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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Richard Lee Woodbury,

Appellant/Petitioner,

v.

Thomas Sorel, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20190112
District Court Case No. 45-2018-CV-01099

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE JAMES D. GION, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

ORAL ARGUMENT REQUESTED

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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. Did the Administrative Hearing Officer err by finding that "Mr. Woodbury refused to submit to the test by action?"

II. Did the Administrative Hearing Officer err as a matter of fact because Mr. Woodbury did not refuse to submit to a chemical test?

III. Did the Administrative Hearing Officer err because Mr. Woodbury asked to take the test again, which cured any perceived refusal, after being informed that the machine recorded a deficient sample and that it was being considered a refusal?

IV. Did the Administrative Hearing Officer err in the Findings of Fact and Conclusions of Law because law enforcement failed to inform Mr. Woodbury as required pursuant to N.D.C.C. § 39-20-01(3)(a)?

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Richard Lee Woodbury, appeals to the Supreme Court of North Dakota from the decision of the North Dakota Department of Transportation issued by Hearing Officer Sarah Huber dated August 20, 2018 and mailed August 21, 2018 revoking his North Dakota driving privileges for 180 days and from the Judgment and Order for Judgment of the Stark County District Court filed February 4, 2019, and from each and every part thereof, including the Memorandum Opinion filed by the Honorable James D. Gion, District Judge, filed February 1, 2019, affirming the decision of the North Dakota Department of Transportation.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On July 20, 2108 law enforcement made contact with Mr. Woodbury. Transcript page 5, lines 11-18 (T. 5:11-18). The law enforcement officer who testified at the hearing (Officer Wise) stopped Mr. Woodbury based on a tip that Mr. Woodbury had struck a pole at a gas station, and observation by Officer Wise of rear end damage to Mr. Woodbury's vehicle. T. 5:22-6:22.

[¶10] Upon speaking with Mr. Woodbury Officer Wise noticed that he could smell the odor of an alcoholic beverage coming from the vehicle and Mr. Woodbury's eyes were red, bloodshot, and watery. T. 7:20-22. Upon questioning by Officer Wise Mr. Woodbury admitted to consuming alcohol and agreed to perform field sobriety tests at the request of Officer Wise. T. 8:21-11:15.

[¶11] After conducting field sobriety tests on Mr. Woodbury Officer Wise read the North Dakota Implied Consent Advisory for a screening test and asked Mr. Woodbury to submit to a screening test, which Mr. Woodbury agreed to perform, with a result over .08. T. 11:25-12:21.

[¶12] Officer Wise informed Mr. Woodbury he was under arrest for driving under the influence, read a Miranda advisory, and then read the North Dakota Implied Consent Advisory requesting a chemical breath test and omitting reference to a urine test. T. 12:23-13:3; Exhibit 17 (Audio/Visual Recording) beginning at 23:59:37.

[¶13] Mr. Woodbury agreed to take the chemical breath test administered by Officer Wise using the Intoxilyzer 8000. T. 13:1-8. Officer Wise administered the test on Mr. Woodbury and testified that the Intoxilyzer 8000 reported deficient samples for the test performed by Mr. Woodbury. T. 13:6-14:1. Officer Wise testified that based on his training and experience a deficient sample indicates refusal of the test. T. 14:3-4. Officer

Wise testified that Mr. Woodbury refused the breath test by not being able to complete it. T. 26:7-8. Officer Wise testified that Mr. Woodbury appeared to be pursing his lips and obstructing the airflow with his lips. T. 26:25-27:5.

[¶14] Exhibit 17, the audio/visual recording, shows that Officer Wise did not believe that Mr. Woodbury was intentionally refusing to complete the chemical test; Officer Wise told Mr. Woodbury multiple times that he did not believe Mr. Woodbury was refusing to perform the test on purpose. Exhibit 17, 00:22:46; 00:23:45; 00:24:16; and 00:35:09. After being informed by Officer Wise that he is being considered a refusal and that he can be considered a refusal even if he did not refuse on purpose Mr. Woodbury asked Officer Wise to try the test again and Officer Wise declined to allow Mr. Woodbury to do so explaining to Mr. Woodbury that refusal is the same penalty as a DUI. Exhibit 17, beginning at 00:34:15.

