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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matthew John Marman,

Appellant/Petitioner,

v.

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

Appellee/Respondent.

Supreme Court Case No. 20160217
District Court Case No. 04-2016-CV-00003

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE BILLINGS COUNTY DISTRICT COURT, THE HONORABLE RHONDA R. EHLIS, 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 failed to advise Mr. Marman that he may remedy his refusal of the screening test.

II. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement did not have reasonable suspicion that Mr. Marman was under the influence.

III. The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal law (N.D.C.C. § 39-20-14) 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.

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Matthew John Marman, appeals to the Supreme Court of North Dakota from the Judgment of the Bilings County District Court filed March 31, 2016, and from each and every part thereof, including the Memorandum Opinion and Order filed by the Honorable Rhonda R. Ehlis, District Judge, filed March 31, 2016, and the decisions of the North Dakota Department of Transportation issued by Hearing Officer Sarah Huber dated October 14, 2015 suspending/revoking his North Dakota driving privileges for 180 days and the letter from Hearing Officer Sarah Huber dated December 9, 2015 granting Mr. Marman's petition for reconsideration but denying his requested relief.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On September 17, 2015 law enforcement made contact with Mr. Marman. Transcript page 4, line 11 to 13 (T. 4:11-13); T. 25:5-15. The law enforcement officer who testified at the hearing (Trooper Nuenthel) was called to the scene of a one vehicle accident. T. 5:8-6:4.

[¶10] After investigating the accident Trooper Nuenthel took custody of Mr. Marman from another law enforcement officer. T. 7:20-24. At the hearing Trooper Nuenthel was permitted to offer hearsay testimony over the objection of Mr. Marman's counsel. T. 6:11-7:18. The objected to testimony included that Mr. Marman had refused an onsite screening test. Id. Trooper Nuenthel did not observe Mr. Marman to have refused an onsite screening test. T. 16:7-20. The Hearing Officer found that Mr. Marman refused the onsite screening test.

[¶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] **I. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement failed to advise Mr. Marman that he may remedy his refusal of the screening test.**

[¶16] Law enforcement did not inform Mr. Marman that he could remedy his refusal of the screening test. N.D.C.C. § 39-08-01, subsection 2(b) requires law enforcement to inform a person who refuses a screening test that they can cure that refusal by taking the chemical test. N.D.C.C. § 39-20-14, subsection 4 provides that a person's license will not be revoked for refusal to take a screening test if they submit a sufficient sample for a chemical test. Absent the notice provision in N.D.C.C. § 39-08-01, subsection 2(b) a person would never know they could cure a refusal of a screening test to prevent the revocation of their driving privileges and by failing to advise Mr. Marman of his opportunity to cure law enforcement denied Mr. Marman due process which ultimately resulted in the revocation of his driving privileges.

[¶17] **II. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement did not have reasonable suspicion that Mr. Marman was under the influence.**

[¶18] The information presented at the hearing was insufficient to find reasonable suspicion for law enforcement to invoke N.D.C.C. § 39-20-14 and require Mr. Marman to submit to a screening test. The only evidence offered at the hearing was from Trooper Nuenthel who was not present to make any observations prior to Mr. Marman allegedly refusing the screening test. The conclusory hearsay statements admitted over the objection of Mr. Marman that Mr. Marman was arrested for refusing a screening test and that Mr. Marman refused a screening test are insufficient for the Department to prove that Mr. Marman actually did refuse the screening test.

[¶19] Additionally, it was an evidentiary error to admit into evidence the hearsay evidence offered over the objection of Mr. Marman to establish a reasonable suspicion to invoke N.D.C.C. § 39-20-14 and require that Mr. Marman submit to a breath screening test. Absent the hearsay evidence that should have been excluded the Department has no evidence to support a finding that there was a reasonable suspicion for law enforcement to require Mr. Marman to submit to a prearrest screening test pursuant to N.D.C.C. § 39-20-14. See State v. Baxter, 2015 ND 107, ¶ 1, 863 N.W.2d 208, 210, reh'g denied (May 27, 2015), cert. granted, judgment vacated, No. 15-243, 2016 WL 3496660 (U.S. June 28, 2016)(requiring reasonable suspicion to request a breath screening test).[1]

[¶20] Mr. Marman also argues that if the Department claims the screening test as a search incident to arrest then in light of Birchfield v. N. Dakota, 136 S. Ct. 2160 (2016) and the remand of Baxter the standard for a search incident to arrest is

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[1] Counsel for Appellant Mr. Marman is also appellant counsel for the Appellant in Baxter.

probable cause and not a reasonable suspicion.

