines ("L.") 7-15). Mann's counsel also reminded the Court: "We did ask that they [priors exhibits] not be presented to the jury and the Court denied that request and so they did go to the jury." (S-2 Tr. at 17, L. 9-11).

[¶34] The Court then asked the State its position and, again, the State was honest and was concerned with doing justice, the prosecutorial function, and responded as follows:

> "The most important thing for the State is to get this right … And I believe I remember Your Honor saying it, and the case law says it too, if it's not stipulated to, the prior offenses are an essential element of the offense that must be proved to the jury beyond a reasonable doubt … I just want to get it right … if a prior offense enhances the level of [the current offense from a misdemeanor to a felony] then North Dakota Case Law states those prior convictions are an essential element of the offense that need to be proved

> to a jury beyond a reasonable doubt and I don't believe that was done in this case."

(S-2 Tr. at 18, L. 14 – 19, L. 15). The State further explained to the Court that this was not sentence-enhancing, but instead, was offense-enhancing, arguing that our scenario was not akin to "a prior conviction that enhances the sentence but not the seriousness of the offense is not an element of the offense." (S-2 Tr. at 20, L. 13-15).

[¶35] The Court loudly argued with the State's explanation, stating:

> "And that's where we are, Mr. Stock. That's exactly where we are. These don't create an element of the offense from which the person was charged."

(S-2 Tr. at 20, L. 16-18). The State was right; the Court was horribly wrong. Instead of looking closer at the issue, the Court said: "the Supreme Court can deal with this matter." (S-2 Tr. at 20, L. 23). The Court denied Mann's motions.

[¶36] The Court further remarked that it had an obligation to take judicial notice of alleged priors documents that are not part of the record. This flies in the face of *Gahner*. *See Gahner*, 413 N.W.2d at 361 (the judicial notice language in N.D.C.C. § 39-08-01(3) "is concerned with matters of pleading rather than matters of proof").

[¶37] Mann's counsel reminded the Court that because the defense has asked that the jury's guilt and sentencing functions be bifurcated and had asked "that the prior offenses … not go to the jury and basically offered to surrender those issues to the [determination] of the Court, and the Court denied that request, then we had a right to go forward on that charge and have a jury find the prior offenses. Those are essential elements." (S-2 Tr. at 27, L. 5-11). The Court did not appear to care about the essential elements and, under the Court's theory, the exhibits could be presented to the jury as

propensity evidence and the Court could also retain the proof issue after trial. No tribunal in a democratic society should operate this way.

[¶38] Mann was sentenced to eighteen (18) months in prison. (App. 137-138). The Court denied Mann's request to stay imposition of sentence pending appeal. (S-2 Tr. at 28, L. 13-14).

[¶39] STANDARD OF REVIEW

Constitutional challenge of statute

[¶40] "The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity." *See City of Fargo v. Salsman*, 2009 ND 15, ¶23, 760 N.W.2d 123. "Parties must do more than submit bare assertions to adequately raise a constitutional issue." *See Renault v. N. Dak. Workers Compensation Bureau*, 1999 ND 187, ¶14, 601 N.W.2d 580.

[¶41] "The power to hold an Act of the Legislature invalid is one of the highest functions of the courts, and such power should be exercised with great restraint." *See Weeks v. Workforce Safety & Insurance*, 2011 ND 188, ¶9, 803 N.W.2d 601. "Under Art. VI, 4, N.D. Const., "only upon agreement of four of the five judges of our State Supreme Court may a statute enacted by our legislature be struck down as unconstitutional." *See State v. Hanson*, 558 N.W.2d 611, 612 (N.D. 1996).

[¶42] A statute is presumed constitutional and "[t]he presumption of constitutionality is so strong that a statute will not be declared unconstitutional 'unless its validity is, in the judgment of the court, beyond a reasonable doubt.'" *See Weeks*, 2011

ND 188 at ¶9. However, a statute shall be declared unconstitutional if "it is clearly shown that it contravenes the state or federal constitution." *See MCI Telecommunications Corp. v. Heitkamp*, 523 N.W.2d 548, 552 (N.D. 1994).

