20220270

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 12, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Appellee, vs. Brandon Todd Tompkins, Appellant.	**SUPREME COURT NO. 20220270** Crim. No. 47-2022-CR-00145 ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE AUGUST 23, 2022,
JUDGMENT OF THE DISTRICT COURT
COUNTY OF STUTSMAN
STATE OF NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABL TROY J. LEFEVRE PRESIDING

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

[¶1] Verdicts in a criminal case must be unanimous. Unanimity requires all jurors to agree that the defendant committed the same criminal act. Here, the jury instructions provided by the district court allowed the jury to convict Appellant if he committed either the act of: (1) being under the influence of an intoxicating liquor; or (2) refusing a chemical test requested by law enforcement. Did allowing the jury to convict Appellant without unanimously agreeing Appellant committed a singular criminal act violate Appellant's right to a unanimous criminal verdict?

REQUEST FOR ORAL ARGUMENT

[¶2] Appellant requests oral argument under Rule 28(h) of the North Dakota Rules of Appellate Procedures. Whether the Legislature's criminalization of refusing a chemical test request created an offense separate from DUI or APC, or merely another means of committing DUI or APC, is an issue of first impression for this Court, and oral argument would aid the Court in resolving this important and recurring question, and with determining the appropriate test for its resolution.

STATEMENT OF THE CASE

[¶3] Appellant, Brandon Todd Tompkins ("Mr. Tompkins"), was cited on April 17, 2022, for a single count of "APC-REFUSAL-1ST OFF[.]" (R1:1) The State ultimately prosecuted Mr. Tompkins under a Second Amended Complaint, charging Mr. Tompkins with two counts. (R49:1) In Count 1, the State alleged Mr. Tompkins committed Driving under the Influence ("DUI") by being "under the influence of an intoxicating liquor; and/or refus[ing] to submit to a chemical test of his breath..." (R49:1) In Count 2, the State alleged Mr. Tompkins committed Actual Physical Control ("APC") by being "under the influence of an intoxicating liquor; and/or []refus[ing] to submit to a chemical test of his breath ..." (R49:1)

[¶4] Mr. Tompkins was tried on both counts on August 23, 2022, with the jury convicting him on both counts. (R56:1; R57:1) Mr. Tompkins then appealed his convictions to this Court. (R62:1-2) Mr. Tompkins argues this Court should reverse his convictions because the district court erred in providing jury instructions allowing the jury to convict Mr. Tompkins of DUI and APC without all jurors unanimously agreeing he committed the same criminal act.

STATEMENT OF THE FACTS

[¶5] On April 17, 2022, Stutsman County Sheriff's Sergeant Brian Davis ("Sgt. Davis") arrested Mr. Tompkins for suspicion of DUI. (R:87:102:25-103:2) Sgt. Davis ultimately cited Mr. Tompkins for a single count of "APC-REFUSAL-1ST OFF[.]" (R1:1)

[¶6] The State then sought to issue an Amended Complaint, (R3:1-3) proposing to charge Mr. Tompkins with one count of violating "North Dakota Century Code section 39-08-01(1)(b), and/or 39-08-01(1)(e) by driving or being in actual physical control of a vehicle" while "under the influence of an intoxicating liquor; and/or []refusing to submit to a chemical test of his breath..." (R4:1) The district court allowed the Amended Complaint. (R:18:1)

[¶7] Mr. Tompkins later moved to dismiss the Amended Complaint, arguing it was duplicitous. (R:44:1-5) The State responded by seeking a Second Amended Complaint, (R:48:1-3) proposing to charge Mr. Tompkins with two counts. (R:49:1) In Count 1, the State alleged Mr. Tompkins committed DUI by being "under the influence of an intoxicating liquor; and/or []refus[ing] to submit to a chemical test of his breath …" (R:49:1) In Count 2, the State alleged Mr. Tompkins committed APC by being "under the influence of an intoxicating liquor; and/or []refus[ing] to submit to a chemical test of his breath ..." (R:49:1) The district court allowed the Second Amended Complaint. (R:52:1)