[¶21] **III. The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal law (N.D.C.C. § 39-20-14) 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.**

[¶22] The United States Constitution's Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV, the North Dakota Constitution contains a parallel provision. N.D. Const. art. I, § 8. As a matter of black letter law it is unconstitutional to punish an individual for simply refusing to consent to a warrantless search.

[¶23] In light of Birchfield (finding an exception to the fourth amendment warrant requirement for breath tests as a search incident to arrest) Mr. Marman argues that the search incident to arrest exception to the warrant requirement does not apply in a refusal scenario to a pre arrest request to take a screening breath test because the subject of the proposed search is not under arrest and in a refusal scenario no search is conducted. Note that cases analyzing a search incident to arrest prior to arrest require an immediate arrest subsequent to the search and probable cause to arrest independent of the search. See Rawlings v. Kentucky, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564, 65 L. Ed. 2d 633 (1980)("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."). Mr. Marman argues that he has a right to refuse a warrantless request to be searched prior to being formally arrested.

[¶24] 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. 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.").

[¶25] The attempt by law enforcement to execute a search against Mr. Marman 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 at least prearrest 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.

[¶26] North Dakota's test refusal law penalizes the constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional. North Dakota's implied consent law provides in part that drivers consent to have their breath chemically tested for the presence of alcohol and that a police officer may require a driver to submit to chemical testing if the officer has reason to believe that the individual committed a moving traffic violation and in conjunction with the violation the officer has formulated an opinion that the individual's body contains alcohol. A person who refuses to submit to a properly requested test is subject to both civil license revocation and criminal prosecution. The legislature, therefore, has made it a crime to exercise one's constitutional right to withhold consent to a search - violating the constitutional prohibition against unreasonable searches and seizures relating to a prearrest screening test.

[¶27] Typically, "consent to search" is a well-established - and important - exception to

the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218. And this is the exception involved in the test refusal statute. The issue of whether the consent exception validates a warrantless search must be evaluated in light of the particular and total circumstances of each individual case unless law enforcement has made a claim of lawful authority to search. See Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Florida v. Royer, 460 U.S. 491 (1983). The State may be entitled to collect evidence, either pursuant to a warrant or an exception to the warrant requirement. But that does not mean a citizen can be compelled to "voluntarily" participate in the accuser's investigation, or punished for his or her refusal to do so. With the refusal to test statute, the North Dakota Legislature has penalized an individual's assertion of the right to be secure against unreasonable searches and seizures by making it a crime to refuse to submit to a properly requested breath screening test. In other words, the statute has eliminated what has been recognized as the constitutionally protected right to say "no." See State v. Odom, 2006 ND 209, ¶15, 722 N.W.2d 370 ("At no time before or during Olson's search did Odom withdraw or limit his consent to search the hotel room. Odom could have prevented Olson from searching the safe by indicating to Olson consent did not extend to the safe."); see also United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (stating that "[o]nce given, consent to search may be withdrawn").

[¶28] The doctrine of unconstitutional conditions renders North Dakota's test refusal law unenforceable and unconstitutional. 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.

[¶29] For example, the Minnesota Supreme Court has previously struck down a provision of the impaired driving code in Minnesota that relied on the argument that a driver must waive the constitutional right to be secure against unreasonable searches and seizures as a condition of licensor. State v. Henning, 666 N.W.2d 379 (Minn. 2003). In Henning, the Minnesota Supreme Court analyzed Minnesota's "whiskey plate" law, Minn. Stat. § 168.0422, which provides that a vehicle displaying special series license plates issued to repeat DWI offenders and their families may be stopped by police officers without suspicion of particular wrongdoing. Id. at 383.

