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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Andrew John Gillmore, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20150321 District Court Case No. 45-2015-CV-00367 **APPELLANT'S BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, 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. Because Mr. Gillmore's test result was within the margin of error of the machine to be below .08 the Hearing Officer erred in her findings of fact and conclusions of law.

II. Mr. Gillmore proved at the hearing that he was not tested according to the approved method by being told to blow as hard as he could.

III. The implied consent advisory read to Mr. Gillmore is misleading because Mr. Gillmore did have a statutory right to refuse and therefore North Dakota law did not require him to submit to testing.

IV. N.D.C.C. § 39-20-01, subsection 3 required the law enforcement officer to inform the person "charged" of the implied consent advisory.

V. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because Mr. Gillmore did not voluntarily submit to field sobriety testing and the results of his field sobriety tests were used to establish probable cause for his arrest.

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

VII. The Administrative Hearing Officer erred in the Conclusions of Law because the chemical test taken by law enforcement was a warrantless search and the department failed to establish an exception to the warrant requirement and therefore, the Hearing Officer's decision violated Mr. Gillmore's constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota.

VIII. The Administrative Hearing Officer erred because Article I, Section 20 of North Dakota's Constitution and or the unconstitutional conditions

doctrine apply to North Dakota's implied consent law making it unconstitutional when a test is sought without a valid search warrant.

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Andrew John Gillmore, appeals from the North Dakota Department of Transportation's March 10, 2015 Order suspending his North Dakota driving privileges for 91 days, the decision of Hearing Officer Sarah Huber dated May 1, 2015 affirming the March 10, 2015 order and denying Mr. Gillmore's prayer for relief and the District Court's Order and Judgment affirming the Department's Order.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On February 14, 2015 law enforcement observed Mr. Gillmore driving a vehicle and stopped him for failing to signal a turn and taking a turn too fast. Transcript page 4, line 17 to page 5, line 14 (T. 4:17-5:14). Upon initial contact with Mr. Gillmore the law enforcement officer could smell the strong odor of cigars coming from the car and that Mr. Gillmore's eyes were watery. T. 6:15-18. Law enforcement obtained license and registration from Mr. Gillmore and went back to the patrol vehicle then returned to Mr. Gillmore's vehicle and looked at Mr. Gillmore's insurance information. T. 43:13-17. Because law enforcement could not determine the odor of an alcoholic beverage the officer had Mr. Gillmore step out of the car and sit in the patrol vehicle telling Mr. Gillmore that he wanted to have a conversation with him. T. 6:19-7:2; 43:17-18. While in the patrol vehicle the officer could smell the odor of an alcoholic beverage and Mr. Gillmore admitted to drinking. T. 7:3-8. Law enforcement then administered field sobriety tests to Mr. Gillmore and read him the North Dakota implied consent advisory. T. 7:18-10:14.

[¶10] Mr. Gillmore agreed to take a screening test but after five attempts no result was

obtained so law enforcement arrested Mr. Gillmore for refusal. T. 10:18-11:1. Law enforcement transported Mr. Gillmore to the law enforcement center and informed him he was under arrest for driving under the influence and refusal. T. 11:15-17. Law enforcement then asked Mr. Gillmore to take a chemical test and Mr. Gillmore complied and a breath test was administered. T. 11:20-12:5. During administration of the breath test the officer instructed Mr. Gillmore to blow as hard as he can. T. 28:16-21. The approved method does not include an instruction to blow as hard as you can. T. 29:3-30:19. The Intoxylizer 8000 has a margin of error. T. 36:18-19.

[¶11] **LAW AND ARGUMENT**

[¶12] **Standard of Review**

[¶13] "[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.

[¶14] 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.

[¶15] 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.

[¶16] "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.

[¶17] **I. Because Mr. Gillmore's test result was within the margin of error of the machine to be below .08 the Hearing Officer erred in her findings of fact and conclusions of law.**

[¶18] Mr. Gillmore demonstrated at the hearing that the margin of error for the

Intoxilyzer 8000 is plus or minus .003. See Hearing Exhibit 9 (District Court Doc ID# 10). Exhibit 9, the Certificate of Analysis, explains that the accuracy of the particular cylinder was plus or minus 0.002 or 2% of BAC whichever is greater. Exhibit 9 also explains that "[a] proper result for the standard test using a cylinder of this lot number would be the range of 0.75 to 0.85" meaning a margin of error of plus or minus .005 which includes the margin of error of the cylinder plus the Intoxilyzer 8000. This means that using this particular cylinder on the Intoxilyzer 8000 the margin of error attributable to the cylinder is plus or minus .002 and therefore the margin of error attributable to the Intoxilyzer 8000 is plus or minus .003.

