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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alan Lee Jessop, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20160387 District Court Case No. 13-2016-CV-00041 **APPELLANT'S PETITON FOR REHEARING** **APPEAL FROM THE JUDGMENT OF THE DUNN COUNTY DISTRICT COURT, THE HONORABLE WILLIAM A. HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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[¶3] **LAW AND ARGUMENT**

[¶4] **The North Dakota Supreme Court should reconsider this matter and reverse Beylund v. Levi, 2017 ND 30, 889 N.W.2d 907 because North Dakota's implied consent law requires the warrantless submission to a blood search in return for the privilege to drive in violation of the Fourteenth and Fourth Amendment 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 that revokes the privilege to drive based on a driver's refusal to submit

to a blood 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] North Dakota's implied consent law requires that drivers be informed that it is a crime to refuse to submit to a blood test. N.D.C.C. § 39-20-01. The United States Supreme Court however has ruled that it is not a crime to refuse to submit to a blood test. Birchfield v. N. Dakota, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). The North Dakota Supreme Court

should reconsider the Jessop decision and reverse Beylund v. Levi, 2017 ND 30, 889 N.W.2d 907 because 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).

[¶9] 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 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").

[¶10] The Jessop opinion relies on the Beylund opinion that denies drivers the opportunity afforded by North Dakota law (N.D.C.C. § 28-32-24(3)) to challenge unconstitutional actions by the State. Beylund explains and cites Holte v. N.D. State Highway Comm'r., 436 N.W.2d 250 (N.D. 1989) for the proposition that N.D.C.C. § 39-20-07(5) requires admission of blood test results irrespective of how the sample was obtained despite that subsection specifically requiring that "results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained." To be clear, to fulfill its due process burden the Department must prove that the blood sample was properly obtained. The Department failed to make this proof because the blood samples in Beylund and Wojahn were not properly obtained because the Department used an unconstitutional law to coerce consent to illegally obtain the blood from Mr. Beylund and Mr. Wojahn. N.D.C.C. § 28-32-24(3) is the mechanism to exclude the evidence if the burden stated in N.D.C.C. § 39-20-07(5) is not met.

[¶11] Subsequent to the decision in Holte the legislature passed N.D.C.C. § 28-32-24(3) providing for evidence to be excluded on constitutional grounds in an adjudicative agency proceeding. N.D.C.C. § 28-32-24(3) provides the procedure for due process compliance with N.D.C.C. § 39-20-07(5). N.D.C.C. § 1-02-07 states

> Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative

intent that such general provision shall prevail.

In interpreting the two statutes Beylund failed to follow the requirements of N.D.C.C. § 1-02-07 because the two statutes can be reconciled not to conflict and are otherwise reconcilable and further N.D.C.C. § 28-32-24(3) was enacted after N.D.C.C. § 39-20-07(5). The Beylund court should not have found the two statues to be irreconcilable so as to give effect to the specific over the general when in fact the two statues can be read to be reconcilable. The Beylund decision disharmonizes the two statutory provisions. Previously, the North Dakota Supreme Court has reiterated that statutes should be harmonized to give meaning to related provisions and avoid conflicts between statutes. See State, ex rel. Roseland v. Herauf, 2012 ND 151, ¶ 7, 819 N.W.2d 546, 549 ("Statutes should be harmonized to give meaning to related provisions and to avoid conflicts between statutes. Great Western Bank v. Willmar Poultry Co., 2010 ND 50, ¶ 7, 780 N.W.2d 437; N.D.C.C. § 1–02–07.").

[¶12] The Beylund decision focused on the inapplicability of the exclusionary rule to civil proceedings and mentioned that a majority of courts have considered similar provisions and concluded the exclusionary rule does not apply to civil administrative license suspension proceedings. There is a split of authority between the States cited in Beylund and the States of Minnesota (Olson v. Comm'r of Pub. Safety, 371 N.W.2d 552, 556 (Minn.1985)), Oregon (Pooler v. Motor Vehicles Div., 306 Or. 47, 755 P.2d 701 (1988)), and Vermont (Vermont v. Lussier, 171 Vt. 19, 757 A.2d 1017 (2000); State v. Nickerson, 170 Vt. 654, 756 A.2d 1240 (2000)).

[¶13] A civil administrative license suspension proceeding works to deprive a person of an important property interest and therefore the proceeding is more like a forfeiture

proceeding where the exclusionary rule does apply. See One 1995 Corvette VIN No. 1G1YY22P585103433 v. Mayor & City Council of Baltimore, 353 Md. 114, 128, 724 A.2d 680, 687 (1999)("Although the purpose of the exclusionary rule may be to curb improper police conduct, the purpose of the Fourth Amendment is to insure "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." It protects everybody, not just those of the criminal milieu, and, thus, is not limited to criminal proceedings.").

[¶14] **CONCLUSION**

[¶15] As previously argued the North Dakota Supreme Court should reconsider its decision in Jessop and reverse Beylund because N.D.C.C. § 28-32-24(3) and N.D.C.C. § 39-20-07(5) are not irreconcilable and absent the application of N.D.C.C. § 28-32-24(3) North Dakota drivers have no procedure available to challenge an unconstitutional act by the State in a civil administrative license suspension proceeding which itself amounts to a denial of due process.

[¶16] Further it is a violation of due process to use an unconstitutional law to deprive a person of an important property interest and the North Dakota Supreme Court should reconsider applying the exclusionary rule to civil administrative license suspension proceedings for the same reasons the exclusionary rule applies to forfeiture proceedings.

[¶17] Based on the forgoing arguments and law Mr. Jessop respectfully request that this petition for rehearing be granted.

Dated: May 30, 2017

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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

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