[¶8] The case then proceeded to trial by jury, and after the parties rested, the district court discussed with the parties the final jury instructions. (R:87:131:19-149:11) Mr. Tompkins objected to the district court's instructions that defined refusing a chemical test request and being under the influence of an intoxicating liquor as alternative means of committing the DUI and APC. (R:87:133:15-24; R:87:133:25-134:6) Mr. Tompkins also objected to the verdict forms on the same grounds. (R:87:142:3-22). The district court overruled Mr. Tompkins's objections,

providing instructions and verdict forms allowing the jury to convict Mr. Tompkins of DUI or APC without unanimously agreeing whether Mr. Tompkins had been under the influence of an intoxicating liquor or refused a chemical test request. (R:55:9-12; R:56:1; R:57:1) The jury convicted Mr. Tompkins of both DUI and APC. (R:56:1; R:57:1) Mr. Tompkins then appealed. (R62:1-2)

LAW AND ARGUMENT

[¶9] The purpose of jury instructions is to correctly and adequately advise the jury of the applicable law. *See, e.g.*, *State v. Erickstad*, 2000 ND 202, ¶ 16, 620 N.W.2d 136. Taken as a whole, instructions must adequately and correctly advise the jury of the applicable law, and must not mislead the jury. *See, e.g.*, *id.* A defendant must request or object to the instructions to preserve the matter for appeal. *See, e.g.*, *State v. Azure*, 525 N.W.2d 654, 656 (N.D. 1994). Here, Mr. Tompkins preserved his objection to the district court's jury instructions, and the jury instructions misstated the law. This Court should reverse.

I. Mr. Tompkins preserved his objections to the jury instructions.

[¶10] When the district court informs the parties to a criminal action of its proposed jury instructions, it must give the parties an opportunity to object on the record to the instructions. N.D.R. Crim. P. 30(b)(1)(B). A party must then object to an instruction, or the failure to give an instruction, on the record. N.D.R. Crim. P. 30(c)(1); *see also State v. Olander*, 1998 ND 50, ¶ 9, 575 N.W.2d 658 ("[I]f the court gives counsel an opportunity to object to proposed instructions, counsel must

designate the omissions of instructions that are objectionable and thereafter only the omissions so designated are deemed excepted to by counsel.").

[¶11] Here, Mr. Tompkins properly objected to the district court's proposed jury instructions. Mr. Tompkins objected to the jury instructions that allowed the jury to convict him of DUI or APC without unanimously agreeing whether he refused a chemical test request or was under the influence of an intoxicating liquor. (R:87:133:15-24; R:87:133:25-134:6; R:87:142:3-22) Indeed, the district court specifically recognized Mr. Tompkins had a standing objection to these instructions. (R:87:22-24) Mr. Tompkins properly preserved his objections.

II. The jury instructions misstated the applicable law by allowing the jury to convict Mr. Tompkins of DUI and APC without unanimously agreeing on all elements.

[¶12] All verdicts in criminal cases must be unanimous. N.D. Const. art. I, § 13; N.D.R. Crim. P. 31(a); *see also* U.S. Const. Amend. VI; *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) (incorporating the Sixth Amendment's right to a unanimous jury verdict against the states). As part of that right to a unanimous criminal verdict, "[n]o person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." N.D.C.C. § 12.1-01-03(1). While unanimity requires agreement on all elements of an offense, unanimity does not require agreement as to the means that a defendant committed an element if alternatives means are allowed by statute. *See, e.g.*, *State v. Pulkrabek*, 2017 ND 203, ¶ 22, 900 N.W.2d 798 (state criminal theft statue presented alternative means of committing theft that did not require juror unanimity); *City of Mandan v. Sperle*, 2004 ND 114,

¶ 15, 680 N.W.2d 275 (city disorderly conduct ordinance presented alternative means of committing disorderly conduct that did not require juror unanimity); *see also Schad v. Arizona*, 501 U.S. 624, 649 (1991) (Scalia, J., concurring) ("[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." (citations omitted)). This "element" versus "means" difference is a distinction stemming from pragmatic legal necessity—

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

Schad, 501 U.S. at 650 (Scalia, J., concurring).