[¶15] **LAW AND ARGUMENT**

[¶16] **Standard of Review**

[¶17] "[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.

[¶18] 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.

[¶19] N.D.C.C. § 28-32-24(3) states that

> [u]pon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency, or any person conducting a proceeding for it, may exclude objectionable evidence.

See Richter v. North Dakota Department of Transportation, 2008 ND 105, ¶9 (N.D. 2008), 750 N.W.2d 430.

[¶20] "An agency's decisions on questions of law are fully reviewable." Kiecker v. North Dakota Dep't of Transp., 2005 ND 23, ¶ 8, 691 N.W.2d 266 (citations omitted). "Whether a finding of fact meets a legal standard is a question of law," which is fully reviewable on appeal. State v. Mitzel, 2004 ND 157, ¶ 10, 685 N.W.2d 120. "The existence of consent is a question of fact to be determined from the totality of the circumstances." Id. at ¶ 13. Whether consent is voluntary is generally decided from the totality of the circumstances. McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 14. The "standard of review for a claimed violation of a constitutional right is de novo." Id. at ¶

8.

[¶21] **I. The Administrative Hearing Officer erred by finding that "Mr. Woodbury refused to submit to the test by action."**

[¶22] In addition to his objections to the admission into evidence of the Report and Notice (Exhibit 1) Mr. Woodbury argued in closing at the administrative hearing that N.D.C.C. § 39-20, regarding the revocation of driving privileges for refusal, violates the doctrine of unconstitutional conditions, because even though a breath test is considered a search incident to arrest, in this case Mr. Woodbury did not refuse the search but performed the same. Therefore the question of law presented in this appeal is does Mr. Woodbury have a constitutional right to refuse the administration of a chemical breath test by his actions?

[¶23] The device Mr. Woodbury tested on (Intoxilyzer 8000) was unable to obtain a sufficient sample from Mr. Woodbury but was still able to test Mr. Woodbury's breath. See Exhibit 1, page 3 of 8. Because the machine (Intoxilyzer 8000) now dictates the parameters of the search, not the law enforcement officer, the scenario involving Mr. Woodbury is no longer a search incident to arrest and has become a search subject to constitutional protections. Therefore forcing compliance with the approved method and the machine's internal diagnostics by the threat of revocation of driving privileges is an unconstitutional condition because in this case the search is no longer being performed by law enforcement and is conducted away from the location and time of the arrest. But see Jessop v. Levi, 2017 ND 115, ¶ 1, 894 N.W.2d 906, 907, reh'g denied (June 7, 2017) ("Beylund v. Levi, 2017 ND 30, ¶ 27, 889 N.W.2d 907 (rejecting application of doctrine of unconstitutional conditions to violation of implied-consent laws in administrative license suspension proceedings").

[¶24] In Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) the United States Supreme Court determined that a breath test is a search incident to arrest making any consent argument irrelevant if in fact a valid search incident to arrest was conducted by law enforcement. In North Dakota for a search incident to arrest to be valid under Article I §8 that search must be conducted substantially contemporaneous to the arrest. See State v. Smith, 2005 ND 21, ¶ 29, 691 N.W.2d 203, 212 ("A search incident to arrest exception applies if: (1) the arresting officer had probable cause to arrest the defendant before searching him; and (2) the arrest was substantially contemporaneous to the search. State v. Overby, 1999 ND 47, ¶ 9, 590 N.W.2d 703."); Compare State v. Kunkel, 455 N.W.2d 208, 210 (N.D. 1990)("Although a search of a vehicle, incident to a valid arrest, may be conducted without a warrant, there are limits on the authority of police to conduct such a search. The search must, in fact, be incident to the arrest, judged by the standard of contemporaneousness. The exception to the warrant requirement does not apply if the search is removed in time or place from the arrest.")(citations omitted).

