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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ulises Barrios-Flores, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20160103 District Court Case No. 45-2015-CV-00758 **APPELLANT'S PETITON FOR REHEARING** **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**

Thomas F. Murtha IV
North Dakota Attorney ID#06984
PO Box 1111
Dickinson ND 58602-1111
701-227-0146
Attorney for Appellant

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[¶3] LAW AND ARGUMENT

[¶4] **The North Dakota Supreme Court should reconsider this matter because North Dakota's implied consent law requires the warrantless submission to a search on less than probable cause in return for the privilege to drive in violation of the Fourteenth and Fourth Amendments of the United States Constitution and Article One Section Eight of the North Dakota Constitution.**

[¶5] According to the United States Supreme Court the continued possession of a driver's license may become essential to earning a livelihood; as such, it is an entitlement which cannot be taken without the due process mandated by the Fourteenth Amendment. See Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 535 (1971).

> Individuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property. The Fourteenth Amendment guarantees that individuals are not to be deprived of their property without due process of law, a protection that has been viewed as guaranteeing procedural due process and substantive due process. Procedural due process promotes fairness in government decisions "[b]y requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.' " Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Substantive due process, "by barring certain government actions regardless of the fairness of the procedures used to implement them, [ ] serves to prevent governmental power from being 'used for purposes of oppression.' " Id. (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 15 L.Ed. 372 (1856)).

John Corp. v. City of Houston, 214 F.3d 573, 577 (5th Cir. 2000).

[¶6] In Lebron v. Sec'y of Florida Dep't of Children and Families, 772 F.3d 1352 (11th Cir. 2014), a requirement that all TANF applicants submit to suspicionless drug testing as a condition of receiving benefits was struck down. Id. at 1378. However, the case was not decided under the unconstitutional conditions doctrine, rather the case was decided using a "special needs" analysis generally applied to suspicionless searches. Id. North Dakota's implied consent law (N.D.C.C. § 39-20-14) that revokes the privilege to drive based on a

driver's refusal to submit to a pre arrest screening test (illegal search) is the same type of unconstitutional law addressed by the 11th Circuit in Lebron.

[¶7] The 11th Circuit in Lebron went on to state that

> [o]ur conclusion is consistent with the decisions of our sister circuit courts of appeal, which "have also applied the special-needs balancing test, rather than treating consent as the sole determinant of a policy's constitutionality, in cases where the government attempted to compel consent to drug testing as a condition for obtaining some privilege." AFSCME, 717 F.3d at 876 (citing Joy v. Penn–Harris–Madison Sch. Corp., 212 F.3d 1052, 1055, 1067 (7th Cir.2000)); see also, e.g., Miller v. Wilkes, 172 F.3d 574, 576, 577–82 (8th Cir.1999) (upholding a school drug testing program after a full special needs analysis and not treating the existence of consent forms as dispositive), vacated as moot, 172 F.3d at 582. "Simply put, we have no reason to conclude that the constitutional validity of a mandated drug testing regime is satisfied by the fact that a state requires the affected population to 'consent' to the testing in order to gain access or retain a desired benefit." Lebron I, 710 F.3d at 1215. In the final analysis, the warrantless, suspicionless urinalysis drug testing of every Florida TANF applicant as a mandatory requirement for receiving Temporary Cash Assistance offends the Fourth Amendment. On this record, the State has not demonstrated a substantial special need to carry out the suspicionless search—we see no concrete danger, only generalized public interests. And the State cannot use consent of the kind exacted here—where it is made a condition of receiving government benefits—to wholly replace the special needs balancing analysis. We respect the State's overarching and laudable desire to promote work, protect families, and conserve resources. But, above all else, we must enforce the Constitution and the limits it places on government. If we are to give meaning to the Fourth Amendment's prohibition on blanket government searches, we must—and we do—hold that § 414.0652 crosses the constitutional line.

Lebron v. Sec'y of Florida Dep't of Children & Families, 772 F.3d 1352, 1377–78 (11th Cir. 2014)(footnote omitted).