[¶30] The State of Minnesota argued in Henning that the legislature has the authority to make it a condition of issuing these license plates that every driver in a repeat offender's family waive the right to be free from suspicion less stops. Id. at 383-84. The Minnesota Supreme Court rejected the argument that such an implied waiver was

a constitutionally permissible means of protecting the public. Id. at 384-85. In doing so, the Minnesota Supreme Court noted that "the police should not be allowed to define the reasonableness of their own conduct. * * * Neither is the legislature empowered to redefine the constitutional parameters of police conduct." Id. at 385 (citation omitted).

[¶31] 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).

[¶32] Essentially, North Dakota's test refusal law denies Mr. Marman substantive due process because it penalizes the exercise of a constitutional right, specifically the right to refuse a prearrest warrantless request to search. Mr. Marman 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. See Birchfield v. N. Dakota, 136 S. Ct. 2160, 2186 (2016) ("[M]otorists cannot be deemed to have consented to submit to a blood test on pain of committing a

criminal offense.”).

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

[¶34] Mr. Marman argues that the North Dakota refusal and implied consent laws are unconstitutional as applied to him because the facts of the case demonstrate that law enforcement did not have a search warrant to search him at the time they asked to search him nor did law enforcement ever apply for a search warrant. The North Dakota law penalizing a refusal to consent to a prearrest 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 v. Missouri, 133, S.Ct. 1552, 1561 (2013) ("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.").

[¶35] In Schneckloth, the United States Supreme Court warned us about the consequences of attempting to bypass constitutional commands by creating or relying on a legal fiction when it wrote that

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746:
>
>> 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

Schneckloth v. Bustamonte, 412 U.S. at 228 – 29. North Dakota's Constitution forbids the North Dakota legislature or a North Dakota agency to draft a law or rule to

circumvent the warrant requirement found in Article I Section 8. Article I, Section 20 explicitly states that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." As such Article I Section 8 cannot be excepted by the Department and the search warrant requirement cannot be excepted by North Dakota's implied consent law.

[¶36] Mr. Marman had a constitutional right to refuse to consent to a prearrest warrantless request to take a breath test. 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." And recently in Patel the Court determined that a law "that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for precompliance review." Id. at 2447.

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

[¶38] 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.").

[¶39] 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).

[¶40] 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.

[¶41] **CONCLUSION**

[¶42] "A slow and steady erosion of the ability of victims of unconstitutional searches and seizures to obtain a remedy for the invasion of their rights saps the constitutional guarantee of its life just as surely as would a substantive limitation." Rawlings v. Kentucky, 448 U.S. 98, 121, 100 S. Ct. 2556, 2569, 65 L. Ed. 2d 633 (1980)(Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.).

[¶43] Although the United States Supreme Court with the advent of Birchfield now adds a breath test to the list of exceptions to the warrant requirement as a search incident to arrest the circumstances of submitting to a breath test are still relevant. A valid breath test requires the subject to provide law enforcement a specific breath sample by blowing at a certain pressure for a certain amount of time and North Dakota law compels the subject to do so on a post arrest and in this case a prearrest basis.

[¶44] North Dakota law compels the subject prior to arrest to provide a breath sample according to parameters determined by law enforcement. In Boyd v. United States, 116 U.S. 616 (1886) the United States Supreme Court struck down a law that compelled the subject of an investigation to produce evidence to be used against the subject. The Boyd Court stated that "[w]e think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings." Id. at

638.

[¶45] The manner used by law enforcement to collect a prearrest breath sample from suspects in North Dakota offends due process by compelling the subject of the test to offer evidence against himself or herself. Id. at 633-34 ("We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."). Accordingly based on the foregoing arguments and law Mr. Marman respectfully requests the hearing officer's decision to revoke his driving privileges be reversed.

Dated: July 18, 2016

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matthew John Marman, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20160217 District Court Case No. 04-2016-CV-00003 **CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF AND APPENDIX**

[¶1] On July 18, 2016 a true and correct copy of the following was electronically served:

APPELLANT'S BRIEF and APPENDIX

on the following:

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Dated: July 18, 2016

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