NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes significant decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to identify cases of first impression, cases that significantly alter earlier interpretations of North Dakota law, and other noteworthy cases. As a special project, Associate Editors assist in researching and writing the Review.* The following topics are included in the Review:

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*The North Dakota Law Review would like to thank 2018-2019 Research Editor Cassandra Frederickson and Associate Editors Marcedes Hurd, Derek Pinnick, and Greg Sinning for their hard work in writing this Supreme Court Review.

CONSTITUTIONAL LAW – SEPARATION OF POWERS: THE GOVERNOR'S AUTHORITY TO VETO AND THE SEPARATION OF POWERS DOCTRINE
N.D. Legislative Assembly v. Burgum

In *N.D. Legislative Assembly v. Burgum*,[1] the Legislative Assembly, joined by individual legislators, petitioned the North Dakota Supreme Court to exercise its original jurisdiction to determine the constitutionality of five partial vetoes issued by Governor Doug Burgum.[2] The Legislative Assembly asked the court to either void the five partial vetoes and declare the bills without the challenged vetoes as current law, or alternatively, to compel the Governor through a writ of mandamus to treat the partial vetoes as a nullity.[3] Governor Burgum, joined by Attorney General Wayne Stenehjem, cross-petitioned seeking judgment declaring provisions in two bills unconstitutional that conditioned the spending or transfer of appropriated funds upon the approval of a legislative committee.[4] Addressing the legislature's arguments, the North Dakota Supreme Court held that the exercise of original jurisdiction was warranted, that the Governor did not have the power to withdraw a veto, and that several of the vetoes were invalid. As for the Governor's cross-petition, the court found that the Attorney General was not precluded from representing the Governor, and that both challenged provisions conditioning funding on approval of a legislative committee were unconstitutional.[5]

After the Regular Session of the 65th Legislative Assembly was adjourned, Governor Doug Burgum vetoed five items in four appropriation bills by striking through certain language in the bills before signing them into law.[6] The five vetoes in question were the Workplace Safety Veto,[7] the Credit Hour Veto,[8] the Any Portion Veto,[9] the Water Commission Veto,[10] and the IT Project Veto.[11]

Before the court analyzed each veto individually, the court discussed that original jurisdiction was proper because the court had previously exercised original jurisdiction to determine the constitutionality of a partial veto as well

1. 2018 ND 189, 916 N.W.2d 83.
2. *Burgum*, 2018 ND 189, ¶ 1, 916 N.W.2d 83.
3. *Id.* at ¶ 3.
4. *Id.*
5. *Id.*
6. *Id.* at ¶ 2.
7. *Id.* at ¶ 16.
8. *Burgum*, 2018 ND 189, ¶ 29, 916 N.W.2d 83.
9. *Id.* at ¶ 31.
10. *Id.* at ¶ 33.
11. *Id.* at ¶ 35.

the constitutionality of a legislative assignment of duties to the lieutenant governor.[12] Additionally, the court addressed the Governor's arguments that none of the challenges to his partial vetoes involved a justiciable controversy.[13] The court stated, "[t]he Legislative Assembly has standing to bring otherwise justiciable claims seeking to defend against executive branch encroachment into the legislative sphere through improper use of a partial veto."[14] The Governor also argued that because he conceded the Any Portion Veto, the Water Commission Veto, and the IT Project Veto were ineffective, no actual and justiciable controversy then existed.[15] The court held, "the Governor has no power to withdraw a veto, nor may he reach that result by agreeing with an attorney general opinion that a veto exceeded constitutional limits."[16] And because this case dealt with the balance of powers between the legislative and executive branches, which tend to undermine the separation of powers between the legislative, executive, and judicial powers, the court found a justiciable controversy of significant public interest that justified the court's exercise of original jurisdiction.[17]

The court then discussed the Governor's veto authority, which is derived from Article V of the North Dakota Constitution. That provision states, "[t]he governor may veto *items* in an appropriation bill, and portions of the bill not vetoed become law."[18] The court relied on *Olson*, where it had interpreted a previous constitutional provision[19] that granted the Governor veto authority. In *Olson*, the court held:

> [T]hat the governor, in exercising his partial veto power, may only veto *items or parts* in appropriation bills that are related to the vetoed appropriation and are so separate and distinct that, after removing them, the bill could stand as workable legislation that comports with the fundamental purpose the legislature intended to effect when the whole was enacted. He may not veto conditions or restrictions on appropriations without vetoing the appropriation itself.[20]

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12. *Id.* at ¶ 5 (citing State *ex rel.* Link v. Olson, 286 N.W.2d 262, 266 (N.D. 1979)); *see also* State *ex rel.* Peterson v. Olson, 307 N.W.2d 528, 531 (N.D. 1981) ("exercising original jurisdiction over 'challenges relat[ing] to the very foundation upon which the executive and legislative branches of government rest'").