[¶8] The opinion in Barrios-Flores relies on the opinion in State v. Baxter, 2015 ND 107, 863 N.W.2d 208, 213, reh'g denied (May 27, 2015), cert. granted, judgment vacated, 136 S. Ct. 2539, 195 L. Ed. 2d 863 (2016), and vacated, 2016 ND 181, ¶ 11, 885 N.W.2d 64 to "conclude [that] a pre-arrest warrantless onsite screening test of an individual's breath

based on reasonable suspicion the individual was driving while impaired does not violate the Fourth Amendment or N.D. Const. art. I, § 8." Barrios-Flores v. Levi, 2017 ND 117, ¶ 17. The opinion in Baxter however has been vacated by both the United States Supreme Court and the North Dakota Supreme Court. The opinion in Barrios-Flores should not be relying on the now vacated opinion in Baxter.

[¶9] The opinion in Barrios-Flores stands for the proposition that a compelled warrantless search is permissible on less than probable cause. The Barrios-Flores opinion is at odds with the Constitutional right to refuse to submit to a warrantless request to submit to a search. See State v. Larson, 343 N.W.2d 361, 365 (N.D. 1984) ("In Schneckloth, supra, 412 U.S. at 227, 93 S.Ct. at 2048, 36 L.Ed.2d at 863, the Court held that a defendant's knowledge of the right to refuse consent is one factor in determining whether or not the consent was voluntary . . ..").

[¶10] The North Dakota implied consent law is unconstitutional and denies procedural due process by requiring law enforcement to use a procedure that misinforms drivers regarding their rights. The North Dakota law is unconstitutional and denies substantive due process because it is unfair (denies due process) to use unconstitutional means to deprive driving privileges. See Lebron at 1374-1375 ("After all, government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Perry, 408 U.S. at 597, 92 S.Ct. 2694; accord Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right."); see Speiser v. Randall, 357 U.S. 513, 519, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) (striking down a state tax exemption denied to claimants who advocated overthrow of the government as

unconstitutionally restricting freedom of speech).

[¶11] 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 statutes, the North Dakota Legislature has criminalized and penalized an individual's assertion of the right to be secure against unreasonable searches and seizures by making it a crime and administratively punishing a refusal to submit to a properly requested screening test before being arrested. In other words, the statutes have 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").

[¶12] **CONCLUSION**

[¶13] The constitutionality Mr. Barrios-Flores' refusal to submit to a pre arrest screening test should be evaluated the same as Mr. Baxter's refusal to submit to a pre arrest screening test. Whether or not that refusal is used to convict for a crime or revoke driving privileges should not matter. The United States Supreme Court in Birchfield v. N. Dakota, 136 S. Ct. 2160 (2016) addressed Mr. Beylund's consent irrespective of the proceeding being criminal or civil, the North Dakota Supreme Court should do the same in addressing Mr. Barrios-Flores' refusal to submit to a pre arrest screening test. Because it is a violation of due process to use an unconstitutional law to deprive a person of an important property

interest and based on the forgoing arguments and law Mr. Barrios-Flores respectfully requests that this petition for rehearing be granted.

Dated: May 30, 2017

/s/Thomas F. Murtha IV

Thomas F. Murtha IV (06984)
Attorney for Appellant
PO Box 1111
Dickinson ND 58602
701-227-0146
murthalawoffice@gmail.com

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Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on May 30, 2017 he electronically served the following on Douglas Anderson, and Michael Pitcher, Assistant North Dakota Attorney Generals representing the North Dakota Department of Transportation:

APPELLANTS' PETITION FOR REHEARING

by sending an electronic copy to the email addresses dbanders@nd.gov and mtpitcher@nd.gov.

Dated: May 30, 2017

Thomas F. Murtha IV

Thomas F. Murtha IV
Attorney ID 6984
PO Box 1111
58602-1111
701-227-0146
Murthalawoffice@gmail.com