[¶13] But while the element versus means distinction is well-established, that is not to say issues surrounding the distinction are settled. Specifically, courts routinely grapple with whether statutory provisions create sperate elements, or merely alternative means. *See, e.g.*, *Pulkrabek*, 2017 ND 203 (considering whether criminal theft statue presented alternative means or separate elements, for committing theft); *Sperle*, 2004 ND 114 (considering whether disorderly conduct statute presented alternative means of committing disorderly conduct); *Schad*, 501 U.S. 624 (plurality opinion) (considering whether premeditation murder and felony murder were alternative means, or separate elements, when committing first degree murder). That is because the courts have been unable to agree to a single test for concisely determining whether statutory language creates alternative means, or

separate elements. *Cf. Schad*, 501 U.S. at 637 ("We are convinced ... of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution, and we think that instead of such a test our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness, and for the rationality that is an essential component of that fairness." (citation omitted)).

[¶14] The inability to define a single test for the element versus means distinction is inconsequential in this case, however, because all tests commonly used by the court confirm that being under the influence of an intoxicating liquor is a separate element from refusing a chemical test request. Because being under the influence of an intoxicating liquor, and refusing a chemical test request, are separate elements, the jury instructions given by the district court misstated the law, requiring reversal.

A. History confirms being under the influence of an intoxicating liquor and refusing a chemical test request are distinct criminal elements.

[¶15] One test courts have employed in determining whether statutory language creates separate elements, or alternative means, is to look at the history of the provision at issue, and the crime or crimes charged therein. *See State v. Bourbeau*, 250 N.W.2d 259, 262-65 (N.D. 1977) (looking at history when determining theft statute did created alternative means, not separate elements). This is the test primarily employed by the United States Supreme Court in *Schad*, when it sought to determine whether premediated murder and felony murder were alternative means of committing first degree murder under Arizona law, rather than separate

elements requiring unanimity. 501 U.S. at 640-43; *cf. also id.* at 651-52 (Scalia, J., concurring) ("[T]he plurality provides no satisfactory explanation of why (apart from the endorsement of history) it is permissible to combine in one count killing in the course of robbery and killing by premeditation...In fact, I think its analysis ultimately relies upon nothing but historical practice..."). Under the history and tradition test, statutory language is treated as creating alternative means if—historically—the provisions were treated as alternative ways of committing a singular substantive offense. *See id.* at 641 ("A series of state-court decisions… have agreed that 'it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one; it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute.'" (citations omitted)); *see also id.* at 642 ("Although the state courts have not been unanimous in this respect, there is sufficiently widespread acceptance of the two mental states as alternative means of satisfying the mens rea element of the single crime of first-degree murder to persuade us that Arizona has not departed from the norm." (citation omitted)); *id.* at 651 (Scalia, J., concurring) ("Submitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite that can be subjected to the indignity of 'fundamental fairness' review. It was the norm when this country was founded, was the norm

when the Fourteenth Amendment was adopted in 1868, and remains the norm today. Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'").

[¶16] Here, history confirms refusing a chemical test request is an offense distinct from being under the influence of an intoxicating liquor. Looking at historical practice, North Dakota law generally considered refusing a chemical test to be civil issue allowing the loss of driving privileges, but not a criminal offense. *See* N.D.C.C. § 39-08-01 (2011); N.D.C.C. § 39-20-04 (2011). The treatment of refusing a chemical test request as an issue separate from criminally being under the influence of an intoxicating liquor is consistent with the historic tradition of other states. *See Birchfield v. North Dakota*, 579 U.S. 438, 444-49 (2016) (outlining history of DUI law in the United States, including the relatively new practice of "enacting laws making it a crime to refuse to undergo testing[]"). Historical practice confirms refusal of a chemical test request has been treated separately from being under the influence of an intoxicating liquor.