[¶43] "Whether a statute is unconstitutional presents a question of law." *See Weeks*, 2011 ND 188 at ¶7. "Questions of law are fully reviewable on appeal." *See State v. Mitzel*, 2004 ND 157, ¶10, 685 N.W.2d 120.

Constitutional violation

[¶44] Whether there was a Sixth Amendment, Due Process, or other constitutional violation "is a question of law, and our standard of review for a claimed violation of a constitutional right is de novo." *See State v. Treis*, 1999 ND 136, ¶11, 597 N.W.2d 664; *see also State v. Messner*, 1998 ND 151, ¶8, 583 N.W.2d 109.

[¶45] LAW AND ARGUMENT

I. Ms. Mann's prosecution, for refusal to submit to chemical testing when no exception to the warrant requirement existed, alleging that it was a crime for Mann to refuse an officer's warrantless request for testing, along with the statute this matter is charged under, N.D.C.C. § 39-08-01(1)(e), is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Accordingly, the statute must be struck down and the refusal charge in this case must be dismissed

[¶46] Ms. Mann contends that her prosecution for refusal to allow a warrantless search into her body for blood evidence was unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North

Dakota Constitution. The law enforcement officer in this case did not have a search warrant and she did not even attempt to secure a warrant. There were no exigent circumstances in this case and there were no other exceptions to the warrant requirement. Ms. Mann had a state and federal constitutional right to refuse testing in this case. Mann cannot be constitutionally convicted for exercising her Fourth Amendment and Article I, Section 8 rights to refuse the warrantless request to search her body for evidence in this case. *See Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 526, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Therefore, her prosecution for refusing testing is unconstitutional and it should be dismissed.

[¶47] Ms. Mann also contends that the statute she stands charged under is itself unconstitutional. The statute at issue in this case, N.D.C.C. § 39-08-01(1)(e), provides that an individual may be criminally charged and convicted, in the same manner as a DUI, if she refuses to submit to a warrantless chemical test search into her body. *See* N.D.C.C. § 39-08-01(1)(e). In essence, the statute, which makes no reference to a search warrant, criminalizes a person's exercise of her Fourth Amendment and Article I, Section 8 rights and her right to refuse a search of her body when law enforcement has no search warrant.

[¶48] Both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution "prohibit unreasonable searches and seizures" and "[t]he guiding principle behind these prohibitions is to safeguard personal privacy and dignity against unwarranted intrusions by the State." *See State v. Phelps*, 286 N.W.2d 472, 474 (N.D. 1979). The United States Supreme Court has "never retreated" from its "recognition that any compelled intrusion into the human body

implicates significant, constitutionally protected privacy interests." *See Missouri v. McNeely*, 133 S.Ct. 1552, 1565 (2013). The extraction of blood, breath, or other products of the human body "to determine … alcohol concentration is a search within the meaning of the Fourth Amendment." *See State v. Kimball*, 361 N.W.2d 601, 604 (N.D. 1985) (citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). "Warrantless searches and seizures … are "presumptively unreasonable."" *See City of Fargo v. Ellison*, 2001 ND 175, ¶10, 635 N.W.2d 151.

[¶49] To be sure, "States [may] choos[e] to protect privacy beyond the level that the Fourth Amendment requires." *See Missouri v. McNeely*, 133 S.Ct. 1552, 1567 (2013) (citing *Virginia* v. *Moore*, 553 U. S. 164, 171, 128 S.Ct. 1598 (2008)). However, states may not provide a lesser privacy interest than that afforded by the federal constitution. "While "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution," … state law [does] not alter the content of the Fourth Amendment." *See Moore*, 553 U. S. at 172 (commenting that "Fourth Amendment protections are not "so variable" and cannot "be made to turn upon such trivialities"" as local law enforcement practices). With the passage of N.D.C.C. § 39-08-01(1)(e), the North Dakota Legislature has chosen to afford to its citizens a lesser privacy interest than that afforded by the Fourth Amendment. This is unconstitutional.

