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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lynh Hong Musick, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20150252 District Court Case No. 2015-CV-00240 **APPELLANT'S BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE ZANE ANDERSON, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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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. The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal law violates the constitutional prohibition against unreasonable searches and seizures, is unconstitutional for denying substantive due process and is unconstitutional for penalizing the exercise of a constitutional right.

II. North Dakota's test refusal law penalizes the constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional.

III. The doctrine of unconstitutional conditions and Article I, Section 20 of the North Dakota Constitution render North Dakota's test refusal law unenforceable and unconstitutional.

IV. North Dakota's test refusal law denies Ms. Musick substantive due process because it penalizes the exercise of a constitutional right, specifically the right to refuse a warrantless request to search.

V. North Dakota's refusal and implied consent laws are unconstitutional as applied because the facts of the case demonstrate that law enforcement did not have a search warrant nor did law enforcement ever apply for a search warrant.

VI. The right to refuse testing is not just statutory but is of a constitutional dimension and an integral part of fourth amendment, article 1 section 8 and substantive due process rights.

[¶6] **STATEMENT OF THE CASE**

[¶7] The Appellant, Lynh Hong Musick, appeals from the decision of the North Dakota Department of Transportation issued by Hearing Officer Sarah Huber dated January 26, 2015 revoking her North Dakota driving privileges for 180 days and the decision of Hearing Officer Sarah Huber dated March 12, 2015 affirming the January 26,

2015 order and denying Ms. Musick's prayer for relief and the Order and Judgment of the District Court affirming the Department's decision.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On December 27, 2014 law enforcement made contact with Ms. Musick and arrested her for driving under the influence. Transcript page 4, line 23 to page 12, line 11 (T. 4:23-12:11). Law enforcement read the North Dakota implied consent advisory to Ms. Musick and asked her to take a test and she refused. T. 13:7-14:3.

[¶10] Ms. Musick attempted to cure her refusal at the administrative hearing on January 21, 2015. T. 1:4; 16:18-20:25.

[¶11] Subsequent to the administrative hearing Ms. Musick pled guilty to DUI in 45-2014-CR-02704. State v. Musick, 45-2014-CR-02704, Criminal Judgment, Appendix.

[¶12] **LAW AND ARGUMENT**

[¶13] **Standard of Review**

[¶14] "[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.

[¶15] 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.

[¶16] 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 (N.D. 2008), 750 N.W.2d 430.

[¶17] "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). "Whether a finding of fact meets a legal standard is a question of law," which is fully reviewable on appeal. State v. Mitzel, 2004 ND 157, ¶ 10, 685 N.W.2d 120. "The existence of consent is a question of fact to be determined from the totality of the circumstances." Id. at ¶ 13. Whether consent is voluntary is generally decided from the totality of the circumstances. McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 14. The "standard of review for a claimed violation of a constitutional right is de novo." Id. at ¶ 8.

[¶18] I. **The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal law violates the constitutional prohibition against unreasonable searches and seizures, is unconstitutional for denying substantive due process and is unconstitutional for penalizing the exercise of a constitutional right.**

[¶19] Ms. Musick is arguing to reverse current North Dakota precedent from a line of cases beginning with McCoy v. North Dakota Department of Transportation, 2014 ND 119, 848 N.W.2d 659. Several of those cases that address Ms. Musick's arguments have filed for a writ of certiorari that is currently pending before the United States Supreme Court. See State v. Birchfield, 2015 ND 6, 858 N.W.2d 302, reh'g denied (Feb. 12, 2015)(pet. for cert. docketed June 16, 2015); State v. Washburn, 2015 ND 8, 861 N.W.2d 173, reh'g denied (Feb. 12, 2015)(pet. for cert. docketed June 16, 2015); Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403, reh'g denied (Mar. 24, 2015)(pet. for cert. docketed June 23, 2015); State v. Beylund, 2015 ND 27, 861 N.W.2d 172, reh'g denied (Mar. 24, 2015)(pet. for cert. docketed June 23, 2015); Culver v. Levi, 2015 ND 26, 861 N.W.2d 172, reh'g denied (Mar. 24, 2015)(pet. for cert. docketed June 23, 2015); State v. Harns, 2015 ND 45, 861 N.W.2d 173, reh'g denied (Mar. 24, 2015)(pet. for cert. docketed June 24, 2015); Wojahn v. Levi, 2015 ND 50, 861 N.W.2d 173, reh'g denied (Apr. 28, 2015)(pet. for cert. docketed July 28, 2015); State v. Baxter, 2015 ND 107, 863 N.W.2d 208, reh'g denied (May 27, 2015)(pet. for cert. docketed August 26, 2015).