[¶19] Because the reported result on the Intoxilyzer 8000 was within the machine's margin of error to be under .08 it is a violation of equal protection to suspend Mr. Gillmore's driver's license based on such a result. Based on the margin of error for the Intoxilyzer 8000 the test results do not show that Mr. Gillmore had an alcohol concentration of at least .08 and in fact only show that Mr. Gillmore had an alcohol concentration in a range from .079 to .085. Therefore the results show that the "least" alcohol concentration reported was .079.

[¶20] "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)." Haney v. N. Dakota Workers Comp. Bureau, 518 N.W.2d 195, 197 (N.D. 1994). Regarding an equal protection claim the Court applies a strict scrutiny test

> to an inherently suspect classification or infringement of a fundamental right and strike[s] down the challenged statutory classification 'unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose.'

> State ex rel. Olson v. Maxwell, 259 N.W.2d 621, 627 (N.D.1977). When an 'important substantive right' is involved, we apply an intermediate standard of review which requires a ' "close correspondence between statutory classification and legislative goals." ' Hanson v. Williams County, 389 N.W.2d 319, 323, 325 (N.D.1986) [quoting Arneson v. Olson, 270 N.W.2d 125, 133 (N.D.1978)]. When no suspect class, fundamental right, or important substantive right is involved, we apply a rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose. See State v. Knoefler, 279 N.W.2d 658, 662 (N.D.1979)."

Gange v. Clerk of Burleigh County District Court, 429 N.W.2d 429, 433 (N.D. 1988). Note that Mr. Gillmore is not challenging the constitutionality of a legislative act but that of an administrative agency in so far as that agency, the Department of Transportation, failed to consider the margin of error of the Intoxilyzer 8000. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179, 92 S. Ct. 1965, 1974, 32 L. Ed. 2d 627 (1972)("State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action. Robinson v. Florida, 378 U.S. 153, 156, 84 S.Ct. 1693, 1695, 12 L.Ed.2d 771 (1964). Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), makes it clear that the application of state sanctions to enforce such a rule would violate the Fourteenth Amendment."). Mr. Gillmore argues that the Department's failure to consider the margin of error in the Intoxilyzer 8000 tests results is "patently arbitrary and bears no rational relationship to a legitimate government purpose." Based on the facts of this case the Hearing Officer's decision violated Mr. Gillmore's equal protection rights.

[¶21] **II. Mr. Gillmore proved at the hearing that he was not tested according to the approved method by being told to blow as hard as he could.**

[¶22] "[I]t is the burden of the Department to establish that the Intoxilyzer test was fairly administered. Ringsaker, at ¶ 11. If the Department wishes to rely on the eased

requirements for admissibility under N.D.C.C. § 39-20-07, it must adhere to those requirements." Lee v. N. Dakota Dep't of Transp., 2004 ND 7, ¶ 17, 673 N.W.2d 245, 250.

[¶23] The Hearing Officer erred in her conclusions of law and findings of fact because the facts at the hearing prove that the law enforcement officer did not follow the approved method in administering the breath test to Mr. Gillmore. The approved method does not instruct to tell the person taking the test to blow as hard as they can; despite that the officer instructed Mr. Gillmore to blow as hard as he could. The failure to follow the approved method invalidates the test. See N.D.C.C. § 39-20-07(5); compare Lee v. N. Dakota Dep't of Transp., 2004 ND 7, ¶ 16, 673 N.W.2d 245, 249-50 ("When the State fails to establish compliance with the toxicologist's directions, which go to the scientific accuracy of the test, the State must prove fair administration through expert testimony. Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 152 (N.D. 1990). Absent a showing of strict compliance with the approved method, expert testimony is necessary to demonstrate the scientific accuracy of the test. In the present case, the arresting officer was the only person to testify at the hearing, and he was not established as an expert."); and compare Havemeier v. N. Dakota Dep't of Transp., 2015 ND 178, ¶ 11 ("[B]ecause the test was not performed in accordance with the approved method when the deputy did not give the driver three minutes to provide a sample and no expert testimony was introduced to explain the effect of the deviation. See Keller, 2015 ND 81, ¶ 11, 861 N.W.2d 768. The deputy's testimony at the hearing does not establish an affirmative refusal by Havemeier to chemical testing.").