[¶50] In *Camara v. Municipal Court*, the United States Supreme Court held that the Fourth Amendment bars prosecution of a person who refuses to permit a warrantless search of his residence when the requesting law enforcement officer does not have a search warrant. *See Camara v. Municipal Court of the City and County of San*

Francisco, 387 U.S. 523, 540, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The *Camara* court stated unequivocally that the homeowner "had a constitutional right to insist that the inspectors obtain a warrant to search and that [the homeowner] may not constitutionally be convicted for refusing to consent to the inspection." *See Camara*, 387 U.S. at 540 (emphasis added).

[¶51] Search warrants are required for searches of dwellings and "no less could be required where intrusions into the human body are concerned." *See Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966) (emphasis added). Therefore, a driver, like a homeowner, has a constitutional right to refuse testing until the officer has a search warrant, and the driver may not constitutionally be convicted for refusing to consent to a warrantless search into his body for evidence. Once a search warrant has been produced, the Fourth Amendment and Article I, section 8 have been satisfied. *See Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968) (the search warrant announces to the occupant that he no longer has a right to resist the search). If a driver or homeowner refuses search after a warrant is produced, his refusal then would be outside of Fourth Amendment protection.

[¶52] Indeed, part of the recent *McNeely* holding itself, that an individual has a right to demand law enforcement acquire a warrant before a search of the body for evidence, establishes that a driver (like a homeowner) has a right under the Fourth Amendment to refuse a warrantless search without criminal reprisal. *See McNeely*, 133 S.Ct. 1552. In the context of the home, that has been the undisturbed precedent from the United States Supreme Court for almost one-half century. *See Camara*, 387 U.S. 523. When jurisprudence adds *Camara* plus *McNeely*, the sum of that math is the proposition

that search warrants are required for a search of a home and a human body, and that neither the homeowner nor the human may "constitutionally be convicted for refusing to consent to the inspection." *See Camara*, 387 U.S. at 540. No less protection can be afforded the human body than a home. *See Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) ("[s]earch warrants are ordinarily required for searches of dwellings," … no less could be required where intrusions into the human body are concerned.").

[¶53] In *McNeely*, the United States Supreme Court did not deem McNeely's implied consent the equivalent of Fourth Amendment consent, because it is not the equivalent. Despite implied consent, the *McNeely* court ruled that a search warrant was still necessary. Also, the South Dakota Supreme Court has recently held that South Dakota's implied consent law does not, under the Fourth Amendment, constitute a consent exception to the warrant requirement. *See State v. Fierro*, 2014 SD 62, ¶23, 853 N.W.2d 235, 243 (S.D. 2014) ("the Legislature cannot enact a statute that would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right"). The Minnesota Supreme Court passed on the question of whether implied consent is the same as Fourth Amendment consent. *See State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013) ("we do not hold that Brooks consented because" of Minnesota's implied consent law).

[¶54] Recently, though, the Minnesota Supreme Court ruled that a warrantless breath search conducted solely "because the officer had probable cause to believe that Bernard was driving under the influence and the officer could have sought and received a warrant based on that evidence … is contrary to basic principles of Fourth Amendment law." *See State v. Bernard*, 859 N.W.2d 762, 766 (Minn. 2015) ("there is no probable cause exception to the warrant requirement"). Through appellate review of *Bernard*, we

now know that, at the very least, some of the jurisprudential foundation for *State v. Birchfield*, 2015 ND 6, 858 N.W.2d 302, was faulty.

[¶55] Before *Bernard*, the last Minnesota Supreme Court case to deal with a Fourth Amendment challenge to the criminal refusal statute was *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009), where a divided pre-*McNeely* court found that the driver had no right to refuse testing because "[r]apid dissipation of alcohol in the blood creates a single-factor exigent circumstance." *See Netland*, 762 N.W.2d at 214. (emphasis added). After *McNeely*, the *Netland* per se exigency rationale is abrogated.