[¶20] Ms. Musick argues that N.D.C.C. § 39-08-01, subsection 1(e), § 39-20-01, § and § 39-20-14 are unconstitutional. As an example § 39-20-14 it states in relevant part that

> [a]ny individual who operates a motor vehicle upon the public highways of this state is deemed to have given consent to submit to an onsite screening test or tests of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer who has reason to believe that the individual committed a moving traffic violation or was involved in a

> traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol. . . . The results of such screening test must be used only for determining whether or not a further test shall be given under the provisions of section 39-20-01. The officer shall inform the individual that North Dakota law requires the individual to take the screening test to determine whether the individual is under the influence of alcohol, that refusal to take the screening test is a crime, and that refusal of the individual to submit to a screening test may result in a revocation for at least one hundred eighty days and up to three years of that individual's driving privileges. If such individual refuses to submit to such screening test or tests, none may be given, but such refusal is sufficient cause to revoke such individual's license or permit to drive . . ..

The United States Constitution's Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV, the North Dakota Constitution contains a parallel provision. N.D. Const. art. I, § 8. As will be discussed in great detail below, as a matter of black letter law it is unconstitutional to punish an individual for simply refusing to consent to a warrantless search. But see State v. Birchfield, 2015 N.D. 6. Irrespective of Birchfield however the United States Supreme Court has already held that an individual cannot be criminally punished for merely exercising their right to refuse to consent to a warrantless search and seizure. City of Los Angeles, Calif. v. Patel, 135 S. Ct. 2443 (2015)(Law criminalizing warrantless refusal to give access to hotel registry found unconstitutional under the Fourth Amendment); Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 540 (1967)("we therefore conclude that 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."); See v. City of Seattle, 387 US 541, 546 ("Therefore, 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."). Under Camera and See, if agents of the State seek to execute a warrantless search, it is unconstitutional to attempt to criminally punish an individual who does nothing more than withhold his Fourth Amendment and Article One Section Eight consent. Here, as in Patel, Camera and See, law enforcement suspected Ms. Musick of committing a crime, and attempted to obtain her consent to execute a warrantless search in order to find incriminating evidence.

[¶21] The attempt by law enforcement to execute a search against Ms. Musick was unequivocally a search as defined by the Fourth Amendment and Article One Section Eight, and is entitled to the same protections as any other probable cause search. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. California v. Ciraolo, 476 U.S. 207, 211 (1986). When it comes to expectations of privacy, both the United States Supreme Court and the North Dakota Supreme Court have recognized that breath alcohol concentration tests are, in fact, "searches" as that term is defined by our Constitution, and are therefore protected by the Fourth Amendment. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616–17 (1989) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis implicates similar concerns about bodily integrity and, like the blood alcohol test we considered in Schmerber should also be deemed a search."); City of Fargo v. Wonder, 2002 N.D. 142, ¶19, 651 N.W.2d 665, 670.

[¶22] The logic behind finding that all three of these types of DWI searches are, in fact, governed by the Fourth Amendment is well established. Prior jurisprudence makes it clear that the definition of a "search" does not depend on a "mechanical interpretation of

the Fourth Amendment." Kyllo v. United States, 533 U.S. 27, 35 (2001). In Kyllo, the Court rejected the State's argument that the use of thermal imaging did not constitute a search because it detected "only heat radiating from the external surface of the house." Id. at 35. The Court then announced that the definition of a "search" under the Fourth Amendment included "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area." Id. at 34 (emphasis added).

[¶23] Kyllo's basic holding - that using less-intrusive means of executing a search does nothing to reduce privacy expectations or constitutional protections - was hardly earth shattering news. Decades earlier, in Katz v. United States, 389 U.S. 347, 352 (1967), the Court rejected the State's argument that an electronic listening device it had placed on the outside of a public telephone booth did not constitute a warrantless search because it "involved no physical penetration of the telephone booth." Instead, the Court aptly held that, "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Id. at 353.