13. *Burgum*, 2018 ND 189, ¶ 6, 916 N.W.2d 83.

14. *Id.* at ¶ 6 (citing Colo. Gen. Assembly v. Lamm, 704 P.2d 1371, 1378–79 (Colo. 1985)).

15. *Id.* at ¶ 9.

16. *Id.*

17. *Id.* at ¶ 10.

18. N.D. CONST. art. V, § 9 (emphasis added).

19. N.D. CONST. § 80 (repealed 1997).

20. *Burgum*, 2018 ND 189, ¶ 13, 916 N.W.2d 83 (citing State *ex rel.* Link v. Olson, 286 N.W.2d 262, 270–71 (N.D. 1979)).

The court determined the difference between the previous section—which permitted executive vetoes of "any item or items or part or parts"—and the current section—which states only that the Governor "may veto items"—was not a substantive textual alteration.[21] Therefore, the *Olson* analysis applied in this case because the plain meaning of the state constitution had not been changed.[22]

A. THE GOVERNOR'S VETO AUTHORITY

Following the precedent established in *Olson*, the court explained that the Governor can veto "items in an appropriation bill" if the remaining legislation is workable, but cannot veto specific conditions on an appropriation unless the appropriation itself is also vetoed.[23] The court then applied the long-established definition of an "item" to the five vetoes in question.[24] This section reviews the court's analysis for each challenged veto.

1. *Workplace Safety Veto*

Senate Bill 2018, § 12, entitled "Entrepreneurship Grants and Voucher Program-Exemption" allocated $2,250,000 for an entrepreneurship grant and voucher program to be developed and administered by the Department of Commerce.[25] The provision stated $600,000 of the funding would come from the general fund and $1,650,000 would come from a separate special fund.[26] Of the total appropriated amount, $900,000 would be distributed equally to Bismarck, Fargo, and Grand Forks; $300,000 to an organization that provided workplace safety; and $300,000 for biotechnology grants. The rest of the provision described guidelines for the funds.[27] Governor Burgum vetoed only the $300,000 appropriation to the workplace safety organization.

The Legislative Assembly argued the Workplace Safety Veto struck a condition of the appropriation and did not strike the appropriation itself, therefore making it invalid under *Olson*.[28] The Governor argued the veto was of a separate and distinct appropriation and was valid because it struck both the condition and the appropriation.[29] The court had to determine whether spending $300,000 on workplace safety was a condition on the $2,250,000

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21. *Id.* at ¶ 14.
22. *Id.*
23. *Id.*
24. *Id.* (citing State *ex rel.* Sandaker v. Olson, 65 N.D. 561, 260 N.W. 586, 589 (1935)).
25. *Id.* at ¶ 16.
26. *Burgum*, 2018 ND 189, ¶ 16, 916 N.W.2d 83.
27. *Id.*
28. *Id.* at ¶ 17.
29. *Id.*

appropriation, or if the $300,000 was a component item of the larger appropriation.[30]

In analyzing this question, the court quoted the veto provision in the North Dakota Constitution, which states, "The governor may veto items in an appropriation bill."[31] The court described an appropriation as the "setting apart from public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object."[32] Because there was no dispute that S.B. 2018 was an appropriation bill, the Governor was permitted to veto any "items" under his item veto power.[33]

The court ultimately rejected the Legislative Assembly's arguments and held The Workplace Safety Veto was within the Governor's item veto authority. This resulted in the larger appropriation, in which the item was originally included, being reduced by the amount of the item.[34] First, the Legislative Assembly argued because the $300,000 was not subtracted from the total appropriated funds, the Governor was able to use the $300,000 at his discretion.[35] Second, the Legislative Assembly argued the Workplace Safety Veto had the intent and effect that the $300,000 be distributed to an organization that provides workplace safety without reducing the $2,250,000 by $300,000.[36] In support of its arguments, the Legislative Assembly cited *General Assembly v. Owens*[37] and *Rush v. Ray*.[38] The court distinguished these cases because the veto in *Owens*, known as the headnote veto, was not considered an item – the provision did not include sums of money, and therefore could not be eliminated without affecting other purposes of the bill.[39] And in *Rush*, the vetoes struck a condition on the appropriated funds but did not strike the appropriation of money.[40]

Here, the court held the Workplace Safety Veto was in accord with the longstanding practice of vetoes in North Dakota.[41] The court explained that it had been long understood that the subtraction of vetoed items from larger