[¶56] Reliance on pre-*McNeely* cases, where single-factor exigency was the central reason upholding the warrantless search, is of little or no value. *See Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986) (overruled by *McNeely*); *see also State v. Hoover*, 916 N.E.2d 1056, 1060 (Ohio 2009) ("It is crucial to note that the refusal to consent to testing is not, itself, a criminal offense"). After *McNeely*, the categorical rule, that law enforcement could automatically extract a chemical test from a suspect for evidence, is now void.

[¶57] Since *Camara*, the United States Supreme Court has never endorsed a statute that criminalizes a refusal to search. In fact, the precedent of the high court is that exercising one's Fourth Amendment rights, by refusing a search, may not be criminalized. *See Camara*, 387 U.S. 523 (1967). Ms. Mann had a Fourth Amendment right (as well as an Article I, Section 8 state constitutional right) to refuse to allow the officer to search her body for evidence without a search warrant. In accord with *Camara* and *McNeely*, Ms. Mann may not be prosecuted for refusing the officer's request for warrantless testing and requiring the officer to follow the Constitution.

[¶58] Consequently, Ms. Mann's prosecution for refusal to submit to warrantless chemical testing, when no exception to the warrant requirement existed, along with the statute this matter is charged under, N.D.C.C. § 39-08-01(1)(e), is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Accordingly, the statute must be struck down and the refusal charge in this particular case must be dismissed.

II. By not granting the Motion to Enter Judgment to Conform with Jury Verdict and by not acquitting Mann on felony DUI, the trial court violated the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; as well as Article I, sections 12 and 13 of the North Dakota Constitution

[¶59] "The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury."[1] *See Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2156 (2013). "The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without due process of law." *See United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 132 L.Ed.2d 444, 63 USLW 4611 (1995). "It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *See Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182, 61 USLW 4518 (1993). The United States Supreme Court has "held that these provisions require criminal convictions to rest upon a jury determination that

[1] *See also* N.D.C.C. § 29-01-06 (right to trial by impartial jury).

the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *See Gaudin*, 515 U.S. at 510 (emphasis added).

[¶60] Therefore, the Due Process Clauses of the Fifth and Fourteenth Amendment, along with the Sixth Amendment to the United States Constitution, taken together, entitle an accused to a jury finding on every element of the alleged crime. The right to a jury trial, itself, includes the right to a jury's determination that the accused is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

[¶61] "Blackstone described "trial by jury" as requiring that *"the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." *See Gaudin*, 515 U.S. at 509-10 (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

[¶62] "It is well established that a criminal defendant cannot be convicted of a crime except upon proof beyond a reasonable doubt of every element of the crime charged." *See State v. Schneider*, 550 N.W.2d 405, 407 (N.D. 1996) (emphasis added). "Under North Dakota law, ... the State must prove beyond a reasonable doubt each element of a charged offense." *See State v. Olander*, 1998 ND 50, ¶20, 575 N.W.2d 658.

Fundamental "due process considerations form the foundation of our system of criminal procedure that an accused cannot be convicted of a crime unless the State proves every element of the offense beyond a reasonable doubt." *See id* at ¶27.

[¶63] When a prior DUI conviction enhances the classification of the offense, "proof of the prior conviction is an element" of the heightened DUI offense. *See State v. Edinger*, 331 N.W.2d 553, 554 (N.D. 1983) (emphasis added); *see also State v. Gahner*, 413 N.W.2d 359, 360 (N.D. 1987) ("the prior conviction was an essential element of the upgraded [DUI] offense"). Therefore, in order for a jury to convict a defendant on a heightened felony DUI offense, the State must prove up all the essential elements to a jury beyond a reasonable doubt, including proof of prior DUI convictions.

[¶64] In our case, the jury did not find proof beyond a reasonable doubt that Ms. Mann committed any prior offenses, apart from the instant offense. Instead, the Court made the finding of guilt on these essential elements. The Court's finding guilt on the essential element priors and then sentencing Mann on a felony, here, where the prior convictions were not proven to a jury beyond a reasonable doubt, violates the Due Process Clauses of the Fifth and Fourteenth Amendments, violates the Sixth Amendment to the United States Constitution, and violates Article I, sections 12 and 13 of the North Dakota Constitution.[2] Accordingly, Mann's felony conviction should be vacated.