[¶24] The Fourth Amendment provides just as much protection to a person's body (Wonder) as to a public telephone booth (Katz). In this light, there can be no dispute that the repeated and unanimous conclusions of our higher courts that breath tests are, in fact, protected by the Fourth Amendment and Article One Section Eight as "searches" which require warrants. A breath test is nothing more than using different technology (infrared spectrometry) to execute a search that "could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area," (like a blood test). Kyllo, 533 U.S. at 34. Conversely, a breath test is not somehow "less" of a search than a blood test

merely because it "involved no physical penetration." Katz, 389 U.S. at 352.

[¶25] In summary, both the United States and North Dakota Supreme Courts have already determined that blood, urine, and breath tests are all searches subject to the full protection of the Warrant Clauses of the United States and North Dakota Constitutions.

[¶26] **II. North Dakota's test refusal law penalizes the constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional.**

[¶27] Typically, "consent to search" is a well-established - and important - exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218. And this is the exception involved in the test refusal statute. The issue of whether the consent exception validates a warrantless search must be evaluated in light of the particular and total circumstances of each individual case unless law enforcement has made a claim of lawful authority to search. See Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Florida v. Royer, 460 U.S. 491 (1983).

[¶28] The State may be entitled to collect evidence, either pursuant to a warrant or an exception to the warrant requirement. But that does not mean a citizen can be compelled to "voluntarily" participate in the accuser's investigation, or punished for his or her refusal to do so. With the refusal to test statute, the North Dakota Legislature has penalized an individual's assertion of the right to be secure against unreasonable searches and seizures by making it a crime to refuse to submit to a properly requested chemical test. In other words, the statute has eliminated what has been recognized as the constitutionally protected right to say "no." See State v. Odom, 2006 ND 209, ¶15, 722 N.W.2d 370 ("At no time before or during Olson's search did Odom withdraw or limit his consent to search the hotel room. Odom could have prevented Olson from searching the safe by indicating to Olson consent did not extend to the safe."); see also United

States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (stating that "[o]nce given, consent to search may be withdrawn").

[¶29] **III. The doctrine of unconstitutional conditions and Article I, Section 20 of the North Dakota Constitution render North Dakota's test refusal law unenforceable and unconstitutional.**

[¶30] The United States Supreme Court in Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926), declared that "[i]f 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 594. This logic is the premise behind the common-sense conclusion that legislatures cannot compel, coerce, or prevent individuals from exercising rights enshrined in the Constitution. North Dakota has also enshrined that principle in its own constitution in Article I § 20 by stating 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." Thus Article I § 20 prevents the legislature from drafting a law to circumvent Article I § 8 and the right to refuse a warrantless search or to even withdraw consent once given. See Odom at ¶15.

[¶31] For example, the Minnesota Supreme Court has previously struck down a provision of the impaired driving code in Minnesota that relied on the argument that a driver must waive the constitutional right to be secure against unreasonable searches and seizures as a condition of licensor. State v. Henning, 666 N.W.2d 379 (Minn. 2003). In Henning, the Minnesota Supreme Court analyzed Minnesota's "whiskey plate" law, Minn. Stat. § 168.0422, which provides that a vehicle displaying special series license

plates issued to repeat DWI offenders and their families may be stopped by police officers without suspicion of particular wrongdoing. Id. at 383.

[¶32] The State of Minnesota argued in Henning that the legislature has the authority to make it a condition of issuing these license plates that every driver in a repeat offender's family waive the right to be free from suspicion less stops. Id. at 383-84. The Minnesota Supreme Court rejected the argument that such an implied waiver was a constitutionally permissible means of protecting the public. Id. at 384-85. In doing so, the Minnesota Supreme Court noted that "the police should not be allowed to define the reasonableness of their own conduct. * * * Neither is the legislature empowered to redefine the constitutional parameters of police conduct." Id. at 385 (citation omitted).

[¶33] The government may attack drunk drivers, but in doing so, it may not attack fundamental liberties. This is precisely what the doctrine of unconstitutional conditions forbids. To hold otherwise would permit laws to provide that a person who is arrested for murder, rape, theft, burglary or any other offense, must consent to a search for evidence, or be punished for that refusal to consent with the same sentence prescribed for the substantive crime itself. The United States Supreme Court has repeatedly stated that

> this 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 . . ..