30. *Id.*
31. N.D. CONST. art. V, § 9.
32. *Burgum*, 2018 ND 189, ¶ 18, 916 N.W.2d 83 (citing State *ex rel.* Link v. Olson, 286 N.W.2d 262, 268 (N.D. 1979)).
33. *Id.*
34. *Id.* at ¶ 28.
35. *Id.* at ¶ 19.
36. *Id.*
37. *Id.* at ¶ 20 (citing Colo. Gen. Assembly v. Owens, 136 P.3d 262, 267 (Colo. 2006)).
38. *Burgum*, 2018 ND 189, ¶ 20, 916 N.W.2d 83 (citing Rush v. Ray, 362 N.W.2d 479 (Iowa 1985)).
39. *Id.*
40. *Id.* at ¶ 21.
41. *Id.* at ¶ 22.

totals was the legal result of an item veto.[42] For example, in *Sandaker*, the legislature passed a bill that had twelve items, one of which was $6960 for the assistant dairy commissioner's salary, and another $3584 for, among other things, the dairy commissioner's salary.[43] When the Governor vetoed all the items other than the dairy commissioner's salary, the court stated the Governor "did not reduce, or pare, or scale, any of these to make an item less than what the Legislature made. He struck out the items entirely." Therefore, the effect was that the appropriation for that department was cut to $3584. In the case at bar, the Governor struck out the item of $300,000 in its entirety and thus subtracted it from any larger amount in which it was originally included.[44] The court stated that to hold otherwise would invalidate how the state's governors had historically used the veto power.[45]

Second, the Legislative Assembly argued S.B. 2018, § 1 provided for the appropriation, while § 12 placed conditions on that appropriation.[46] To support its argument, the Legislative Assembly cited the 2017 North Dakota Legislative Drafting Manual and compared the language to S.B. 2018, § 1. The Assembly also emphasized to the court that § 1 used appropriation language and was titled "Appropriation" while § 12 stated that "[t]he amount appropriated for entrepreneurship grants in Section 1 of this Act . . . ."[47] The court held that even though § 1 contained traditional appropriation language, that did not prohibit a conclusion that § 12 also contained items appropriating funds or defining an appropriation.[48] Concluding otherwise would have allowed the legislature to shelter certain items from a veto by providing for them in any other section than the traditional appropriation section, the court determined.[49]

Third, the Legislative Assembly argued the $300,000 could not be deemed an item of appropriation because the source of funding was unascertainable.[50] The Legislative Assembly cited *Owens* as its support, which stated that "the source of funding is as much a part of an item of appropriation as the amount of money appropriated and the purpose to which it is to be devoted, and so it could not be removed from the item veto power."[51] Here, the

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42. *Id.*; *see also* State *ex rel.* Link v. Olson, 286 N.W.2d 262, 271 (N.D. 1979).
43. *Burgum*, 2018 ND 189, ¶ 23, 916 N.W.2d 83 (citing State *ex rel.* Sandaker v. Olson, 65 N.D. 561, 260 N.W. 586, 587 (1935)).
44. *Id.*
45. *Id.* at ¶ 22.
46. *Id.* at ¶ 24.
47. *Id.*
48. *Id.* at ¶ 25.
49. *Burgum*, 2018 ND 189, ¶ 25, 916 N.W.2d 83.
50. *Id.* at ¶ 26.
51. *Id.* (citing Colo. Gen. Assembly v. Owens, 136 P.3d 262, 267 (Colo. 2006)).

Legislative Assembly argued because § 1 stated the $2,250,000 sum, of which $600,000 was from the general fund and $1,650,000 was from special funds, the source of the $300,000 could not be determined, and therefore the veto could not be of an item in an appropriation.[52] The court disagreed and referred to § 14 of S.B. 2018, which stated the source of the $300,000 was the Research North Dakota fund. In § 14, $1,500,000 was allocated for the entrepreneurship grants and vouchers, which directly corresponded with the five specific entrepreneurship grants and vouchers in § 12.[53] Therefore, the court stated that when the bill was read as a whole, the plain language clearly showed the funding source was the Research North Dakota Fund.[54]

The court held the Legislative Assembly could not insulate an item from veto "by including it within a larger appropriation, funding that larger appropriation from multiple special funds, or failing to identify the funding source for the item."[55] Therefore, the Workplace Safety Veto was within the Governor's item veto authority.