[¶65] In our case, Mann's counsel suggested to the Court, in chambers before trial, the possibility of letting the Court determine proof of prior offenses if the Court would shield those prior offense exhibits from the jury. The Court refused to shield the exhibits and told the State to present the propensity exhibits to the jury. Mann never

[2] Article I, Section 13 of the North Dakota Constitution guarantees that "[t]he right of trial by jury shall be secured to all, and remain inviolate."

waived her jury trial right to have a jury determination on every essential element of the offense.

[¶66] "Despite the fundamental nature of the right to trial by jury, it is a right which may be waived by a defendant under certain conditions. *See State v. Kranz*, 353 N.W.2d 748, 751 (N.D. 1984). However, "waivers of constitutional rights by a defendant are not to be inferred lightly, but must be clearly and intentionally made." *See id* at 752.

[¶67] In order to waive a constitutional right, the act must be a "voluntary, knowing, and intelligent decision done with sufficient awareness of the relevant circumstances and likely consequences." *See State v. Haugen*, 384 N.W.2d 651, 653 (N.D. 1986) ("[I]t is the responsibility of the trial court to "ascertain whether or not the defendant's jury trial waiver is a voluntary, knowing, and intelligent decision 'done with sufficient awareness of the relevant circumstances and likely consequences."). An "unwitting" waiver is entirely insufficient. In our case, there was no waiver.

[¶68] Furthermore, Mann's counsel did not waive her right to a jury trial determination on every element of the offense, as that is a right personal to Ms. Mann alone. In *State v. Bakke*, former Chief Justice Ralph Erickstad authored the opinion that held:

> "[W]e hold that an attorney may not waive his client's constitutional right to a jury trial in a felony case. In such cases, an express waiver must be made personally by the defendant in writing or in open court."

See State v. Bakke, 498 N.W.2d 819, 822 (N.D.App. 1993) (collecting cases showing the majority of jurisdictions holding that the jury trial right in a felony case is personal to the defendant and that any waiver must be done personally, by the defendant). There was no express waiver made by the Defendant.

[¶69] Also, Rule 23 of the North Dakota Rules of Criminal Procedure provides that "the trial must be by jury unless" the "the defendant waives a jury trial in writing or in open court," the "prosecuting attorney consents," and "the court approves." *See* N.D.R.Crim.P. 23(a).[3] Therefore, "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *See Bakke*, 498 N.W.2d at 821. The aforementioned predicates were not fulfilled.

[¶70] To be sufficient, a waiver of the jury trial right to a jury's determination that the accused is guilty of every element of the crime with which he is charged, beyond a reasonable doubt, must be done personally, in writing or in open court. The record must evidence that the waiver was clearly and intentionally made and that the act was a voluntary, knowing, and intelligent decision done with sufficient awareness of the relevant circumstances and likely consequences. None of this was done in our case – there was no waiver. Mann did not waive her personal right to a jury determination on every element.

[¶71] Moreover, the State agrees with the defense that Exhibits 2 and 3 are insufficient convictions. Whatever crib sheet the judge was holding at the bench was never disclosed to the parties and was never admitted into evidence. So, if this Court believes this is an enhancement issue (the defense believes it is not), then "[t]he record before us does not contain evidence of a prior counseled conviction … nor of a waiver of

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[3] In addition, N.D.C.C. § 29-16-02 provides that "[i]n any case, whether a misdemeanor or felony, a trial jury may be waived by the consent of the defendant and the state's attorney expressed in open court and entered on the minutes of the court. Otherwise, the issues of fact must be tried by the jury."

counsel by [the Defendant] in the prior DUI proceeding." *See State v. Emery*, 2008 ND 3, ¶8, 743 N.W.2d 815.

[¶72] Additionally, it was improper for the judge below to take judicial notice of prior offenses from documents not made part of the record and not proven. Subsection N.D.C.C. § 39-08-01(3) states, in relevant part, the following:

> "The court shall take judicial notice of the fact that an offense would be a subsequent offense if indicated by the records of the director or may make a subsequent offense finding based on other evidence."