[¶34] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[¶35] **IV. North Dakota's test refusal law denies Ms. Musick substantive due process because it penalizes the exercise of a constitutional right, specifically the right to refuse a warrantless request to search.**

[¶36] Ms. Musick argues that implied consent is not valid consent for fourth

amendment consent purposes and that the rule established in Camara is not made inapplicable by North Dakota's implied consent law. If "implied consent" was valid "consent" for fourth amendment purposes then Missouri v. McNeely, 133 SCt. 1552 (2013) would have been decided in favor of the search by law enforcement. Compare State v. Fierro, 2014 S.D. 62, ¶23 (S.D. 2014)("South Dakota's implied consent law "by itself, does not provide an exception to the search warrant requirement . . . and any argument to the contrary cannot be reconciled with the United States Supreme Court and this Court's Fourth Amendment warrant requirement jurisprudence."). In McNeely the driver refused the warrantless request to search him and was searched anyway, as we know the United States Supreme Court upheld the Missouri State Supreme Court's decision to suppress the evidence obtained subsequent to that warrantless search.

[¶37] The United States Supreme Court in Speiser v. Randall Prince v. City and County of San Francisco, California, 357 U.S. 513, 526 (1958) reiterated that "'[i]t is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' Bailey v. State of Alabama, 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191." The concept of "implied consent" as articulated in North Dakota's DUI laws is that very type of statutory presumption that has been prohibited by the United States Supreme Court and it should be apparent that it cannot be used to transgress Ms. Musick's constitutional right to refuse a warrantless request by law enforcement to search her. Compare 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.").

[¶38] **V. North Dakota's refusal and implied consent laws are unconstitutional as applied because the facts of the case demonstrate that law enforcement did not have a search warrant nor did law enforcement ever apply for a search warrant.**

[¶39] Law enforcement did not have a search warrant to search Ms. Musick nor did law enforcement make an attempt to get a search warrant. Therefore, the North Dakota law penalizing a refusal to consent to a warrantless search is unconstitutional as applied to the circumstances and facts of this case. See Camara, at 540 ("we therefore conclude that 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."); See also McNeely at 1561 ("In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.").

[¶40] **VI. The right to refuse testing is not just statutory but is of a constitutional dimension and an integral part of fourth amendment, article 1 section 8 and substantive due process rights.**

[¶41] South Dakota recently addressed the issue in Fierro, 2014 S.D. 62, ¶23 ("our precedent is clear that the Legislature cannot enact a statute that would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right") finding that an individual has a constitutional right to refuse testing despite South Dakota's implied consent law, and it is generally accepted in other jurisdictions that individuals have a

constitutional right to refuse a warrantless search. See People v. Pollard, 2013 COA 31, ¶26 (Colo. App. 2013)("In prohibiting unreasonable searches and seizures, the Fourth Amendment to the United States Constitution necessarily grants to individuals the right to refuse warrantless entries and searches. See Ramet v. State, 209 P.3d 268, 269 (Nev. 2009); see also United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978) ("The [Fourth] Amendment gives [a defendant] a constitutional right to refuse to consent to entry and search.")"); Longshore v. State, 924 A.2d 1129, 1159 (Md. 2007) ("A person has a constitutional right to refuse to consent to a warrantless search . . .."); People v. Stephens, 349 N.W.2d 162, 163-64 (Mich. Ct. App. 1984) (the Fourth Amendment gives the defendant the constitutional right to refuse to consent to a search).

[¶42] In cases where appellate courts have determined that there is no constitutional right to refuse a warrantless request for a chemical test those appellate courts have relied on an interpretation of Schmerber v. California, 384 U.S. 757 (1966) that has since been abrogated by McNeely. See People v. Shaw, 534 N.Y.S.2d 929, 930 72 N.Y.2d 1032, 531 N.E.2d 650 (N.Y. 1988)("The defendant has no constitutional right to refuse to consent to such a search (Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908)."); People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845, 848, 385 N.E.2d 584 (N.Y. 1978)("In consideration of defendant's attack on the constitutionality of . . . the Vehicle and Traffic Law, we start with the decision of the Supreme Court of the United States in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 in which that court held that withdrawal of blood from the human body for chemical analysis, although compelled, does not constitute evidence of a testimonial or communicative nature and does not, therefore, violate the Fifth Amendment privilege

