20200183
FILED JULY 21, 2020
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of West Fargo, Petitioner, vs. The Honorable Thomas R. Olson, Judge of the District Court, East Central Judicial District, and Brady Duane Johnson, Respondents.	**SUPREME COURT NO. 20200883** Cass Co. Court No. 2019-CR-04563

ON PETITION FOR SUPERVISORY WRIT FROM THE
JUNE 19, 2020, ORDER OF THE DISTRICT COURT
HONORING RESPONDENT'S N.D.R. EVID. 707
DEMAND FOR CROSS-EXAMINATION
CASS COUNTY, NORTH DAKOTA
SOUTH EAST JUDICIAL DISTRICT
HONORABLE THOMAS R. OLSON PRESIDING

BRIEF OF RESPONDENT BRADY DUANE JOHNSON IN OPPOSITION TO PETITION FOR SUPERVISORY WRIT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. This Court exercises its supervisory jurisdiction "rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists." The inability of the prosecution to appeal is insufficient for exercise of supervisory jurisdiction. Should this Court exercise its supervisory jurisdiction when Petitioner argues the extraordinary circumstances are its inability to appeal an unfavorable ruling?

II. When North Dakota law requires the creation and signing of a document to provide prima facie evidence of a requirement for an evidentiary shortcut, the statements in the document are testimonial for purposes of Rule 707 of the North Dakota Rules of Evidence. Petitioner concedes the witness created and signed a document as prima facie evidence of approval and proper installation—requirements for the evidentiary shortcut. Did the district court err in requiring Petitioner to produce the attesting witness to satisfy Petitioner's Rule 707 obligations?

STATEMENT OF THE CASE

[¶1] Petitioner, the City of West Fargo ("City"), alleges Respondent Brady Duane Johnson ("Mr. Johnson") committed the offense of Driving Under the Influence, in violation of city ordinance. App'x to Pet. For Supervisory Writ ("Appendix"), at 3. Consistent with Rule 707 of the North Dakota Rules of Evidence, Mr. Johnson invoked his right to cross-examine, demanding the City to produce Roberta Grieger-Nimmo ("Grieger-Nimmo"), a designee of the Director of the State Crime Laboratory. *Id.* at 4. The City objected, requesting a hearing before the district court. Honoring Mr. Johnson's constitutional right of confrontation, the district court denied the City's objection. *Id.* at 35. The City thereafter petitioned this Court for a Writ of Supervision.

STATEMENT OF FACTS

[¶2] Consistently, upon objection and demand for cross-examination under Rule 707 of the North Dakota Rules of Evidence, prosecutors in Cass County would produce State Crime Laboratory Designee Greiger-Nimmo. *See e.g.*, *State v. Debra Delmore*, 09-2018-CR-02366 (Index ##9-10); *State v. Daniel Vagle*, 09-2018-CR-02043 (Index ## 13-14); *State v. Justin Roness*, 09-2018-CR-02463 (Index ## 17-18); *State v. Frank Clemens*, 09-2018-CR-02817 (Index ##15-16); *State v. Mitchell Nyhammer*, 09-2018-CR-03139 (Index ## 22-23); *State v. Jacob Bauer*, 09-2018-CR-03328 (Index ## 14-15); *State v. Kendra Plaschko*, 09-2018-CR-03604 (Index ##6-7); *State v. Tyler Anderson*, 09-2018-CR-03760 (Index ##8-9); *State v. Annette Peterson*, 09-2018-CR-00389 (Index ##9-10). In this case, consistent with Rule 707, Mr. Johnson specifically invoked confrontation rights by naming Greiger-Nimmo, demanding cross-examination. App'x, at 4. Although no witnesses testified at the hearing requested by the City, the City reported to the district court that Greiger-Nimmo's employment with the State Crime Laboratory had terminated. Tr., at 4:9-13. Arguing the City did not want to be burdened with issuing a subpoena to honor Mr. Johnson's confrontation rights, the City urged the district court to order Mr. Johnson to "call her himself." *Id.* at 4:7, 13-14.

[¶3] At the hearing it requested, seeking the district court's approval to ignore the invoked right of cross-examination, the City offered no witnesses or testimony. *See generally* Tr. Instead, the City admitted knowing Grieger-Nimmo's employment terminated, and tacitly admitted no effort whatsoever to honor Mr. Johnson's

confrontation clause rights. *See id.* at 4:11-15 (City telling trial court it had no knowledge where Greiger-Nimmo lives). Following argument, underscoring the right of cross-examination is constitutional, the district court denied the City's request to ignore the invoked right of confrontation. App'x, at 36-37.