2. *Credit Hour Veto*

The second veto the court analyzed was the "Credit Hour Veto." The court held the Credit Hour Veto was ineffective and S.B. 2003 became law unmodified.[56] In sum, § 39 of the bill provided that the 65th Legislative Assembly intended "future general fund appropriations in support of the North Dakota state university department of nursing program in Bismarck be adjusted for savings resulting from facility lease negotiations *and for credit-hours completed at the school*."[57] The Legislative Assembly argued when Governor Burgum vetoed the language "and for credit-hours completed at the school," he replaced the legislature's intent with his own, and the veto was therefore unconstitutional.[58] Whether the item veto power was limited to items making appropriations and accompanying conditions was an issue of first impression for the court.[59] The court stated S.B. 2003 was an appropriation bill and § 39 was not a condition on the appropriation. The court held that although the Governor could veto "items in an appropriation bill," he could not veto any part of a statement of legislative intent.[60] Here, because §

52. *Id.*
53. *Id.*; *see also* S.B. 2018, § 14, 65th Legis. Assemb., Reg. Sess. (N.D. 2017).
54. *Burgum*, 2018 ND 189, ¶ 26, 916 N.W.2d 83.
55. *Id.* at ¶¶ 27, 28.
56. *Id.* at ¶ 32.
57. *Id.* at ¶ 29 (citing S.B. 2003, § 39, 65th Legis. Assemb., Reg. Sess. (N.D. 2017)) (emphasis added).
58. *Id.* at ¶ 30.
59. *Id.*
60. *Burgum*, 2018 ND 189, ¶ 30, 916 N.W.2d 83.

39's opening clause stated, "It is the intent of the sixty-fifth legislative assembly that . . . ." and because this section was a single sentence, the entire sentence was a statement of the Legislative Assembly's intent.[61] Therefore, the Credit Hour Veto was ineffective.

3. *Any Portion Veto*

The third veto that the court analyzed was the "Any Portion Veto" in Senate Bill 2003, § 18. The court held the "Any Portion Veto" was ineffective and the bill became law as the legislature wrote it. The court provided the following excerpt of § 18:

> Dickinson state university may not discontinue *any portion of* its department of nursing academic program during the biennium beginning July 1, 2017, and ending June 30, 2019 . . . .[62]

Although the Governor conceded the "Any Portion Veto" was ineffective, the court moved forward with the analysis because the Governor did not have the power to withdraw or concede a veto as ineffective.[63] Although the veto did not strike a sum of money to Dickinson State University, the Legislative Assembly argued the Governor vetoed a condition of the appropriation to the university.[64] The court agreed with the Legislative Assembly, and even though the veto only modified a condition on appropriated funds, the veto was unauthorized because it altered the legislature's intent to keep the appropriation of funds going to Dickinson State University only if the entire nursing program remained intact.[65]

4. *Water Commission Veto*

The fourth veto that the court analyzed was H.B. 1020, § 5. The court held the veto was ineffective because the Governor vetoed a condition on the appropriation and did not veto the appropriation itself.[66] Section 5 of H.B. 1020 designated the spending of $298,875,000 four ways: $120,125,000 for water supply; $27,000,000 for rural water supply; $136,000,000 for flood control; and $15,750,000 for general water. The bill also stated that "the state water commission may transfer funding among these items, *subject to budget section approval and upon notification to the legislative management's water*

61. *Id.*

62. *Id.* at ¶ 31 (citing S.B. 2003, § 18, 65th Legis. Assemb., Reg. Sess. (N.D. 2017)) (emphasis added).

63. *Id.* at ¶ 32.

64. *Id.*

65. *Id.*

66. *Burgum*, 2018 ND 189, ¶ 34, 916 N.W.2d 83.

topics overview committee."[67] The Governor vetoed the provision that required approval from the legislature's budget section.

The Legislative Assembly argued the Governor vetoed a condition on the appropriation of the $298,875,000 designated to the water commission, and that allowing the veto to go forward would permit the water commission to use the entire amount of appropriated funds without oversight.[68] The court held that because § 5 conditioned the entire appropriation amount on the approval of transferring funds between categories, and because the Governor did not veto the $298,875,000 itself, the veto was unauthorized.[69]

5. *IT Project Veto*

The last veto the court analyzed was the "IT Project Veto" in S.B. 2013, § 12.[70] In the bill, the legislature allocated $3,600,000 to the information technology budget. The legislation also stated, "*Of the $3,600,000, $1,800,000 may be spent only upon approval of the budget section*. It is the intent of the sixty-fifth legislative assembly that . . . the governor and the commissioner of university and schools lands achieve efficiencies and budgetary savings within the department of trust lands through . . . alternative solutions relating to information technology."[71] Again, the Governor vetoed the provision giving the budget section discretion over the appropriation. The court held the veto was ineffective because it did not strike an item of appropriation – the half of the $3.6 million appropriation contingent on approval from the budget section constituted a condition and not an appropriation itself.[72]

B. NONDELEGATION AND SEPARATION OF POWERS

With the veto issues resolved, the court next addressed the Governor's cross-petition, in which he argued the budget provisions in H.B. 1020 (Water Commission Veto) and S.B. 2013 (IT Project Veto) were unconstitutional in violation of the nondelegation and separation of powers doctrines.[73] In re-