[¶17] Recent history reiterates this understanding. North Dakota law first criminalized the refusal of a chemical test request in 2013. *See* 2013 N.D. Sess. Law, ch. 301, § 7. In criminalizing the refusal of a chemical test request, the Legislature also enacted the requirement that law enforcement provide motorists with an advisory that "North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs[, and]

that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence[.]" 2013 N.D. Sess. Law, ch. 301, § 11. This language shows refusing a chemical test request is distinct from being under the influence of an intoxicating liquor. Specifically, because refusal is "punishable in the same manner as driving under the influence[,]" 2013 N.D. Sess. Law, ch. 301, § 11, refusal is necessarily distinct from driving under the influence. If refusal was not a separate offense, it would not be "punish[ed] in the same manner as driving under the influence[,]" 2013 N.D. Sess. Law, ch. 301, § 11, it would simply be driving under the influence.

[¶18] The legislative history also underscores this understanding. Ken Sorenson, speaking on behalf of the Attorney General's confirmed the criminalization of refusing a chemical test request "is a separate offense[.]" *See* Hr'g on H.B. 1302 Before the House Judicial Comm. (Apr. 17, 2013), 63rd N.D. Legis. Sess. (oral testimony from Ken Sorenson) ("The language adding a new subdivision E into 390801E is because the State's Attorneys felt that this language would clarify that refusal is a separate offense and it would be subject to the offense classifications and penalties in 390801." (emphasis added)). In other words, everything surrounding the decision to criminalize refusal confirms refusal is a separate offense from being under the influence of an intoxicating liquor. *Cf. Pulkrabek*, 2017 ND 203, ¶ 15 (theft provisions created alternative means of committing theft when legislative history showed enactment intended to create only a single offense).

[¶19] The history of the criminalization of refusing a chemical test request establishes that refusal is a distinct crime from being under the influence of an intoxicating liquor. Accordingly, the district court erred in instructing the jury that distinct elements—being under the influence of an intoxicating liquor and refusing a chemical test request—were merely alternative means of committing DUI or APC.

B. The "conceptual grouping" test confirms being under the influence of an intoxicating liquor and refusing a chemical test request are distinct criminal elements.

[¶20] Another test employed by courts in determining whether statutory language creates separate elements, or alternative means, is the "conceptual grouping" test. In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the defendant was charged with violating 18 U.S.C. § 2313, which prohibited "receiv[ing], conceal[ing], stor[ing], barter[ing], sell[ing] or dispos[ing] of" any stolen vehicle or aircraft moving in interstate commerce, and was convicted after the trial judge charged the jury that it need not agree on which of the enumerated acts the defendant had committed. 553 F.2d at 454-56. The Fifth Circuit reversed, reasoning the defendant's right to "jury consensus as to [his] course of action" was violated by the joinder in a single count of "two distinct conceptual groupings," receiving, concealing, and storing forming the first grouping (referred to by the court as "housing"), and bartering, selling, and disposing ("marketing") constituting the second group. *Id.* at 456-59. The court found the acts within a conceptual grouping were sufficiently similar to obviate the need for jurors to agree about which of them

was committed, whereas the acts in the distinct conceptual grouping were so unrelated that the jury must decide separately as to each grouping. *Id.* at 458-59.

[¶21] A number of courts subsequently adopted the *Gipson* court's "conceptual grouping" test. *See, e.g.*, *United States v. Peterson*, 768 F.2d 64 (2d Cir. 1985), *cert. denied*, 474 U.S. 923; *United States v. Duncan*, 850 F.2d 1104, 1113 (6th Cir. 1988), *cert. denied sub nom. Downing v. United States*, 493 U.S. 1025 (1990); *State v. Baldwin*, 304 N.W.2d 742, 747-49 (Wis. 1981). And even though the usefulness of the test has been questioned, *see Schad*, 501 U.S. at 635-36, courts continue to apply the distinct conceptual groupings test. *See, e.g.*, *State v. Brown*, 134 N.E.3d 783, 795 (Ohio Ct. App. 2019). Indeed, even this Court has found *Gipson* useful in analyzing unanimity issues. *Cf. State v. Skjonsby*, 319 N.W.2d 764, 773-74 (N.D. 1982) (considering *Gipson*, but finding its rationale procedurally inapplicable to the case before the Court).