See N.D.C.C. § 39-08-01(3). In examining the "judicial notice" language component of this subsection, the collective North Dakota Supreme Court looked to Justice VandeWalle's writings and agreed "[t]hat section is concerned with matters of pleading rather than matters of proof." *See State v. Gahner*, 413 N.W.2d 359, 361 (N.D. 1987) (emphasis added).

[¶73] In both *Gahner* and *Edinger*, the high court discussed whether the defendant was placed on adequate notice of the prior offenses when the charging document fails to allege the prior offenses. The *Edinger* court noted that "Section 39-08-01(2) [now subsection 3] … provides that the court may take judicial notice that "such conviction would be the second or subsequent violation" if the complaint fails to so state." *See State v. Edinger*, 331 N.W.2d 553, 554 (N.D. 1983).[4] This section was concerned with matters of pleading and notice, not matters of proof.

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[4] However, "[m]erely because a court may take judicial notice of prior convictions does not mean that the defendant should forfeit the right to be informed of the exact nature of the charge against him." *See State v. Edinger*, 331 N.W.2d 553, 555 (N.D. 1983).

[¶74] For example, if the State in this case failed to allege prior offenses in the charging document, this Court could cure that infirmity by taking judicial notice of prior offenses, as it relates to pleading. Here, the State did fail to allege specific prior offenses in the charging document. If Ms. Mann had argued that she did not have notice that the State was moving forward with a charge alleging prior offenses, this Court could have taken judicial notice of prior offenses, for pleading and notice purposes, and deemed the charging document sufficient with respect to notice to the defendant. The judicial notice language in N.D.C.C. § 39-08-01(3) "is concerned with matters of pleading rather than matters of proof." *See Gahner*, 413 N.W.2d at 361.

[¶75] Here, because Ms. Mann did not argue that the charging document provided insufficient notice of the charge, judicial notice under N.D.C.C. § 39-08-01(3) does not come into play. "That section is concerned with matters of pleading rather than matters of proof." *See State v. Gahner*, 413 N.W.2d 359, 361 (N.D. 1987) (emphasis added). Accordingly, it was improper for the judge to take judicial notice of his crib sheet, which was not offered or admitted into evidence and was not shown to the parties, to establish a matter of proof.

[¶76] Mann had a constitutional right[5] to a jury determination on every element of the felony DUI offense. Her jury[6] returned a finding on first-offense DUI only. If this Court does not dismiss the prosecution as being unconstitutional under *Camara*, and strike down the statute, then Mann's felony conviction should be vacated and this matter

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[5] The Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; as well as Article I, sections 12 and 13 of the North Dakota Constitution.

[6] "A defendant has a valued right to have his trial completed by a particular tribunal." *See State v. Voigt*, 2007 ND 100, ¶12, 734 N.W.2d 787.

should be remanded for sentencing only as a misdemeanor, first-offense DUI. *See Davis v. State,* 31 So.3d 887, 889 (Fla.App. 4 Dist. 2010) ("directing the trial court to vacate Davis's adjudication and sentence for felony DUI and adjudicate him as to only the instant DUI of which the jury found him guilty").

[¶77] CONCLUSION

[¶78] For the foregoing reasons, Ms. Mann asks this court to vacate the Criminal Judgment and conviction in this matter, reverse the district court's denial of her Motion to Dismiss, order N.D.C.C. § 39-08-01(1)(e) be struck down, and order that Mann's refusal charge in this case be dismissed. If this Court does not provide the aforementioned relief, Mann asks that her felony conviction be vacated and that this matter be remanded for sentencing only as a misdemeanor, first-offense DUI.

Respectfully submitted
this 13th day of July, 2015.

/s/ *Dan Herbel*

Dan Herbel
Attorney for Appellant Ruthie Mann
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

[¶79] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 13, 2015, the BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were 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 13th day of July, 2015.

/s/ *Dan Herbel*
_____
Dan Herbel