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67. *Id.* at ¶ 33 (citing H.B. 1020, § 5, 65th Legis. Assemb., Reg. Sess. (N.D. 2017)) (emphasis added).
68. *Id.* at ¶ 34.
69. *Id.*
70. *Id.* at ¶ 35.
71. *Id.* (citing S.B. 2013, § 12, 65th Legis. Assemb., Reg. Sess. (N.D. 2017)) (emphasis added).
72. *Burgum*, 2018 ND 189, ¶ 36, 916 N.W.2d 83.
73. *Id.* at ¶ 37.

sponse, the Legislative Assembly argued the Attorney General lacked standing to challenge the constitutionality of these provisions and that the provisions were constitutional.[74]

The court first addressed the Legislative Assembly's argument that the Attorney General lacked standing. The Legislative Assembly argued the Attorney General had the duty to *defend* state statutes against constitutional challenge and could not advocate against the constitutionality of the provisions on the Governor's behalf.[75] The court held the Attorney General could choose which officer—here, either the Governor or the Legislative Assembly—to represent when state officers become opposing parties, and that the Attorney General could therefore represent the Governor.[76] The court stated that representing the Governor in challenging the constitutionality of a statute was within the Attorney General's duties to "[a]ppear and defend all actions and proceedings against any state officer."[77] Additionally, this decision was also consistent with *Solberg v. State Treasurer*,[78] where the Attorney General argued against the constitutionality of a statute on behalf of a state official.

The court then moved on to the constitutionality concerns. After describing the three branches of government and the powers vested in each branch in North Dakota, the court analyzed the two budget section provisions under the separation of powers doctrine to determine whether one branch of government had encroached into the proper sphere of another branch without the consent of the other branch.[79]

The court held the Legislative Assembly went beyond its authority when creating the budget section provision in H.B. 1020, § 5, and therefore the provision was found unconstitutional because it violated the nondelegation doctrine.[80] The court compared H.B. 1020, § 5 to the statute in a previous case "which authorized the state board of higher education to provide facilities to be used for educational purposes at institutions or higher education."[81] Like that case, where the court concluded the legislature had unconstitutionally delegated its legislative authority by failing to create rules or funding guidelines for the board in determining approval of construction projects on the state's college campuses, here the budget section also had no legislative guidance to constrain it.[82] As written, the legislation gave the

74. *Id.* at ¶ 37.
75. *Id.* at ¶ 39.
76. *Id.*
77. *Id.*; *see also* N.D. CENT. CODE § 54-12-01(3) (2017).
78. 78 N.D. 806, 53 N.W.2d 49 (1952).
79. *Burgum*, 2018 ND 189, ¶ 44, 916 N.W.2d 83.
80. *Id.* at ¶ 53.
81. *Id.* at ¶ 48.
82. *Id.* at ¶¶ 48, 53.

budget section unfettered discretion to approve or reject the water commission's request to transfer funding among the four specified categories.[83] Therefore, because the law provided no safeguards against arbitrary action, the court found that the Legislative Assembly had improperly attempted to delegate its legislative power.[84]

Furthermore, H.B. 1020 also violated the constitution because the Legislative Assembly was attempting to retain control over executing a law after it was enacted by delegating power to a committee made up of forty-two members of the 141-member Legislative Assembly.[85] The court explained that after a law is enacted, any further fact finding and discretionary decision-making for administrative purposes become executive functions.[86] The court likened this committee to a South Carolina case that reviewed actions taken by a legislative committee.[87] The committee in that case was granted broad authority to control the expenditure of state and federal funds and was made up of twelve legislators.[88] The South Carolina court held that the authority granted to the committee created a veto-like power in the committee, which violated the separation of powers between the legislative and executive branches of government.[89] The North Dakota Supreme Court also likened H.B. 1020, § 5 to *Bowsher v. Synar,* where the United States Supreme Court held the Balanced Budget and Emergency Deficit Control Act of 1985 violated the separation of powers doctrine because the comptroller general, an officer subject to removal only by Congress, was given the "ultimate authority to determine the budget cuts to be made" – an otherwise executive-branch function. The U.S. Supreme Court also outlined two constraints on the legislature in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*[90] There, the U.S. Supreme Court reviewed federal legislation that authorized the transfer of operating control of two airports from the federal government to local authority on the condition of creating a review board.[91] The review board consisted of nine members of Congress who would be given the power to veto the decisions of the local authority. The court held the creation of the board was an "impermissible encroachment" on the executive branch which violated the separation of