against self incrimination . . .. It follows from this holding that, inasmuch as a defendant can constitutionally be compelled to take such a test, he has no constitutional right not to take one."); Burnett v. Municipality of Anchorage, 678 P.2d 1364, 1371(Concurring Opinion) (Alaska App. 1984)("The purpose of implied consent is not . . . to compel a waiver of fourth amendment rights or to penalize the refusal to give such a waiver. Because the implied consent statute requires a lawful arrest for driving while intoxicated before a person can be requested to submit a sample of his breath, the warrantless seizure of a person's breath will be justified as a search incident to arrest in every case where police properly request a breathalyzer test. Where a police request for a breath sample is improper because probable cause to arrest does not exist, consent to take the test would not constitute a waiver of fourth amendment rights, since evidence of the test results would be subject to subsequent challenge and suppression. Thus, the implied consent statute simply does not compel individuals to waive their fourth amendment rights. Rather, the statute requires persons who have been arrested for driving while intoxicated to cooperate in providing police with information that they are legally entitled to obtain. In each case, the authority to obtain the information sought derives not from the implied consent law, but from the probable cause that justified the arrest for driving while intoxicated.").

[¶43] Apart from cases that have misinterpreted Schmerber to uphold refusal laws the Minnesota Supreme Court in State v. Bernard, 859 N.W.2d 762 (Minn. 2015) has found that a driver does not have a constitutional right to refuse a request to take a breath test as the same is a search incident to arrest. Ms. Musick argues that she does have a constitutional right to refuse a chemical test of breath, blood or urine.

[¶44] What the Minnesota Supreme Court has done in Bernard is create a new categorical exception to the warrant requirement under the fourth amendment, however, a plurality of the United States Supreme Court in McNeely v. Missouri, 133 S.Ct. 1552 (2013) refused such an approach writing that "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." Id. at opinion page 19. In its majority opinion the United States Supreme Court wrote that regarding McNeely "the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect." Id. at opinion page 26.

[¶45] Ms. Musick argues that if she has a constitutional right to refuse a warrantless request to take a chemical test then criminalizing her exercise of that right to gain her consent makes her consent involuntary. The North Dakota Supreme Court in State v. Birchfield, 2015 ND 6 distinguished Camara v. Municipal Ct. of San Francisco, 387 U.S. 523 (1967) and cases like it on the basis that those cases found it unconstitutional to penalize refusal in a suspicionless search circumstance which apparently would leave open whether or not it is unconstitutional to penalize a refusal in a suspicion search circumstance. See Beylund v. Levi, 2015 ND 18, ¶14, quoting Birchfield ("Unlike the regulation in Camara which allowed for suspicionlesss searches of private property, implied consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge.") But see State v. Baxter, 2015

ND 107 (allowing criminal refusal on less than probable cause). Distinguishing Camara on the basis that it is a suspicionless search scenario does not automatically open the door to allow the criminalization of refusal to consent to a warrantless search in a suspicion search scenario. In a suspicion search scenario there is no need to criminalize a refusal because law enforcement can always effectuate the search by getting a warrant and criminalizing a refusal to consent only circumvents the warrant requirement.

[¶46] It is axiomatic that if it is constitutional to criminalize a refusal to consent to a warrantless search then the fourth amendment warrant requirement is not an inalienable right and is otherwise meaningless, being subject to the whim of any legislative endeavor to make its assertion a crime. As the Eleventh Circuit explained in Lebron v. Florida, 772 F.3d 1352 (11th Cir. 2014)

> [t]he State says that deposition testimony from Lebron indicates that he freely signed the consent form and knew he could refuse the drug test, albeit at the expense of his TANF eligibility. This fact does not affect the result because "[s]urrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever else it is, is not the type of consent that automatically renders a search reasonable as a matter of law."

Id. at opinion pages 47-48, quoting Am. Fed'n of State, Cnty. & Mut. Employees Counsel 79 v. Scott, 717 F.3d 851, 873 (11th Cir. 2013). Ms. Musick argues that the court should adopt the consent analysis in Lebron and find that penalizing and criminalizing a refusal to consent renders that consent invalid for fourth amendment purposes because

> [i]n assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Camara at 533 citing Schmerber. And further, as the United States Supreme Court explained in Camara, 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." Id. at 540.

[¶47] 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.

[¶48] Ms. Musick argues that she has a constitutional right to refuse to consent to a warrantless search and that she therefore has a constitutional right to refuse to consent to a warrantless request to take a breath test or a blood draw. As explained above Ms. Musick 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.

[¶49] Ms. Musick had a constitutional right to refuse to consent to a warrantless request to take a breath test or a blood draw. 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, 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, 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."

[¶50] Reversing a conviction for harboring a fugitive in United States v. Prescott, 581 F.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).

[¶51] 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. 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.").

[¶52] 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).

