20160141
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 31, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jesse Scott Koehly, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20160141 District Court Case No. 45-2015-CV-00565 **APPELLANT'S BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE JAMES GION, 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 Findings of Fact and Conclusions of Law because law enforcement violated Mr. Koehly's limited right to counsel in an implied consent refusal context by recording his telephone conversations.

II. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because Mr. Koehly cured his refusal by agreeing to take the chemical test after he initially refused to take the test, was in continual police custody and a test sequence was conducted without his presence while he was locked in an interview room.

III. The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal law (N.D.C.C. § 39-08-01 Subsection 1(e)) and implied consent law (N.D.C.C. § 39-20) violate the constitutional prohibition against unreasonable searches and seizures, are unconstitutional for denying substantive due process, are unconstitutional for penalizing the exercise of a constitutional right and the constitutional right to withhold consent to a warrantless search or withdraw consent once given and violate the doctrine of unconstitutional conditions.

IV. The doctrine of unconstitutional conditions renders North Dakota's test refusal and implied consent laws unenforceable and unconstitutional and North Dakota's test refusal and implied consent laws conflict with Article I § 20 of the North Dakota Constitution which prevents the legislature from drafting a law to except the provisions of Article I § 8 and the right to refuse a warrantless search or to withdraw consent once given.

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Jesse Scott Koehly, appeals to the Supreme Court of North Dakota from the Judgment of the Stark County District Court filed February 16, 2016, and from each and every part thereof, including the Memorandum Opinion and Order filed by the

Honorable James Gion, District Judge, filed February 10, 2016 and February 16, 2016, and the decisions of the North Dakota Department of Transportation issued by Hearing Officer Sarah Huber dated August 11, 2015 revoking his North Dakota driving privileges for 180 days and the letter from Hearing Officer Sarah Huber dated October 15, 2015 granting Mr. Koehly's petition for reconsideration but denying his requested relief.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On July 11, 2015 law enforcement made contact with Mr. Koehly. Transcript page 5, line 14 to 19 (T. 5:14-19). Law enforcement observed Mr. Koehly run a red light and stopped him. T. 6:17-18. Law enforcement had Mr. Koehly perform field sobriety tests. T. 8:7-8. At the conclusion of the field sobriety tests law enforcement read the North Dakota Implied Consent Advisory to Mr. Koehly and asked him to take a screening test. T. 11:5-7. Mr. Koehly was unable to complete the screening test, law enforcement considered him a refusal and arrested him. T. 11:9-12:18.

[¶10] Mr. Koehly was transported to the law enforcement center and placed in an interview room where he was read the implied consent advisory and was asked to take a chemical test. T. 12:24-13:5. Mr. Koehly's phone conversations and his interactions with law enforcement in the interview room were recorded. Exhibit 17. Mr. Koehly was provided a phone and Mr. Koehly asked to consult with a lawyer before making a decision to take the test or not. T. 32:13-20; Exhibit 17 at approx. 9:23.

[¶11] Mr. Koehly asked law enforcement to take a blood test but only a breath test was offered. T. 32:25-33:7. Mr. Koehly then agreed to take the breath test but was not allowed to do so. T. 33:11-21; Exhibit 17 at approx. 32:24. Law enforcement conducted the breath test without Mr. Koehly in the room. T. 15:7-8 ("I went ahead and I did start

the machine, which I let it run through the . . . test two full times and it came insufficient answer . . . or def . . . deficient sample since he never gave a sample."); Exhibit 17 at approx. 33:19-21.

[¶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] **I. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement violated Mr. Koehly's limited right to counsel in an implied consent refusal context by recording his telephone conversations.**

[¶17] The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement violated Mr. Koehly's limited right to counsel in an implied consent refusal context by recording his telephone conversations. Bickler v. N. Dakota State Highway Com'r, 423 N.W.2d 146, 147 (N.D. 1988)("When an arrestee consults with counsel, he must be allowed to do so in a meaningful way. A consultation would be meaningless if relevant information could not be communicated without being overheard. There is a right to privacy inherent in the right to consult with counsel."); See generally Lies v. Dir., N. Dakota Dep't of Transp., 2008 ND 30, ¶ 10, 744 N.W.2d 783, 786-87 (""This Court has repeatedly held that defendants must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a chemical test." State v. Pace, 2006 ND 98, ¶ 6, 713 N.W.2d 535 (citing Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 12, 622 N.W.2d 180; Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994); Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 288 (N.D. 1987)). The failure to allow a DUI arrestee a reasonable opportunity to consult with a lawyer after the arrestee has made such a request prevents the revocation of his driver's license for refusal to take a chemical test. E.g., *787 Baillie, 522 N.W.2d at 750.").