LAW AND ARGUMENT

I. No extraordinary circumstances exist warranting this Court's exercise of supervisory authority.

[¶4] The standard for this Court's exercise of supervisory authority is well established:

> The authority to issue a supervisory writ is discretionary, and [this Court] decide[s] whether to exercise supervisory jurisdiction on a case-by-case basis, considering the unique circumstances of each case. [This Court] exercise[s] [its] authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists." Issue of vital concern regarding matters of important public interest may warrant the exercise of [its] supervisory jurisdiction.

State v. Grzadzieleski, 2019 ND 254, ¶ 8, 934 N.W.2d 864 (citations and internal quotations omitted). Applying this standard, this Court should decline the City's request.

[¶5] The City first argues "the City lacks another adequate remedy." Petitioner's Br., ¶ 3. Specifically, "[t]he City's ability to appeal is limited[,]" and if Mr. Johnson was "acquitted at trial, the City could not appeal[,]" and If Mr. Johnson was "convicted at trial, [he] would not likely raise the issue on appeal, and the possibility that the City could raise it is remote." *Id.* Under this Court's precedent, however, the inability "to appeal a ruling 'does not necessarily create extraordinary

circumstances justify supervisory jurisdiction.'" *Grzadzieleski*, 2019 ND 254, ¶ 9 (citation omitted). In fact and in essence, the City asks this Court to "ignore the prohibition of appeals under N.D.C.C. § 29-28-07." *State v. Powley*, 2019 ND 51, ¶ 13, 923 N.W.2d 123. Faced with a statute prohibiting prosecutorial appeals of pretrial evidentiary rulings, and a contrary request from the City, this Court should follow the statute, declining the City's contrary request. *Id.*

[¶6] If the Court choses to disregard N.D.C.C. § 29-28-07, it should reject the City's unsupported claim of no alternative remedy. The City could subpoena the witness. While there is no testimony or evidence presented in the district court, in its Petition, the City avers Grieger-Nimmo can be located in Minnesota. *See* Petitioner's Br., ¶ 4 n.1. The City has authority to subpoena out-of-state witnesses. N.D.R. Crim. P. 17(e)(2). The claim of "no remedy" is unsupported by the record and contrary to the law: the City can subpoena Grieger-Nimmo. Based on the invoked right, and N.D.R.Ev. 707, the City must.

[¶7] Secondly, the City argues this case presents an "extraordinary case because word of this strategy 'demanding' Grieger-Nimmo be produced under the Confrontation Clause has spread among the defense bar, and identical demands have been filed in numerous DUI cases in the state, including several pending before the same trial judge in this case." Petitioner's Br., ¶ 4 (footnote omitted). But the City's own argument proves this is not an extraordinary case. A case is "extraordinary" if it presents "[a] highly unusual set of facts that are not commonly associated with a particular thing or event." *Black's Law Dictionary* 277 (9th ed. 2009) (defining

"extraordinary circumstances"). By claiming demand for cross-examination have "spread among the defense bar, and identical demands have been filed in numerous DUI cases in the state," the City admits this case is not extraordinary.

[¶8] Moreover, the routine and regular practice of producing Grieger-Nimmo for cross-examination upon invocation and demand is well established. Mr. Johnson is aware of no fewer than nine examples within the last two years of Grieger-Nimmo appearing for the prosecution upon demand by a defendant. *See e.g.*, *State v. Debra Delmore*, 09-2018-CR-02366 (Index ##9-10); *State v. Daniel Vagle*, 09-2018-CR-02043 (Index ## 13-14); *State v. Justin Roness*, 09-2018-CR-02463 (Index ## 17-18); *State v. Frank Clemens*, 09-2018-CR-02817 (Index ##15-16); *State v. Mitchell Nyhammer*, 09-2018-CR-03139 (Index ## 22-23); *State v. Jacob Bauer*, 09-2018-CR-03328 (Index ## 14-15); *State v. Kendra Plaschko*, 09-2018-CR-03604 (Index ##6-7); *State v. Tyler Anderson*, 09-2018-CR-03760 (Index ##8-9); *State v. Annette Peterson*, 09-2018-CR-00389 (Index ##9-10). Contrary to the City's claim, this is an ordinary, customary demand. Assuming the City's unsupported averments—that Grieger-Nimmo's state employment terminated and she moved across the river to Minnesota—the only thing "extraordinary" is that the City must issue a subpoena, pay witness fees, and comply with the out-of-state subpoena procedure provided by N.D.R. Crim. P. 17(e)(2), and N.D.C.C. § 31-03-28. Inconvenience to the prosecution, and compliance with statute, do not render this case extraordinary. The Court should decline supervision.