[¶53] 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 was penalized a driver's failure to consent in North Dakota is penalized making the application of the law unconstitutional as it violates the doctrine of unconstitutional conditions.

[¶54] **VII. The Administrative Hearing Officer erred because Ms. Musick should have been granted the opportunity at the hearing to cure her refusal, not doing so**

denied Ms. Musick equal protection.

[¶55] Article I, § 21, N.D. Const., has long been "viewed as our state constitutional guarantee of equal protection under the law." Matter of Adoption of K.A.S., 499 N.W.2d 558, 563 (N.D.1993). Under Art. I, § 21, N.D. Const., not all legislative classifications are unlawful. We review the lawfulness of legislative classifications under three separate standards of review. "The standard used in a particular case depends upon the challenged statutory classification and the right allegedly infringed." Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897, 902 (N.D.1987), *aff'd* 487 U.S. 450, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988).

> Because no inherently suspect or fundamental interest classifications warranting strict scrutiny are involved in this case, we must choose between the rational basis standard and the intermediate standard. There is no bright line test for choosing one test over the other. Hanson v. Williams County, 389 N.W.2d 319 (N.D.1986).

Haney v. N. Dakota Workers Comp. Bureau, 518 N.W.2d 195, 197-198 (N.D. 1994).

[¶56] The requirements to cure refusal are found in N.D.C.C. § 39-20-04(2). The Administrative Hearing Officer erred because Ms. Musick should have been permitted to cure her refusal at the hearing. Not providing Ms. Musick that opportunity denies her equal protection rights because she had not been charged with DUI at the time of her hearing (classification) and could only plead to refusal. Technically Ms. Musick was offered a plea whereby the State would amend the charge to DUI but at the time of the administrative hearing the charge had not yet been amended. By not allowing Ms. Musick to cure, the law to allow the cure is arbitrarily provided only to those individuals that have the opportunity before the deadline to plead guilty to DUI and do not have an administrative hearing. Subsequent to the hearing Ms. Musick was charged with DUI and entered a guilty plea to DUI in file 45-2014-CR-02704.

[¶57] Ms. Musick's argument is that all persons charged with refusal are not treated equally because some have the opportunity to cure that refusal and others do not based on

factors controlled by the State. Compare Gableman v. Hjelle, 224 N.W.2d 379, 384 (N.D. 1974)("Pursuant to s 39-20-04, N.D.C.C., all persons who refuse to submit to a chemical test are treated in the same manner, and revocation of such persons' operator's licenses is mandatory, not discretionary, and is not unreasonable, capricious, or arbitrary. Heer v. Dept. of Motor Vehicles, 252 Or. 455, 450 P.2d 533, 537 (1969)."). Because there is no basis for the classification between those who refuse and are charged with DUI and those who refuse and are charged with DUI after the deadline to cure Ms. Musick's equal protection rights were violated. See Crawford v. Board of Education of City of Los Angeles, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982)(A facially neutral statute may violate equal protection in its application or effect.).

[¶58] **CONCLUSION**

[¶59] Although McNeely dealt with a forced blood draw, the question presented is 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 Court made this clear five days after it issued McNeely, when it vacated the judgments in three consolidated Minnesota appellate court cases, two of which involved urine tests and all three of which were obtained under the Implied Consent law. The Court remanded "for further consideration in light of Missouri v. McNeely, 569 U.S. ___ (2013)." Brooks v. Minnesota, No. 12-478 (Order filed April 22, 2013). Had the court intended its holding in McNeely to be limited to warrantless non-consensual blood draws, there would have been no reason to vacate the Minnesota

judgments that involved allegedly "consensual" urine and blood testing and instruct the Minnesota Court of Appeals that it must issue a new decision consistent with McNeely.

[¶60] 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. The fact that the North Dakota law provides for the option to refuse a test is irrelevant, it is the fact that the law can be construed to permit an illegal search in exchange for the privilege to drive and the threat of criminal charges.

[¶61] Accordingly based on the foregoing arguments Ms. Musick respectfully requests that the Department's order revoking her driving privileges for 180 days be reversed.

Dated: October 5, 2015

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lynh Hong Musick,

Appellant/Petitioner,

v.

Grant Levi, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20150252
District Court Case No. 2015-CV-00240

CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF

[¶1] On October 5, 2015 a true and correct copy of the following was electronically served:

APPELLANT'S BRIEF and APPENDIX

on the following:

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