[¶18] In State v. Berger, 2001 ND 44, ¶ 23, 623 N.W.2d 25, 31 the North Dakota Supreme Court stated that the driver in that case "was not denied a reasonable and meaningful opportunity for consultation with counsel, considering the officers gave him a telephone and telephone book, and afforded him privacy in a booking room for about ten

minutes. . . ." Unlike the Berger case Mr. Koehly was never provided privacy as his entire phone conversation was recorded. See Bickler at 148 ("We hold that when an arrested person asks to consult with counsel before electing to take a chemical test he must be given the opportunity to do so out of police hearing, and law enforcement must establish that such opportunity was provided.").

[¶19] **II. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because Mr. Koehly cured his refusal by agreeing to take the chemical test after he initially refused to take the test, was in continual police custody and a test sequence was conducted without his presence while he was locked in an interview room.**

[¶20] The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because Mr. Koehly cured his refusal by agreeing to take the chemical test after he initially refused to take the test, was in continual police custody and a test sequence was conducted without his presence while he was locked in an interview room. See State v. Nagel, 2014 ND 224, ¶ 11, 857 N.W.2d 374, 379 ("We have repeatedly recognized that a driver, who has previously refused a chemical test, can change his mind and cure the prior refusal, by consenting. See State v. Fetch, 2014 ND 195, ¶ 8, 855 N.W.2d 389; Maisey v. N.D. Dep't of Transp., 2009 ND 191, ¶ 24, 775 N.W.2d 200; Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶ 13, 747 N.W.2d 510; Lund v. Hjelle, 224 N.W.2d 552, 557 (N.D. 1974)."); See Houn v. N. Dakota Dep't of Transp., 2000 ND 131, ¶ 9, 613 N.W.2d 29, 32 ("An arrestee who refuses to submit to a chemical test may cure that refusal by consenting to a test within a reasonable time after the prior refusal if the subsequent test would still be accurate, testing equipment or facilities are still available, the subject has been in police custody and under observation for the whole time since arrest, and the subsequent test will result in no substantial inconvenience or expense to

law enforcement. Lund, 224 N.W.2d at 557."); Compare Havemeier v. N. Dakota Dep't of Transp., 2015 ND 178, ¶ 9, 865 N.W.2d 442, 444 ("In Keller v. North Dakota Dep't of Transp., 2015 ND 81, ¶¶ 8–11, 861 N.W.2d 768, we recently held that fair administration of an Intoxilyzer test is not established when a law enforcement officer prematurely terminates the testing sequence before the machine times out in violation of the approved method, and no expert testimony is provided on the effect, if any, of the deviation.").

[¶21] A review of the recording in the interview room at the approximate time stamp of 32:24 on Exhibit 17 demonstrates that Mr. Koehly changed his mind, cured his refusal and agreed to take the chemical test but law enforcement informed him he had refused and would not allow him to take the test. At approximately 45:50 on Exhibit 17 Mr. Koehly knocks on the door again to cure his previous refusal and is told by the law enforcement officer that the paper work is just about done. The facts show that the Hearing Officer erred by not finding that Mr. Koehly had cured his prior refusal.

[¶22] **III. The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal law (N.D.C.C. § 39-08-01 Subsection 1(e)) and implied consent law (N.D.C.C. § 39-20) violate the constitutional prohibition against unreasonable searches and seizures, are unconstitutional for denying substantive due process, are unconstitutional for penalizing the exercise of a constitutional right and the constitutional right to withhold consent to a warrantless search or withdraw consent once given and violate the doctrine of unconstitutional conditions.**

[¶23] The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal law (for both the screening test and the chemical test) 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. 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. Koehly 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 warrantless searches (screening test and chemical test) in order to find incriminating evidence, such a procedure used to

obtain consent should be found unconstitutional. See State v. Won, 136 Haw. 292, 318, 361 P.3d 1195, 1221 (2015), as corrected (Dec. 9, 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.").

[¶24] Mr. Koehly 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 Mr. Koehly'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), cert. granted, 136 S. Ct. 614, 193 L. Ed. 2d 494 (2015); Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403, reh'g denied (Mar. 24, 2015), cert. granted, 136 S. Ct. 614, 193 L. Ed. 2d 495 (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).