[¶25] Because the search of Mr. Woodbury's breath was conducted by a machine, a substantial amount of time after his arrest, at a location far removed from his arrest, and there was no reason law enforcement could not have applied for a search warrant, the search incident to arrest exception to the warrant requirement does not apply and Mr. Woodbury had a North Dakota Constitutional right to refuse to submit to a warrantless request to be searched. 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").

[¶26] Although the United States Supreme Court with the advent of Birchfield now considers a breath test 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. North Dakota law therefore compels the subject to provide the breath sample according to parameters determined not by law enforcement but by a machine.

[¶27] 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. As in Boyd Mr. Woodbury was compelled by North Dakota law to offer evidence against himself specifically by being compelled to provide law enforcement a sample of his breath. The manner used by law enforcement to collect a breath sample from Mr. Woodbury 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.").

[¶28] 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] The government may pass laws to eliminate drunk driving, but in doing so it may not pass laws to eliminate 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). North Dakota's test refusal law denies Mr. Woodbury substantive due process because it penalizes the exercise of a constitutional right, specifically the right to refuse a warrantless request to search. Mr. Woodbury 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.").

[¶30] 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. Woodbury'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.").

[¶31] 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. Woodbury 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 v. Municipal Ct. 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 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.").

[¶32] 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 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).

[¶33] 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.

[¶34] Mr. Woodbury argues that he has a constitutional right to refuse to consent to a warrantless search and that he therefore has a constitutional right (barring an exception to the warrant requirement) to refuse to consent to a warrantless request to take a breath test. As explained above Mr. Woodbury 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.

[¶35] Mr. Woodbury had a constitutional right to refuse to consent to a 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 v. City of Seattle, 387 U.S. 541 (1967) the Court recognized a person's constitutional right to resist a warrantless fire inspection, observing that the "appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse."

[¶36] 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).

[¶37] 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."); See State ex rel. Cleveringa v. Klein, 63 N.D. 514, 249 N.W. 118, 123-24 (1933)("To make more certain that these inalienable rights are secured to everyone, under all circumstances and under all crises, the people of this state said in section 21, "The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise," and in section 24, "To 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." It is clear from this recital that there are some things which the people of this state have specifically forbidden the Legislature of this state to do. No matter what the emergency may be, the people, in their wisdom, have deliberately limited the power of its agents known as the Legislature. Whether this be wise or unwise, whether it may now be said that the people at the time of the adoption of the Constitution could not foresee the emergency which exists, are matters of judgment for the people themselves to determine in any movement to alter or change these provisions. Until so changed, they are constitutional limitations on the power of the Legislature, the members of which took an oath to support this Constitution, with all of its provisions, as well as to support the Constitution of the United States.").

[¶38] 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)(reversed on other grounds)("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).

[¶39] 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.

[¶40] 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).

[¶41] 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 State v. Yong Shik Won, 137 Haw. 330, 372 P.3d 1065 (2015), as corrected (Dec. 9, 2015)(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.").

[¶42] In Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) the United States Supreme Court articulated what has become known as the "special needs balancing test" that was originally born out of the Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619 (1989) and New Jersey v. T.L.O., 469 U.S. 325 (1985) line of cases. Those cases however articulate that such an analysis is only appropriate for cases "outside the normal needs of law enforcement." In other words, if law enforcement is presently engaged in the "competitive enterprise of ferreting out crime," the rule is to get a warrant or prove an exception. If the search is being performed for some other reason, the court can balance the intrusion against the State's compelling interest. See Maryland v. King, 133 S. Ct. 1 (2012). Accordingly, the first step in any Fourth Amendment analysis is not to look at the "nature of the intrusion," but rather the "purpose of the intrusion." And if that purpose is to ferret out crime, no balancing test is used, the State needs to get a warrant or prove an exception.