83. *Id.* at ¶ 53.
84. *Id.* (citing Montana-Dakota Util. Co. v. Johanneson, 153 N.W.2d 414, 421 (N.D. 1967)).
85. *Burgum*, 2018 ND 189, ¶¶ 54, 61, 916 N.W.2d 83.
86. *Id.* at ¶ 55; *see also* State *ex rel.* McLeod v. McInnis, 278 S.C. 307, 295, S.E.2d 633, 637 (1982).
87. *Burgum*, 2018 ND 189, ¶ 55, 916 N.W.2d 83 (citing *McInnis*, 295 S.E.2d at 634).
88. *Id.*
89. *Id.*
90. 501 U.S. 252 (1991).
91. *Burgum*, 2018 ND 189, ¶ 58, 916 N.W.2d 83.

powers.[92] The two legislative-branch constraints the Court outlined were, "1) It may not invest itself or its Members with either executive power or judicial power, and 2) when it exercises its legislative power, it must follow the single, finely wrought and exhaustively considered, procedures specified in Article I."[93] Therefore, because H.B. 1020, § 5 allowed the Legislative Assembly to maintain control over an important aspect of executing the law after it had been enacted, it encroached on the role of the executive and bypassed constitutionally mandated legislative processes. Thus, the provision was unconstitutional because it violated the separation of powers doctrine.[94]

The Legislative Assembly argued that if the budget section provision of H.B. 1020, § 5 was stricken from the bill, the language granting the water commission the authority to transfer funds should have also been stricken in order for the bill to be consistent with legislative intent.[95] In reply, the Governor argued that striking the bill would have allowed the legislature to make law through litigation.[96] Additionally, the Governor argued the remaining language after striking the budget section condition was workable legislation and therefore did not need to be stricken.[97]

The court ultimately struck down both the budget section approval condition and the transfer authority provision.[98] The court reasoned that when a provision is unconstitutional, the court must ensure the remaining legislation functions as close as possible to what the legislature intended. Although the court determined that the remaining portion of the bill would have been workable legislation without the budget section condition, it would have resulted in a piece of legislation that thwarted the intent of the Legislative Assembly.[99] Because the legislature used the language, "subject to budget section approval," the Legislative Assembly purposefully conditioned the funding transfer from the water commission upon approval of the budget section. As a result, the court determined that H.B. 1020, § 5 would read, "[t]he funding designated in this section is for the specific purposes identified," which was consistent with the Legislative Assembly's original intent.[100]

The court next had to determine whether S.B. 2013, § 12, which provided $1.8 million of the total $3.6 million allocated for information technology could "be spent only upon approval of the budget section,"

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92. *Id.* (citing *Citizens for Abatement of Aircraft Noise*, 501 U.S. at 269).
93. *Id.* (citing *Citizens for Abatement of Aircraft Noise*, 501 U.S. at 274).
94. *Id.* at ¶¶ 60–61, 64.
95. *Id.* at ¶ 65.
96. *Id.*
97. *Burgum*, 2018 ND 189, ¶ 65, 916 N.W.2d 83.
98. *Id.* at ¶ 67.
99. *Id.* at ¶ 66.
100. *Id.*

violated separation of powers principles.[101] The Legislative Assembly argued the budget section performed only the "limited legislative function of gathering facts to ascertain whether certain funds will be made available for expenditure."[102] However, the court found that the budget section held the ultimate authority to approve or reject the use of half of the funds allocated and therefore went beyond the proper legislative function because it encroached on executive-branch power.[103]

The Legislative Assembly then argued § 12 of the bill provided adequate standards to determine whether the budget section would approve or deny additional spending for information technology.[104] The bill stated, "It is the intent of the sixty-fifth legislative assembly that during the 2017–18 interim, the governor and the commissioner of university and school lands achieve efficiencies and budgetary savings within the department of trust lands through the use of innovative ideas and through alternative solutions relating to information technology."[105] The court concluded that this statement provided neither adequate standards nor an objective determination on whether the Legislative Assembly would approve the $1.8 million in conditional funding, and instead only provided a general goal to "achieve efficiencies and budgetary savings."[106] Because the provision failed to provide adequate guidance and left wide discretion to the budget section to approve or reject the use of the $1.8 million in appropriated funds, the court found the provision was unconstitutional as a violation of the nondelegation doctrine.[107]

Finally, the Legislative Assembly argued that if the budget section provision of S.B. 2013, § 12 was stricken from the bill, then the amount appropriated to the information technology project needed to be reduced from $3.6 million to $1.8 million because the Legislative Assembly did not intend for the commissioner of university and school lands to spend the entire appropriation. The court agreed that the budget section provision was a condition on the $1.8 million of the appropriated amount but also believed it was less clear whether the legislature "contemplated or desired" to appropriate the full $3.6 million.[108] Therefore, the court determined the entire appropriation amount of $3.6 million would stand because in § 1 of the bill, the Legislative Assembly appropriated $3.6 million for capital assets, and § 3 provided that $3.6