[¶25] Mr. Koehly argues that N.D.C.C. § 39-08-01, subsection 1(e), § 39-20-01, and § 39-20-14 are unconstitutional because they in part compel consent. Compare New Jersey v. Portash, 440 U.S. 450, 459, 99 S. Ct. 1292, 1297, 59 L. Ed. 2d 501 (1979) ("Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless

defendant, but it is no less compelled."). In addition to the United States Supreme Court decisions mentioned above finding it unconstitutional to criminalize a refusal to consent to a warrantless search, the State of Minnesota in State v. Trahan, 870 N.W.2d 396, 399 (Minn. Ct. App. 2015)("Because we conclude that conducting a warrantless blood test would have been unconstitutional, charging appellant with a crime based on his refusal to submit to the test implicates his fundamental right to be free from unconstitutional searches. And because the test-refusal statute as applied is not narrowly tailored to serve a compelling government interest, it fails strict scrutiny and violates appellant's right to due process under the United States and Minnesota Constitutions.") determined that it is unconstitutional to criminalize a warrantless refusal to submit to a blood draw. The State of Hawai'i in State v. Yong Shik Won, found consent based on criminal sanctions invalid. The State of Kansas in State v. Ryce, No. 111,698, 2016 WL 756686 (Kan. Feb. 26, 2016) (Holding that (1) despite implied consent laws, a breath, blood, or urine test remains a search under the Fourth Amendment; (2) under the Fourth Amendment, a consent implied through the implied consent law can be withdrawn; and (3) statute criminalizing a driver's refusal to submit to an unconstitutional search was not narrowly tailored to compelling State interests, and thus violated due process.) found its refusal statute unconstitutional.

[¶26] The attempt by law enforcement to execute a search against Mr. Koehly 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.

[¶27] 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).

[¶28] 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.

[¶29] 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. 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.

[¶30] North Dakota's test refusal laws penalizes the constitutional right to withhold consent to a warrantless search, rendering the laws unconstitutional. 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).

[¶31] 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 be punished for his or her refusal to do so. With the refusal to test statutes, 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 and revoking the driving privileges of those who refuse to submit to a properly requested screening and or chemical test. 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").

[¶32] **IV. The doctrine of unconstitutional conditions renders North Dakota's test refusal and implied consent laws unenforceable and unconstitutional and North Dakota's test refusal and implied consent laws conflict with Article I § 20 of the North Dakota Constitution which prevents the legislature from drafting a law to except the provisions of Article I § 8 and the right to refuse a warrantless search or to withdraw consent once given.**

[¶33] 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.

[¶34] 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 . . ..

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

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

[¶36] 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 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 Mr. Koehly's constitutional right to refuse a warrantless request by law enforcement to search him. 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.").

[¶37] 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. Law enforcement did not have a search warrant to search Mr. Koehly 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.").

[¶38] 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. 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).

[¶39] Mr. Koehly argues that if he has a constitutional right to refuse a warrantless request to take a chemical test then penalizing his exercise of that right to gain his consent makes his 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 suspicion-less 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 suspicionless 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 suspicion-less 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 penalize a refusal because law enforcement can always effectuate the search by getting a warrant and penalizing a refusal to consent only circumvents the warrant requirement.

[¶40] 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 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." Therefore 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.

[¶41] Mr. Koehly argues that he has a constitutional right to refuse to consent to a warrantless search and that he 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 Mr. Koehly 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.

[¶42] Mr. Koehly 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."

[¶43] 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).

[¶44] 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.").

[¶45] 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).

[¶46] 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.

[¶47] **CONCLUSION**

[¶48] 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. 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.

[¶49] The fact that the North Dakota law provides for the option to refuse a test is irrelevant, the relevant legal issue is that the North Dakota law can be construed to permit an illegal search in exchange for the privilege to drive under the threat of criminal charges. "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. "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 v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).

[¶50] 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."); and see Won at opinion page 13 (citations omitted)("Where a search may not be accomplished without consent, a request for consent that subjects the person to imprisonment for refusal is calculated to overbear a defendant's will in order to impel submission.").

[¶51] Accordingly based on the foregoing arguments and law Mr. Koehly respectfully requests the hearing officer's decision to revoke his driving privileges be reversed.

Dated: May 31, 2016

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jesse Scott Koehly,

Appellant/Petitioner,

v.

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

Appellee/Respondent.

Supreme Court Case No. 20160141
District Court Case No. 45-2015-CV-00832

CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF AND APPENDIX

[¶1] On May 31, 2016 a true and correct copy of the following was electronically served:

APPELLANT'S BRIEF and APPENDIX

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