[¶24] **III. The implied consent advisory read to Mr. Gillmore is misleading because Mr. Gillmore did have a statutory right to refuse and therefore North**

Dakota law did not require him to submit to testing.

[¶25] The advisory read to Mr. Gillmore incorrectly advised him that North Dakota law requires him to submit to testing when in fact Mr. Gillmore had a statutory right to refuse to submit to a chemical test. See State v. Baxter, 2015 ND 107, ¶ 11, 863 N.W.2d 208, 213, reh'g denied (May 27, 2015) (pet. for cert. docketed August 26, 2015)("Rather, he took advantage of the statutory right to refuse the test, and no test was given."). Because the advisory read to Mr. Gillmore was misleading as to his rights under North Dakota law it was error for the Department to use the results of that test to suspend his driving privileges. But see and compare State v. Smith, 2014 ND 152, ¶ 20, 849 N.W.2d 599, 606 ("We have held that another factor in determining the voluntariness of consent includes the law enforcement officer's statements to a defendant, whether intentionally or unintentionally misleading. State v. Abrahamson, 328 N.W.2d 213, 216 (N.D.1982). The deputy twice advised Smith of the implied consent law, using similar language included in the statute. The deputy's advisory was not misleading."). Note in Smith that the North Dakota Supreme Court did not address the issue of the advisory stating that the law required submission to the test when the law also granted the right to refuse the test.

[¶26] **IV. N.D.C.C. § 39-20-01, subsection 3 required the law enforcement officer to inform the person "charged" of the implied consent advisory.**

[¶27] Law enforcement was required to inform Mr. Gillmore of the implied consent advisory after arrest, failure by law enforcement to do so means that Mr. Gillmore was not tested in accordance with N.D.C.C. § 39-20-01 and the Hearing Officer committed error by finding otherwise. Note that N.D.C.C. § 39-20-05(2) only addresses and makes failure to inform of a potential suspension a nonissue for the scope of the hearing, it does not make failure to inform that refusal is a crime a nonissue and therefore N.D.C.C. § 39-

20-05(2) does not completely nullify the requirements of N.D.C.C. § 39-20-01(3).

[¶28] **V. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because Mr. Gillmore did not voluntarily submit to field sobriety testing and the results of his field sobriety tests were used to establish probable cause for his arrest.**

[¶29] Field sobriety tests are evidence obtained subsequent to a search. Compare City of Wahpeton v. Skoog, 300 N.W.2d 243 (N.D. 1980)(noting that field sobriety tests are physical and real evidence); compare City of Devils Lake v. Grove, 2008 ND 155, ¶ 15, 755 N.W.2d 485("If an investigative detention lasts too long or its manner of execution unreasonably infringes an individual's Fourth Amendment interests, it may no longer be justified as an investigative stop and, as a full-fledged seizure . . .."). The Department has the burden to prove that the search was voluntary but the hearing officer made no findings in this regard. Absent the results of the field sobriety tests law enforcement did not have probable cause to arrest Mr. Gillmore.

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

[¶31] 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." 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 ND 6, 858 N.W.2d 302, reh'g denied (Feb. 12, 2015), cert. granted, No. 14-1468, 2015 WL 8486653 (U.S. Dec. 11, 2015). 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 Patel, 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 Mr. Gillmore of committing a crime, and used the threat of criminal sanctions and administrative penalties including the taking of his privilege to drive in order to obtain his consent to execute a warrantless search in order to find incriminating evidence, such a procedure used to obtain consent should be found unconstitutional. See State v. Won, No. SCWC-12-0000858, 2015 WL 7574360 at *21 (Haw. Nov. 25, 2015, Nakayama dissenting)("The Majority holds that the criminal sanctions for refusing to submit to a breath or blood alcohol test provided by Hawai'i Revised Statutes (HRS) § 291E–68 (Supp. 2012) are inherently coercive, thus rendering Defendant Yong Shik Won's (Won) otherwise voluntary consent invalid.").