101. *Id.* at ¶ 68.
102. *Id.* at ¶ 69.
103. *Burgum*, 2018 ND 189, ¶ 69, 916 N.W.2d 83.
104. *Id.* at ¶ 70.
105. *Id.*
106. *Id.* at ¶ 71, 916 N.W.2d 83.
107. *Id.*
108. *Id.* at ¶ 72.

million was for an information technology project. The condition only came later in § 12. Therefore, the court declined to alter these sections to reflect the $1.8 million appropriation that the Legislative Assembly desired because it was not the judiciary's prerogative to add words to a statute.[109] Finally, the court stated that the Legislative Assembly almost certainly contemplated spending the entire $3.6 million on the information technology project because the commissioner was provided the authority to spend the entire amount without guidelines after spending half of the appropriated funds. Therefore, the court found that § 12 appropriated the entire $3.6 million for the information technology project.[110]

Chief Justice VandeWalle concurred in part and dissented in part. The Chief Justice concurred in the result reached by the majority opinion in part II and part III with the understanding that not every bill that contains a dollar sign or speaks to an amount of money is an appropriation.[111] He also agreed with the portion of part IV of the opinion that held the bills unconstitutional as violating the nondelegation doctrine because the legislature did not provide adequate standards for the budget section. However, the Chief Justice dissented to the portion in part IV of the opinion discussing separation of powers because (1) he believed it was unnecessary to the decision, and (2) he was not convinced the delegation to the budget section, if proper standards were in place, would violate that doctrine.

The Chief Justice then discussed how the Governor and Attorney General did not question the authority of the legislature to appropriate money to line items without giving the executive branch the authority to transfer funds among those line items. While he agreed that without proper guidelines established by the legislature the budget section provisions were unconstitutional delegations of authority, he noted it seemed odd that giving one executive branch agency more leeway in spending appropriated funds than other executive branch agencies may itself have been a violation of the separation of powers doctrine. He stated that the "all or nothing approach" the majority adopted, and cases cited to support this approach, was unconvincing. Furthermore, the Chief Justice was unconvinced because the court was concerned with the authority to transfer funds from one line item to another, and not with the authority of the budget section to prohibit the expenditure of funds.[112]

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109. *Burgum*, 2018 ND 189, ¶ 73, 916 N.W.2d 83.
110. *Id.* at ¶¶ 73, 74.
111. *Id.* at ¶ 76 (VandeWalle, C.J., concurring and dissenting).
112. *Id.* at ¶ 79.

Justice Crothers also concurred in part and dissented in part in an opinion joined by Chief Justice VandeWalle and Justice McEvers. Justice Crothers concurred in much of the result reached by the majority. However, he dissented from the section of the opinion that decided the portion of H.B. 1020 violated the separation of powers doctrine, and he asserted that the constitutional analysis should have stopped after the nondelegation holding.[113] Because concepts of judicial restraint require courts to first consider whether a question can be resolved without a constitutional analysis,[114] Justice Crothers stated that great caution and circumspection must be exercised when a constitutional analysis is required.[115] Here, relying on a previous case that held courts must decide constitutional questions on the "narrowest possible grounds to avoid reaching unnecessary constitutional issues," he believed that since the nondelegation basis was narrower than the separation of powers grounds, the opinion considering the validity of H.B. 1020, § 5 should have stopped after the nondelegation analysis.[116]

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113. *Id.* at ¶¶ 82, 83 (Crothers, J., concurring and dissenting).

114. *Id.* at ¶ 84 (citing Hosp. Servs., Inc. v. Brooks, 229 N.W.2d 69, 71–72 (N.D. 1975)); *see also* Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157–159 (1984).

115. *Burgum*, 2018 ND 189, ¶ 85, 916 N.W.2d 83 (Crothers, J., concurring and dissenting) (citing State v. King, 355 N.W.2d 807, 809 (N.D. 1984)).

116. *Id.* at ¶ 86.