II. The district court correctly determined Grieger-Nimmo's statements were testimonial when contained in documents required by statute and used to satisfy statutory requirements.

[¶9] If this Court elects to exercise supervisory authority, it should affirm the correct decision below. In all criminal prosecutions, "the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, 'to be confronted with the witnesses against him.'" *Lilly v. Virginia*, 527 U.S. 116, 123 (1999) (citations omitted). The confrontation clause of the Sixth Amendment ensures "the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 123-24 (citing *Maryland v. Craig*, 497 U.S. 836, 845, (1990)). Courts honor an accused's sacrosanct Sixth Amendment right of confrontation by submitting a declarant to the rigors of cross-examination, defined by the Supreme Court as "the greatest legal engine ever invented for the discovery of truth." *Id.* at 124 (citing *California v. Green*, 399 U.S. 149, 158 (1970)). Consistent with this constitutional framework, this Court adopted Rule 707 of the North Dakota Rules of Evidence that, upon demand, requires the City to produce Grieger-Nimmo for cross-examination. The district court did not err by honoring the Constitution and Rule 707.

[¶10] This Court interprets "rules of court, including the rules of evidence, in accordance with principles of statutory construction." *State, ex rel. Roseland v. Herauf*, 2012 ND 151, ¶ 7, 819 N.W.2d 546. (citations omitted). In relevant part, Rule 707 provides:

> (a) **Notification to Defendant.** If the prosecution intends to introduce an analytical report issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report and must also serve a copy of the report on the defendant or the defendant's attorney at least 60 days before the date set for the trial.
>
> (b) **Objection.** At least 45 days before the date set for the trial, the defendant may object in writing to the introduction of the report and identify by name or job title a person who made a testimonial statement in the report to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. If the witness is not available to testify, the court must grant a continuance.

[¶11] N.D.R. Evid. 707(a) & (b). "Rule 707, N.D.R. Ev[id]., must be interpreted in light of N.D.C.C. § 39-20-07, which governs the admission of analytical reports into evidence, because the rule and the statue are interconnected regarding analytical reports, as demonstrated by the language of the rule." *Herauf*, 2012 ND 151, ¶ 11 (citation omitted).

[¶12] In relevant part, Section 39-20-07 provides:

> 5. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the individual requested to take the chemical test.

> 6. The director of the state crime laboratory or the director's designee may appoint, train, certify, and supervise field inspectors of breath testing equipment and its operation, and the inspectors shall report the findings of any inspection to the director of the state crime laboratory or the director's designee for appropriate action. Upon approval of the methods or devices, or both, required to perform the tests and the individuals qualified to administer them, the director of the state crime laboratory or the director's designee shall prepare, certify, and electronically post a written record of the approval with the state crime laboratory division of the attorney general at the attorney general website, and shall include in the record:
>
> > a. An annual register of the specific testing devices currently approved, including serial number, location, and the date and results of last inspection.
> >
> > b. An annual register of currently qualified and certified operators of the devices, stating the date of certification and its expiration.
> >
> > c. The operational checklist and forms prescribing the methods currently approved by the director of the state crime laboratory or the director's designee in using the devices during the administration of the tests.
> >
> > d. The certificate of the director of the state crime laboratory designating the director's designees.
> >
> > e. The certified records electronically posted under this section may be supplemented when the director of the state crime laboratory or the director's designee determines it to be necessary, and any certified supplemental records have the same force and effect as the records that are supplemented.
> >
> > f. The state crime laboratory shall make the certified records required by this section available for download in a printable format on the attorney general website.

N.D.C.C. § 39-20-07(5) & (6). Under this statutory framework, the prosecution cannot admit a chemical test unless: (1) the sample was properly obtained; (2) the test was fairly administered; (3) the method and device used in test the same were

approved by the State Toxicologist; and (4) the test was performed by an individual or person certified by the State Toxicologist as qualified to perform the test. *Herauf*, 212 ND 151, ¶ 12 (citing N.D.C.C. § 39-20-07(5); *Schlosser v. North Dakota Dep't of Transp.*, 2009 ND 173, ¶ 9, 775 N.W.2d 695).