[¶22] The conceptual grouping test confirms being under the influence of an intoxicating liquor and of refusing a chemical test request are in separate elements. Section 39-08-01(1) provides:

> A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> > a. That person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.
> >
> > b. That person is under the influence of intoxicating liquor.

> c. That person is under the influence of any drug or substance or combination of drugs or substances to a degree which renders that person incapable of safely driving.
>
> d. That person is under the combined influence of alcohol and any other drugs or substances to a degree which renders that person incapable of safely driving.
>
> e. That individual refuses to submit to any of the following:
>
> > (1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or
> >
> > (2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01.

N.D.C.C. § 39-08-01(1).

[¶23] So written, Section 39-08-01(1) creates two distinct conceptual groups. The first group is an "influence" group, where a motorist is either under the influence, or has legally been deemed to be under the influence, of a substance. *See* N.D.C.C. § 39-08-01(1)(a)-(d). The second group is a "refusal" group, where a motorist refuses testing. *See* N.D.C.C. § 39-08-01(e)(1)-(2). So understood, "individual jurors and the collective jury could be expected to perceive and understand that the conduct prohibited by the first grouping," that related to being under the influence of a substance, "is distinct and different from the conduct forbidden by the second grouping," that dealing with refusing a chemical test request to determine whether

the motorist is under the influence of a substance. *Gipson*, 553 F.2d at 458. But because the district court's jury instructions allowed the jury to convict Mr. Tompkins of DUI or APC if some jurors found he committed an influence group act, while others found he committed a refusal group act, the instructions misstated the law.

C. The North Dakota Century Code confirms being under the influence of an intoxicating liquor and refusing a chemical test request are distinct criminal elements.

[¶24] The final test commonly employed by courts when assessing unanimity issues is one of pure statutory interpretation. In *Richardson v. United States*, 526 U.S. 813 (1999), the defendant was charged with violating 21 U.S.C. § 848, which prohibited "a continuing series of violations[]" of the federal drug statutes, and was convicted after the trial judge charged the jury that it did not need to agree on what violations of the drug statutes the defendant had committed. 526 U.S. at 815-16 (citations and internal quotations omitted). The United States Supreme Court reversed, looking solely at the statutory text, and reasoning a violation "is an act or conduct that is contrary to law[,]" and criminal law requires a jury to unanimously agree as to when a criminal defendant has violated the law. *Id.* at 818-19.

[¶25] Here, North Dakota law defines, in relevant part, an "[e]lement of an offense" as "forbidden conduct[]" or "[t]he attendant circumstances specified in the definition and grading of the offense[.]" N.D.C.C. § 12.1-01-03(1)(a) & (b). North Dakota law also provides that "[n]o person may be convicted of an offense unless

each element of the offense is proved beyond a reasonable doubt." N.D.C.C. § 12.1-01-03(1).

[¶26] Applying this to Section 39-08-01(1), the forbidden conduct or attendant circumstances for the crime of refusal is refusing a chemical test request. *See* N.D.C.C. § 39-08-01(1)(e). Conversely, the forbidden conduct or attendant circumstances for the crime of being under the influence—or APC—is being under the influence of an intoxicating liquor. *See* N.D.C.C. § 39-08-01(1)(b). So defined, it is clear that refusal and being under the influence possess separate and distinct "elements of the offense." As such, the district court erred in providing jury instructions that did not require the jury to unanimously agree whether Mr. Tompkins refused a chemical test request or was under the influence of an intoxicating liquor.

D. This Court's decision in *State v. Huber* confirms being under the influence of an intoxicating liquor and refusing a chemical test request are distinct criminal elements.

[¶27] Without strictly applying any of the foregoing tests, this Court previously considered whether Section 39-08-01(1) set forth a single crime with alternative means in *State v. Huber*, 555 N.W.2d 791, 794 (N.D. 1996). Specifically, the State argued that DUI and APC were not alternative charges, but were both, "in fact, DUI under North Dakota law." *Id.* This Court rejected the argument, finding "'[t]he use of the word "or" between DUI and APC in the statute indicates that the Legislature intended to establish two distinct offenses.'" *Id.* (quoting *State v. Jacobson*, 338 N.W.2d 648, 650 (N.D. 1983)). This Court further reasoned that the differing

statutory consequences for DUI and APC confirmed that DUI and APC were separate offenses. *Id.* (reasoning that a sentence for APC could be stayed, while a sentence for DUI could not).