[¶32] **VII. The Administrative Hearing Officer erred in the Conclusions of Law because the chemical test taken by law enforcement was a warrantless search**

and the department failed to establish an exception to the warrant requirement and therefore, the Hearing Officer's decision violated Mr. Gillmore's constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota.

[¶33] Mr. Gillmore's argument is that absent a search warrant or an exception to the warrant requirement having him submit to a breath test was illegal and any evidence obtained therefrom should be suppressed. Mr. Gillmore acknowledges that his arguments have for the most part been previously addressed in North Dakota in a line of cases beginning with McCoy v. North Dakota Department of Transportation, 2014 ND 119, 848 N.W.2d 659. The United States Supreme Court has accepted certiorari in two of those cases, Birchfield and Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403, reh'g denied (Mar. 24, 2015), cert. granted, No. 14-1507, 2015 WL 3867245 (U.S. Dec. 11, 2015).

[¶34] "[E]ver since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), evidence obtained by search and seizure violative of the Fourth Amendment is, by virtue of the Due Process Clause of the Fourteenth Amendment, inadmissible in State courts. State v. Manning, 134 N.W.2d 91 (N.D. 1965)." State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974). Because Mr. Gillmore submitted to a breath test without a warrant, and in the absence of any valid exception to the warrant requirement of the Fourth Amendment to the United States Constitution or Article I Section 8 of the Constitution of the State of North Dakota, the order suspending Mr. Gillmore's's driving privileges that relies on that search violates his constitutional rights and should be rescinded. See N.D.C.C. § 28-32-46.

[¶35] Consent is a valid exception to the warrant requirement. State v. Swenningson, 297 N.W.2d 405 (N.D. 1974). The Fourth Amendment requires that consent to a search be voluntary. Schneckloth; State v. Page, 277 N.W.2d 112 (N.D. 1979). To determine

what constitutes "voluntary consent" the court considers the totality of the circumstances at the time that consent was given. State v. Metzner, 244 N.W.2d 215 (N.D. 1976). Consent must be the product of an essentially free and unconstrained choice; it cannot be the product of coercion. Schneckloth. However, if in seeking consent law enforcement makes a claim of lawful authority to search then the totality of the circumstances standard does not apply. See Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Florida v. Royer, 460 U.S. 491 (1983).

[¶36] The facts of this case demonstrate that Mr. Gillmore was coerced into giving his consent by the reading of the Implied Consent Advisory which included the threat of criminal charges. Essentially, Mr. Gillmore was allowed the privilege to drive and to not be charged criminally in return for the surrender of his rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the North Dakota Constitution. Mr. Gillmore was not presented a free and unconstrained choice.

[¶37] Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker, rather than the product of duress or coercion, express or implied." Schneckloth, 412 U.S. at 222. Consent is involuntary if it results from circumstances that overbear the consenting party's will and impairs his or her capacity for self-determination. Id. at 233. The Department cannot prove consent simply by showing an individual acquiesced to a claim of lawful authority or submitted to a show of force. Bumper at 548. Fourth Amendment consent does not lie where the police claim to have a right to the result. Id. at 550.

[¶38] Mr. Gillmore's case is analogous to Bumper because law enforcement informs him that if he refuses to take the test it is a separate crime, just like the presentation of a

search warrant stating that the court requires that the suspect submit to a search law enforcement informed Mr. Gillmore that the law of the State of North Dakota requires him to submit to a search or it is a crime. Under these rules, the Department has the burden to prove that consent was freely and voluntarily given. Id. at 548. But to do so the standard is NOT the totality of the circumstances from Schneckloth but rather because Mr. Gillmore acquiesced to the lawful authority invoked against him "submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law." Bumper at 549, fn. 14. Law enforcement in this case used North Dakota's implied consent law and the threat of the crime of test refusal to circumvent the warrant requirement. Mr. Gillmore had two choices when he was asked to consent to a test: consent to a warrantless search or lose his privilege to drive and be charged with a crime.