[¶13] This Court first analyzed the interaction between Rule 707 and Section 39-20-07 in *Herauf*, where law enforcement arrested a driver for DUI, and the driver submitted to a chemical blood test. *Id.* at ¶ 2. The nurse collecting the blood sample signed a form stating she had properly drawn the sample. *Id.* For trial, the driver sought to subpoena the nurse, and the State resisted by arguing "the nurse had no knowledge of the analytical report[]" it sought to use as evidence. *Id.* This Court found Section 39-20-07(1) required the nurse to sign the form to provide prima facie evidence the sample was properly drawn. *Id.* at ¶ 14. Because statute required the nurse to sign the statement, and because the statement was necessary to establish the blood was properly drawn, this Court held the nurse's declarations in the signed statement were "testimonial," and that Rule 707 and Section 39-20-07 required testimony from the nurse if demanded by the driver. *Id.* at ¶ 15.

[¶14] Building on *Herauf*, in *State v. Lutz*, 2012 ND 156, 820 N.W.2d 111, a DUI arrestee submitted to a blood draw. *Id.* at ¶ 2. This Court reaffirmed the State must produce the nurse who drew the blood. *Id.* at ¶ 5. But this Court held the State was not required to produce the analyst who prepared volatiles solution used in the chemical test because "there is no statute similar to N.D.C.C. § 39-20-07(10) that addresses the analyst who prepared the volatiles solution used in the chemical test,

making our analysis under that statute as to the individual who drew the blood sample applicable on the issue." *Id.* at ¶ 6.

[¶15] In *State, ex rel. Madden v. Rustad*, 2012 ND 242, 823 N.W.2d 767, a DUI arrestee submitted to a blood draw. *Id.* at ¶ 2. This Court held the prosecution need not produce the director of the state crime lab for cross-examination because the director's certification of the analytical report was not "testimonial." *Id.* at ¶ 19. This Court explained "[t]here is no statutory language like the language in N.D.C.C. § 39-20-07(10), which requires the Director to make testimonial statements in the prima facie evidence established under the evidentiary shortcuts in N.D.C.C. § 39-20-07." *Id.* at ¶ 17.

[¶16] Finally, in *State v. Severinson*, 2013 ND 121, 833 N.W.2d 517, a DUI arrestee submitted to a blood draw. *Id.* at ¶ 2. Vetter analyzed the blood sample for the North Dakota Crime Lab, with Akhtar providing peer review of Vetter's report. *Id.* The driver sought to cross-examine Akhtar under Rule 707. *Id.* This Court articulated the issue as "whether Akhtar made a testimony statement in the analytical report[,]" *id.* at ¶ 15, ultimately finding "[u]nlike *Herauf*, no statute similar to N.D.C.C. § 39-20-07(10) discusses the requirement of peer review procedures. Thus, as in *Lutz*, the analysis from *Herauf* is 'inapplicable on the issue.'" *Id.* at ¶ 16 (citations omitted). Accordingly, this Court concluded "Akhtar's report was not testimonial and the State was not required to produce him under N.D.R. Ev[id]. 707 and the Confrontation Clause." *Id.*

[¶17] *Herauf* controls this case. The City concedes it must show "that the testing device was installed by a field inspector." Petitioner's Br., ¶ 14 (citation omitted). The City further concedes "[t]he document used to meet this requirement is the 'Installation and Repair Checkout,' which was reviewed and certified in this case by Roberta Grieger-Nimmo." *Id.* (citation omitted). In other words, the City concedes statute required Grieger-Nimmo to sign the Installation and Repair Checkout to establish the device used was properly installed by a field inspector, rendering the statements in the document testimonial under *Herauf*. App'x, at 31. The district court correctly required testimony from Grieger-Nimmo.

[¶18] Even absent the City's concessions, the district court properly applied the law. The North Dakota Legislature established a statutory framework requiring approval of testing devices, and following approval, requiring the approving director or designee to "prepare, certify, and electronically post a written record of the approval." N.D.C.C. § 39-20-07(5) and (6). In a comprehensive initial inspection, App'x, at 5-30, designee Greiger-Nimmo tested and initially approved the machine used to test Mr. Johnson.[1] *See id.* at 7 (noting Grieger-Nimmo's certification that machine "is acceptable to be used in the field"). As required by statute, Greiger-Nimmo posted her November 28, 2018 initial inspection and

[1] Grieger-Nimmo is a designee of the Director as required by statute. *See* North Dakota Att'y Gen., *Memo Regarding Designees of the State Crime Lab. Dir.*, *available at* https://attorneygeneral.nd.gov/sites/ag/files/documents/Crime-Lab1/2018-07-16-Designees-BreathEquipment.pdf (last visited July 17, 2020).