[¶43] Regarding law enforcement's contact with Mr. Woodbury the purpose of the intrusion was to ferret out crime. Therefore, this is not a "special needs" case, but rather a case involving the competitive enterprise of ferreting out crime, no balancing is permitted. The United States Supreme Court in Ferguson v. City of Charleston, 532 U.S. 67 (2001) explains that the court cannot "balance needs" for law enforcement engaged in a primary criminal investigation. The question presented in Ferguson was "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." Ferguson, 532 U.S. 67, 70. To reach a determination of this question the Ferguson court explained why a special needs balancing test was not appropriate

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

Id. at 84 (footnotes omitted).

[¶44] Because the circumstances of Mr. Woodbury's case involve law enforcement engaged in the competitive enterprise of ferreting out crime an analysis of the constitutionality of North Dakota's implied consent and refusal law regarding the fourth amendment and article one section eight should not entail use of the "special needs" balancing test and instead law enforcement must obtain a warrant or prove an exception.

[¶45] **II. The Administrative Hearing Officer erred as a matter of fact because**

Mr. Woodbury did not refuse to submit to a chemical test.

[¶46] Reviewing the audio visual recording of the encounter reveals that at all times Mr. Woodbury cooperated and consented to taking the chemical breath test. Throughout the test sequence law enforcement indicates to Mr. Woodbury that the law enforcement officer does not believe that Mr. Woodbury was intentionally causing the machine not to register his breath sample. At approximately 34:10 law enforcement explains to Mr. Woodbury that he did not have to do it on purpose but because the machine read a deficient sample it is a refusal. Mr. Woodbury then asked if he could try the test again and law enforcement reaffirmed that he did not think that Mr. Woodbury caused the machine to register a deficient sample on purpose and law enforcement did not offer Mr. Woodbury another chemical test.

[¶47] A refusal must be intentional because a driver must affirmatively withdraw the driver's implied consent for that withdrawal to be effective. See Grosgebauer v. NDDOT, 2008 ND 75, 747 N.W.2d 510.

> Whether a driver refused to take a requested test is a question of fact. See, e.g., Pokrzywinski v. Director, North Dakota Dep't of Transp., 2014 ND 131, ¶ 15, 847 N.W.2d 776. If a law enforcement officer complies with statutory requirements, a person's consent to chemical testing is implied and the person can only withdraw consent by affirmatively refusing to submit to testing. See, e.g., State v. Johnson, 2009 ND 167, ¶ 7, 772 N.W.2d 591.

Havemeier v. N. Dakota Dep't of Transp., 2015 ND 178, ¶ 8, 865 N.W.2d 442, 444. Because Mr. Woodbury did not intentionally cause the machine to register a deficient sample Mr. Woodbury's actions cannot be considered a refusal as a matter of fact. Further, the testimony at the hearing does not establish an affirmative refusal by Mr. Woodbury to chemical testing because Mr. Woodbury asked to take the test again after

he was informed of the deficient sample results but was denied the same because law enforcement did not think that Mr. Woodbury caused the machine to register a deficient sample on purpose. Compare this scenario with Geiger v. Hjelle, 396 N.W.2d 302, 302–03 (N.D.1986), where it was held that a properly administered Intoxilyzer test recording "deficient sample[s]," coupled with the arresting officer's testimony that the driver "did not adequately submit to the test" and the driver's response to a request for a second test that he "had enough of this runaround," was sufficient to warrant a finding of refusal. Mr. Woodbury on the other hand offered to take a second test and unlike in Geiger law enforcement did not believe that Mr. Woodbury was intentionally submitting a deficient sample.

[¶48] **III. The Administrative Hearing Officer erred because Mr. Woodbury asked to take the test again, which cured any perceived refusal, after being informed that the machine recorded a deficient sample and that it was being considered a refusal.**

[¶49] Mr. Woodbury argues that he asked to take the test again, which effectively cured any perceived refusal, after being informed that the machine recorded a deficient sample and that it was being considered a refusal. Because Mr. Woodbury cured any alleged refusal he can avoid a driver's license revocation. See Maisey v. NDDOT, 2009 ND 191, 775 N.W.2d 200 . Or to put it another way Mr. Woodbury cured any alleged refusal by immediately agreeing to take the chemical test again after he was informed he had submitted deficient samples. 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."). Again, because Mr. Woodbury cured any alleged refusal he can avoid a driver's license revocation. See Maisey v. NDDOT, 775 N.W.2d 200 (2009).