[¶39] However, beginning with McCoy North Dakota has followed the reasoning of the Minnesota Supreme Court in State v. Brooks, 838 N.W.2d 563 (Minn. 2013) regarding the same issue of consent being argued in this case. Brooks explains that standing alone being informed of the consequences of refusal does not amount to coercion even if those consequences include a loss of driving privileges and being charged with a crime. Despite stating that "[t]he obvious and intended effect of the implied-consent law is to coerce the driver suspected of driving under the influence into 'consenting' to chemical testing" in Prideaux v. State Department of Public Safety, 247 N.W.2d 385, 388 (Minn. 1976), before refusal was a crime in Minnesota, the Minnesota Supreme Court in Brooks does not explain its decision to find now that Minnesota's implied consent law does not

coerce the driver despite a scathing concurrence from Justice Stras.

[¶40] Mr. Gillmore is arguing to overturn precedent set by the North Dakota Supreme Court in its consideration of Brooks and find that under a totality of the circumstances only the issue of being advised of the consequences of refusal standing alone did not amount to coercion but that consent itself is not valid for fourth amendment purposes when it is conditioned on the receipt of a government benefit. In doing so the Court would adopt the analysis of the United States Court of Appeals for the Eleventh Circuit in Lebron v. Florida, 772 F.3d 1352 (11th Cir. 2014). Lebron explains that consent is not valid for fourth amendment purposes when it is conditioned on the receipt of a government benefit. Id. at opinion pages 46-54. See also State v. Won, No. SCWC-12-0000858, 2015 WL 7574360, at *14 (Haw. Nov. 25, 2015), as corrected (Dec. 9, 2015)("Where arrest, conviction, and imprisonment are threatened if consent to search is not given, the threat infringes upon and oppresses the unfettered will and free choice of the person to whom it is made, whether by calculation or effect."). In the case of Mr. Gillmore's situation his consent was conditioned on not only the receipt of the government benefit but also the criminalization of his failure to consent.

[¶41] The heart of the issue is whether or not Mr. Gillmore had a constitutional right to refuse the request to submit to a chemical test. The North Dakota Supreme Court has so far only addressed the statutory provision that provides that no test shall be conducted if the driver refuses. The Minnesota Supreme Court in State v. Bernard, 859 N.W.2d 762 (Minn. 2015), reh'g denied (Mar. 16, 2015), cert. granted, No. 14-1470, 2015 WL 8486654 (U.S. Dec. 11, 2015) has found that a driver does not have a constitutional right to refuse a request to take a breath test. Mr. Gillmore argues that he does have a

constitutional right to refuse a chemical test of breath, blood or urine. See Won, at *17 ("this approach discounts the statutory and constitutional rights to refuse to submit to a BAC test and does not account for the coercive nature of the threat of imprisonment communicated by the Implied Consent Form, the forced selection between constitutional rights, or the significant punishment authorized for the refusal offense.").

[¶42] What the Minnesota Supreme Court has done in Brooks and 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.

[¶43] Mr. Gillmore argues that if he has a constitutional right to refuse a warrantless request to take a chemical test then criminalizing his exercise of that right to gain his consent makes his consent involuntary. The North Dakota Supreme Court in Birchfield distinguished Camara 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, 859 N.W.2d

403, 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.").

[¶44] It seems axiomatic however 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

> [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). Mr. Gillmore argues that the consent analysis in Lebron and Won and the dissenting opinion in Brooks are far superior to the conclusory assertions of the majority opinion in Brooks and that North Dakota should abandon its reliance on Brooks regarding consent and find instead that penalizing and criminalizing a refusal to consent renders that consent invalid for fourth amendment purposes.

[¶45] Searches that impose "significant intrusions upon the interests protected by the Fourth Amendment," and are "authorized and conducted without a warrant procedure

lack the traditional safeguards which the Fourth Amendment guarantees to the individual." Camara at 534. It is unconstitutional to require 'consent' to such searches by imposing criminal sanctions for refusal. Camara at 525-534. In Camara, the United States Supreme Court analyzed a housing code which required an occupant to allow a city inspector to enter the occupant's building, without a warrant. Id. at 526. The defendant refused to allow a warrantless inspection, and was charged with a misdemeanor for such refusal. Id. at 526-527. The Court, overruling its own precedent, held that such searches were a significant invasion of privacy, requiring Fourth Amendment protections. Id. at 525-34. The Court reasoned that the defendant should not be subject to criminal sanctions for requiring a warrant as was Defendant's Fourth Amendment right. Id. at 531-534. Like the administrative code in Camara, North Dakota's implied consent law and criminal statute making refusal a crime are unconstitutional.