[¶28] Applying this Court's *Huber* reasoning to this case confirms refusing a chemical test request is a distinct offense from being under the influence of an intoxicating liquor. First, like DUI and APC, "or" separates being under the influence of an intoxicating liquor from refusing a chemical test request. *See* N.D.C.C. § 39-08-01(1).

[¶29] But the use of "or" does not necessarily denote separate offenses. *Cf. Pulkrabek*, 2017 ND 203, ¶ 22 (finding state criminal theft statue presented alternative means of committing theft when using "or"); *Sperle*, 2004 ND 114, ¶ 15 (finding city disorderly conduct ordinance presented alternative means of committing disorderly conduct when using "or"). Nevertheless, Section 39-08-01(1) also possesses the other factor this Court found meaningful in *Huber*—differential treatment. Under Section 39-08-01(1), if a motorist both is found to be both under the influence of an intoxicating liquor and of refusing a chemical test request from the same incident, then "the violations are deemed a single violation and the court shall forward to the department only the conviction for driving under the influence or actual physical control." N.D.C.C. § 39-08-01(1). But if being under the influence of an intoxicating liquor and of refusing a chemical test request were merely alternative means of committing the same offense, then Section 39-08-

01 would not need to "deem" them a single violation—then could only be a single violation.

[¶30] Other related statutes also treat differently the refusal of a chemical test request from being under the influence of an intoxicating liquor. *Cf. State v. Castleman*, 2022 ND 7, ¶ 8, 969 N.W.2d 169 ("Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are interpreted in context to give meaning and effect to every word, phrase, and sentence." (citation and internal quotation omitted)). Specifically, North Dakota law suspends a motorist's driving privileges if found to be under the influence, whereas the law requires revocation and immediate confiscation of a driver's license if a motorist refuses to submit to a chemical test request. *Compare* N.D.C.C. § 39-20-04, *with* N.D.C.C. § 39-20-04.1; *cf. also* N.D.C.C. § 39-08-01(1) ("If the individual violated subdivisions a, b, c, or d of this subsection and subdivision e of this subsection and the violations arose from the same incident, for purposes of suspension or revocation of an operator's license, the violations are deemed a single violation and the court shall forward to the department of transportation only the conviction for driving under the influence or actual physical control."). This Court's *Huber* rationale confirms that refusing a chemical test request is a separate offense from being under the influence of an intoxicating liquor.

CONCLUSION

[¶31] The Constitution limits "a State's capacity to define different courses of conduct... as merely alternative means of committing a single offense, thereby

permitting a defendant's conviction without jury agreement as to which course or state actually occurred." *Schad*, 501 U.S. at 632. That is because "no person may be punished criminally save upon proof of some specific illegal conduct." *Id.*

[¶32] Here, the instructions given by the district court allowed the jury to convict Mr. Tompkins without unanimously agreeing whether he committed the same specific illegal conduct—the instructions allowed the jury to convict Mr. Tompkins of DUI and APC if some jurors believed he committed the illegal conduct of being under the influence of an intoxicating liquor, while other jurors believed he refused a chemical test request. Because the instructions did not require unanimous agreement of the same illegal conduct, the district court's jury instructions misstated the law to the jury. This misstatement of the law requires reversal.

Respectfully submitted this 12th day of December.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(d) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 24 pages.

Dated this 12th day of December, 2022.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, APPELLEE, vs. BRANDON TODD TOMPKINDS, APPELLANT.	**SUPREME COURT NO. 20220270** Criminal No. 47-2022-CR-00145

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on December 12, 2022, the following documents:

APPELLANT'S BRIEF

were e-mailed to the address below and are the actual e-mail address of the parties intended to be so served and said parties have consented to service by e-mail:

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