[¶50] **IV. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement failed to inform Mr. Woodbury as required pursuant to N.D.C.C. § 39-20-01(3)(a).**

[¶51] The relevant portions of N.D.C.C. § 39-20-04 provide that

> [i]f a person refuses to submit to testing under section 39-20-01 or 39-20-14, none may be given . . .. The director, upon the receipt of . . . a certified written report of the law enforcement officer in the form required by the director, forwarded by the officer within five days after issuing the temporary operator's permit, showing that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01 or equivalent ordinance . . . that the person was lawfully arrested if applicable, and that the person had refused to submit to the test or tests under section 39-20-01 or 39-20-14, shall revoke that person's license or permit to drive and any nonresident operating privilege for the appropriate period under this section . . ..

[¶52] The Department lacks jurisdiction to revoke Mr. Woodbury's driving privileges because law enforcement failed to meet the requirements of N.D.C.C. § 39-20-04 by failing to inform Mr. Woodbury as required pursuant to N.D.C.C. § 39-20-01(3)(a) which specifically requires that

> [t]he law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test directed by the law enforcement officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence.

In this case law enforcement specifically only informed Mr. Woodbury regarding a chemical breath test and omitted that refusal to take a urine test is a crime. Exhibit 17, at approximately 23:59:40.

[¶53] Because law enforcement failed to advise Mr. Woodbury with the complete advisory required pursuant to N.D.C.C. § 39-20-01(3)(a) the Department lacks jurisdiction to revoke Mr. Woodbury's driving privileges because N.D.C.C. § 39-20-04 requires revocation only when a person refuses to submit to testing under N.D.C.C. § 39-20-01.

[¶54] Two cases have recently addressed the failure of law enforcement to read a complete advisory as follows:

> "Words of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears." State v. O'Connor, 2016 ND 72, ¶ 8, 877 N.W.2d 312 (internal citations omitted). Section 39-20-01(3), N.D.C.C., requires "a specific warning be provided to an arrested defendant before the results of a chemical test can be admitted in a[n] ... administrative proceeding." O'Connor, at ¶ 13. Neither the plain language of N.D.C.C. § 39-20-01(3) nor its legislative history indicate an intent by the legislature to restrict an officer's speech to only the specific words written in the statute. Instead, the statute provides only the mandatory language that must be included in the advisory. See N.D.C.C. § 39-20-01(3)(b); State v. Bohe, 2018 ND 216, ¶ 16, 917 N.W.2d 497.

Korb v. N. Dakota Dep't of Transportation, 2018 ND 226, ¶ 10, 918 N.W.2d 49, 53

> As [the North Dakota Supreme Court] explained in State v. O'Connor, 2016 ND 72, 877 N.W.2d 312, this provision[,N.D.C.C. § 39-20-01(3)(b),] sets out clear and specific instructions for exactly what information must be communicated to a driver who is arrested for driving under the influence. Subdivision (b) strictly requires communicating all the information required by subdivision (a) before a test result is admissible. O'Connor, at ¶¶ 8, 11 (applying same version of § 39-20-01(3) at issue here). Considering only the statute as explained by O'Connor, the advisory was incomplete and thus inadmissible under subdivision (b).

Schoon v. N. Dakota Dep't of Transportation, 2018 ND 210, ¶ 12, 917 N.W.2d 199, 203.