[¶46] 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 at 228-229. North Dakota's Constitution forbids the North Dakota legislature or a North Dakota agency from drafting 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.

[¶47] **VIII. The Administrative Hearing Officer erred because Article I, Section 20 of North Dakota's Constitution and or the unconstitutional conditions doctrine apply to North Dakota's implied consent law making it unconstitutional when a test is sought without a valid search warrant.**

[¶48] In Frost v. R.R. Comm'n, 271 U.S. 583 (1926) the United States Supreme Court articulated the doctrine of unconstitutional conditions stating that

> as a general rule, the state, having the power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If 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 593-94. Because the doctrine of unconstitutional conditions should apply in North Dakota just as it did in California Mr. Gillmore should not have to relinquish a Constitutional Right in order to obtain a privilege. But North Dakota's implied consent

law does just that by conditioning the grant of the privilege to drive upon a driver's surrender of their Constitutional right to be secure against unreasonable searches by requiring that the driver submit to a test without a warrant. The condition becomes even more egregious when the State threatens to charge a crime for failure to consent to a warrantless search.

[¶49] 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. 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, 387 U.S. 523, 540 (1967), 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 v. City of Seattle, 387 U.S. 541, 546 (1967), 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] In Beylund v. Levi, the North Dakota Supreme Court rejected the same argument Mr. Gillmore is making now. However, as Mr. Gillmore argued above, the heart of the matter is whether or not he has a constitutional right to refuse to consent to a warrantless request to submit to a chemical test. The North Dakota Supreme Court in Beylund did not specifically address the question, only coming close by stating at ¶25 that "[a]ssuming Beylund has a constitutional right to refuse, it does not necessarily invalidate the implied consent law under the unconstitutional conditions doctrine."

[¶51] In Beylund the North Dakota Supreme Court assumed facts not in the record to determine the purpose of the implied consent law. In doing so however Beylund ignored the other side of the equation, that being that North Dakota's implied consent law creates a statutory categorical exception to the warrant requirement. So far the Department has failed to establish any need for such an exception. The purpose of implied consent laws as articulated in the case relied on by the North Dakota Supreme Court in Beylund, Mackey v. Montrym, 443 U.S. 1 (1979), is actually to provide for summary suspension of driver's licenses not circumvent the warrant requirement. The two concepts are not mutually exclusive. Including a warrant requirement does not interfere with implied consent laws.

[¶52] Assuming Mr. Gillmore did have a constitutional right to refuse, conditioning his driving privileges on the waiver of that right is unconstitutional because the State has no need for Mr. Gillmore to waive that constitutional right. For example, assume law enforcement first obtained a search warrant. Under such a scenario the State has no need

for Mr. Gillmore to consent because law enforcement can rely on the search warrant to obtain a chemical test. Assume law enforcement attempts to obtain a search warrant but is unable to do so. Under such a scenario the State has no need for Mr, Gillmore to consent to a chemical test because as per McNeely and Schmerber v. California, 384 U.S. 757 (1966) law enforcement could obtain a chemical test in reliance on search incident to arrest combined with exigent circumstances. Because the Department has not and cannot demonstrate a need for implied consent laws detached from the warrant requirement, North Dakota's implied consent law as applied to the facts of Mr. Gillmore's case is unconstitutional because law enforcement failed to even consider obtaining a search warrant and instead used the implied consent law to obtain Mr. Gillmore's consent. See Beylund at ¶25 ("the sanction for refusal . . . serves as a strong inducement to take the test").