approval electronically. *See* North Dakota Att'y Gen., *Intoxilyzer® 8000 – Intoxilyzer 80-007097, available at* https://attorneygeneral.nd.gov/alcoholtoxicology-testing/breath-alcohol-intoxilyzer%C2%AE-records/intoxilyzer%C2%AE-8000-intoxilyzer-80-268 (last visited July 16, 2020). Notably, the current initial inspection and approval posted online and dated June 17, 2020, was completed by designee and State Toxicologist Charles Eder. *Id.* While the City urged the district court Eder could testify in lieu of Grieger-Nimmo, Eder's initial inspection and approval of the machine occurred six months after Mr. Johnson's September 22, 2019 chemical test. *Compare id.*, *with* Tr., 5:11-15. Consistent with this Court's precedent, the City is required to produce Grieger-Nimmo for cross-examination on her testimonial statements to honor Mr. Johnson's invoked constitutional right of confrontation.

[¶19] Despite the clear application of precedent, the City argues this Court should overrule its prior jurisprudence because "every state to decide this issue has ruled that foundational documents pertaining to breath-test devices are nontestimonial." Petitioner's Br., ¶ 25. In support of this argument, the City cites *People v. Pealer*, 985 N.E.2d 903, 908 (N.Y. 2013), *Matthies v. State*, 85 So.3d 838 (Miss. 2012), *People v. Jacobs*, 939 N.E.2d 64 (Ill. Ct. App. 2010), and *State v. Bergin*, 217 P.3d 1087 (Or. Ct. App. 2009). But the City omits a dispositive distinction: New York, Mississippi, Illinois, and Oregon all lack rules corresponding with Rule 707 of the North Dakota Rules of Evidence. *See generally* N.Y.R. Evid. (containing no Rule 707); Miss. R. Evid. (containing no Rule 707); Ill. R. Evid. (containing no Rule

707); Or. Rev. Stat. ch. 40 (containing no Rule 707). Because this Court's jurisprudence establishes the determination of whether a document is testimony relies on the interplay between Section 39-20-07 and Rule 707, *see Herauf*, 2012 ND 151, ¶ 11, the cases cited by the City lack value. Because Grieger-Nimmo certified the required field inspection, and because Greiger-Nimmo was the designee who completed, certified, and posted the initial inspection and approval required by statute, the district court properly applied the law, and this Court should deny supervision.

CONCLUSION

[¶20] "[W]hen the people adopted the Constitution and its Bill of Rights, they thought the liberties promised there worth the costs. It is not for this Court to reassess this judgment to make the prosecutor's job easier." *Gamble v. United States*, 130 S.Ct. 1960, 2009 (2019) (Gorsuch, J., dissenting). Mr. Johnson's right to confrontation is not even a cost, it is "the 'greatest legal engine ever invented for the discovery of the truth[.]'" *Green*, 399 U.S. at 158 (footnote omitted).

[¶21] Yet the City opposes Mr. Johnson's use of the "greatest legal engine ever invented for the discovery of truth" to verify Greiger-Nimmo properly installed and calibrated Intoxilyzer 80-007097 as required by statute, and as required to lay foundation for admission of Mr. Johnson's test results. The City, instead, argues a person with no personal knowledge of the installation and calibration of Intoxilyzer 80-007097 may lay the mandated foundation because producing the attesting witness would require effort by the City. This Court should not discard Mr.

Johnson's rights for the City's convenience. This Court should affirm the district court's order, and deny the City's petition for supervisory writ.

Respectfully submitted July 22, 2020.

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CERTIFICATE OF COMPLIANCE

[¶22] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 19 pages.

Dated this 21st day of July, 2020.

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IN THE SUPREME COURT
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City of West Fargo, Petitioner, vs. The Honorable Thomas R. Olson, Judge of the District Court, East Central Judicial District, and Brady Duane Johnson, Respondents.	SUPREME COURT NO. 20200883 Cass Co. No. 2019-CR-4563 **CERTIFICATE OF SERVICE**

I hereby certify that on July 21, 2020, the following documents:

BRIEF OF RESPONDENT BRADY DUANE JOHNSON IN OPPOSITION TO PETITION FOR SUPERVISORY WRIT

were served by e-mail and electronically through the North Dakota e-filing portal to the parties listed below:

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Dated this 21st day of July, 2020.

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