[¶55] As quoted above Korb requires that a specific warning be given before the chemical test result can be admitted in an administrative proceeding. That specific warning is the language of N.D.C.C. § 39-20-01(3)(a). By way of comparison the warning read to Mr. Woodbury omitted reference to urine and therefore because N.D.C.C. § 39-20-04 requires law enforcement to request a test pursuant N.D.C.C. § 39-20-01 before the Department can revoke driving privileges and law enforcement failed to give a substantially complete advisory by omitting reference to urine it was error for the Hearing Officer to revoke Mr. Woodbury's driving privileges.

[¶56] As quoted by Schoon above N.D.C.C. § 39-20-01(3)(a) sets out clear and specific instructions for exactly what information must be communicated to a driver who is arrested for driving under the influence. As the facts indicate law enforcement did not communicate all the information required by subdivision (a). Because law enforcement failed to advise Mr. Woodbury with the complete advisory as required pursuant to N.D.C.C. § 39-20-01(3)(a) the Department lacks jurisdiction to revoke Mr. Woodbury's driving privileges pursuant to N.D.C.C. § 39-20-04.

[¶57] By design of the statute law enforcement determines the test the subject of the investigation is to take and law enforcement can choose that test at any time. Therefore it

follows that the legislature required law enforcement to read a complete advisory to the suspect, not a partial advisory. A plain reading of the statute dictates that law enforcement read a complete advisory to the suspect or the Department can't revoke driving privileges when the driver refuses. The statute says what it means and means what it says.

[¶58] The facts of this case and Mr. Woodbury's argument compare favorably with the district court's analysis in the case of State of North Dakota v. Steven Lee Sadler, 47-2018-CR-00618 (District Court Judge Cherie L. Clark). Index # 41, Appendix . The explanation in Sadler for granting the motion to suppress addresses concerns regarding the dilemma surrounding the status of the advisory omitting reference to a urine test when only a breath test is requested. "Omission of the word "urine," makes the advisory substantively incomplete because without it "there is a loss of information conveyed." Id. at ¶12." Id. at ¶22. Because Officer Wise failed to recite all of the information required in N.D.C.C. § 39-20-01(3)(a) the Department lacks jurisdiction to revoke Mr. Woodbury's driving privileges pursuant to N.D.C.C. § 39-20-04.

[¶59] **CONCLUSION**

[¶60] 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). Because, absent an exception to the warrant requirement, Mr. Woodbury has a constitutional right to refuse to submit to a warrantless search it is a violation of due process to deprive him of his driving privileges (an important property interest) for exercising a constitutional right. Further, the Department lacks jurisdiction to take action against Mr. Woodbury's driving privileges because Mr. Woodbury did not refuse testing pursuant to N.D.C.C. § 39-20-04 and because law enforcement failed to give Mr. Woodbury the complete advisory required by N.D.C.C. § 39-20-01.

[¶61] Based on the foregoing arguments and law Mr. Woodbury respectfully requests that the hearing officer's decision be reversed.

[¶62] **REQUEST FOR ORAL ARGUMENT**

[¶63] Mr. Woodbury respectfully requests that the North Dakota Supreme Court schedule oral argument for this case as permitted pursuant to N.D.R.App. 28(h). This matter involves the statutory interpretation of N.D.C.C. § 39-20-01(3)(a) and N.D.C.C. § 39-20-04 and what appears to be a split in interpretation amongst the district courts. Oral argument would be helpful to the Court and allow the parties to answer any questions the Justices may have concerning the issues presented in this appeal.

Dated: May 15, 2019

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Richard Lee Woodbury,

Appellant/Petitioner,

v.

Thomas Sorel, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20190112
District Court Case No. 45-2018-CV-01099

CERTIFICATE OF COMPLIANCE

[¶1] The undersigned certifies that pursuant to ND.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 36 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface (Times New Roman 12 point font).using the software program Microsoft Office Word.

Dated: May 15, 2019

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CERTIFICATE OF SERVICE

[¶1] 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 15, 2019 he electronically served the following on the North Dakota Attorney General:

APPELLANT'S BRIEF
APPELLANT'S APPENDIX

by sending an electronic copy to the email address dbanders@nd.gov.

Dated: May 15, 2019

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