[¶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 her constitutionally protected interests . . .." Perry v. Sindermann, 408 U.S. 593, 597 (1972). If it could, the "exercise of those [interests] would in effect be penalized and inhibited." Id. In rejecting the argument that the doctrine of unconstitutional conditions invalidates North Dakota's implied consent laws the North Dakota Supreme Court in Beylund relied on the balancing test articulated in Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) known as the "special needs balancing test" that was born out of the Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619 (1989)("Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. See, e.g., Payton

v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978). We have recognized exceptions to this rule, however, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987), quoting New Jersey v. T.L.O., supra, 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment).") and New Jersey v. T.L.O., 469 U.S. 325 (1985) line of cases. Those cases however articulate that such an analysis is only appropriate for cases "outside the normal needs of law enforcement." In other words, if law enforcement is presently engaged in the "competitive enterprise of ferreting out crime," the rule is to get a warrant or prove an exception. If the search is being performed for some other reason, the court can balance the intrusion against the State's compelling interest. See Maryland v. King, 133 S. Ct. 1 (2012). Accordingly, the first step in any Fourth Amendment analysis is not to look at the "nature of the intrusion," but rather the "purpose of the intrusion." And if that purpose is to ferret out crime, no balancing test is used, the State needs to get a warrant or prove an exception.

[¶54] Regarding law enforcement's contact with Mr. Gillmore the purpose of the intrusion was to ferret out crime. Therefore, this is not a "special needs" case, but rather a case involving the competitive enterprise of ferreting out crime, no balancing is permitted. The United States Supreme Court in Ferguson v. City of Charleston, 532 U.S. 67 (2001) explains that the court cannot "balance needs" for law enforcement engaged in a primary criminal investigation. The question presented in Ferguson was "whether the interest in using the threat of criminal sanctions to deter pregnant women from using

cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." Ferguson, 532 U.S. 67, 70. To reach a determination of this question the Ferguson court explained why a special needs balancing test was not appropriate

> [b]ecause law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."

Id. at 84 (footnotes omitted).

[¶55] It appears in Beylund that the special needs balancing test was used to "immunize" North Dakota's implied consent law by defining its constitutionality based on the statute's "ultimate rather than immediate purpose." Such an approach is inconsistent with the Fourth Amendment as the Ferguson Court went on to state in explaining its decision

> a motive, however, cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the MUSC policy. The stark and unique fact that characterizes this case is that Policy M–7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions. While respondents are correct that drug abuse both was and is a serious problem, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." Indianapolis v. Edmond, 531 U.S., at 42–43, 121 S.Ct. 447. The Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy. See, e.g., Chandler, 520 U.S., at 308, 117 S.Ct. 1295; Skinner, 489 U.S., at 619, 109 S.Ct. 1402.

Id. at 85-86. Therefore, because the circumstances of this case involve law enforcement engaged in the competitive enterprise of ferreting out crime an analysis of the constitutionality of North Dakota's implied consent and refusal law regarding the fourth amendment should not entail use of the "special needs" balancing test and instead law enforcement must obtain a warrant or prove an exception.

[¶56] **CONCLUSION**

[¶57] "Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." State v. Halseth, 339 P.3d 368, 371 (Idaho 2014). The notion that a driver "consents" to a warrantless search in return for the privilege of driving would violate the doctrine of unconstitutional conditions, at least when the driver is unable to revoke that consent free of criminal penalty. "The "unconstitutional conditions doctrine vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013). Thus, the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" Amelkin v. McClure, 330 F.3d 822, 827 (6th Cir. 2003) (quoting Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989)); see also Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 67 (1988) ("In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."). It would be a "palpable incongruity" to strike down a legislative act that expressly divests a person of rights guaranteed by the 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." Frost, 271 U.S. 583, 593-94 (1926).

[¶58] Although the government may have a compelling interest to investigate drinking and driving scenarios North Dakota's current implied consent laws that condition the privilege to drive on the waiver of a constitutional right and further criminalize the exercise of that right are not the least restrictive means to accomplish that goal. The situation could be easily remedied by incorporation of a warrant requirement. Instead of trying to circumvent the warrant requirement North Dakota law should embrace it. See 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.").

[¶59] Accordingly based on the foregoing arguments and law Mr. Gillmore respectfully requests that the Department's decision be reversed.

Dated: December 16, 2015

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Andrew John Gillmore,

Appellant/Petitioner,

v.

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

Appellee/Respondent.

Supreme Court Case No. 20150321
District Court Case No. 45-2015-CV-00367

CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF AND APPENDIX

[¶1] On December 16, 2015 a true and correct copy of the following was electronically served:

APPELLANT'S BRIEF and APPENDIX

on the following:

Michael Pitcher
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