INDIAN LAW – JURISDICTION AND POWER TO ENFORCE CRIMINAL LAWS

Olson v. N.D. Department of Transportation

In *Olson v. N.D. Department of Transportation*,[117] Harold Olson ("Olson") appealed from a district court order which affirmed the North Dakota Department of Transportation's ("DOT") decision to revoke his driver's license.[118] Olson appealed, arguing that his arrest by a sheriff's deputy was invalid because of his status as an enrolled tribal member and because the arrest took place on tribal land.[119] Olson argued that if his arrest was invalid, the DOT did not have authority to revoke his driver's license under N.D.C.C. § 39-20-01(2).[120]

On May 13, 2017, an officer for the Mandan, Hidatsa, and Arikara ("MHA") Nation found Olson asleep at the wheel of his car in the middle of the road on tribal land.[121] Unaware that Olson was an enrolled member of the Turtle Mountain Chippewa Tribe, the MHA officer called the Mountrail County Sheriff's Office to take over the arrest.[122] A sheriff's deputy arrived and found probable cause to believe that Olson was driving under the influence and arrested him.[123] Olson refused to submit to a breath test for the deputy and was issued a report and notice form.[124]

Olson requested an administrative hearing with the DOT, where he offered his tribal identification card.[125] Olson admitted he did not have his tribal ID with him at the time of arrest, but was "pretty sure" he told the MHA officer about his enrollment status.[126] The administrative hearing officer concluded that the deputy had reasonable grounds to believe Olson was driving under the influence.[127] The administrative hearing officer further concluded

117. 2018 ND 94, 909 N.W.2d 676.
118. *Olson*, 2018 ND 94, ¶ 1, 909 N.W.2d 676.
119. *Id.* at ¶ 9.
120. *Id.* at ¶¶ 2, 9.
121. *Id.* at ¶ 2.
122. *Id.* at ¶¶ 2–3.
123. *Id.* at ¶ 3.
124. *Olson*, 2018 ND 94, ¶ 3, 909 N.W.2d 676; *see also* N.D. CENT. CODE § 39-20 (2017).
125. *Olson*, 2018 ND 94, ¶¶ 4–5, 909 N.W.2d 676.
126. *Id.* at ¶ 5.
127. *Id.*

the deputy had jurisdiction because he was acting under a request for assistance by an MHA officer.[128] Olson appealed to a district court, which affirmed the DOT's decision.[129] Olson then appealed to the North Dakota Supreme Court.[130]

N.D.C.C. § 28-32-46 controls court review of admirative agency decisions.[131] The relevant provision of § 28-32-46(1) states that a court must affirm the agency's decision unless the agency decision is found to be within one of the reasons listed in the statute.[132] Appeals from a district court ruling under § 28-32-46 are reviewed in the same manner.[133] Revocation of a driving privileges under N.D.C.C. § 39-20 are civil and separate from criminal proceedings.[134] Questions of law are subject to full review.[135] There were no disputed facts.[136]

Olson argued that his arrest was not lawful, and therefore, a prerequisite to losing his license was not met.[137] State officers have authority to arrest when the state has criminal jurisdiction.[138] Because of this, the court determined the first issue was "whether the State has criminal jurisdiction over a non-member Indian and the accompanying authority to arrest on tribal land."[139]

The court began its analysis by recognizing that only Congress can change who has criminal jurisdiction in Indian Country.[140] State authority in

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128. *Id.* at ¶ 6.

129. *Id.* at ¶ 1.

130. *Id.*

131. *Olson*, 2018 ND 94, ¶ 8, 909 N.W.2d 676.

132. *Id.*; N.D. CENT. CODE § 28-32-46 (2017) lists eight reasons for a court to overturn an agency decision: (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 the 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) 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; and (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.

133. *Olson*, 2018 ND 94, ¶ 8, 909 N.W.2d 676 (quoting Deeth v. N.D. Dep't of Transp., 2014 ND 232, ¶ 11, 857 N.W.2d 86).

134. *Id.* (citing Beylund v. Levi, 2017 ND 30, ¶ 17, 889 N.W.2d 907).

135. *Id.* (citing Valinshout v. N.D. Dep't of Transp., 2011 ND 138, ¶ 12, 799 N.W.2d 397).

136. *Id.* at ¶ 7.

137. *Id.* at ¶ 9 (citing Kroshel v. Levi, 2015 ND 185, ¶ 36, 866 N.W.2d 109). N.D. CENT. CODE § 39-20-01(2) (2017) states that driving privileges can only be revoked for refusing a chemical test after a valid arrest.

138. *Olson*, 2018 ND 94, ¶ 11, 909 N.W.2d 676 (citing State v. Wilkie, 2017 ND 142, ¶¶ 8–10, 895 N.W.2d 742).

139. *Id.* at ¶ 11.

140. *Id.* at ¶ 12 (quoting Davis v. O'Keefe, 283 N.W.2d 73, 75–76 (N.D. 1979)).

Indian Country is subject to two restrictions.[141] First, a state action is prohibited if it undermines "the right of reservation Indians to make their own laws and be ruled by them."[142] Second, state authority can be preempted by federal law.[143] The court concluded:

> As such, because the State did not elect to assume criminal jurisdiction over tribal lands,[144] the State is foreclosed from exercising criminal jurisdiction within the boundaries of the MHA because we conclude the MHA has criminal jurisdiction and state jurisdiction would undermine the MHA's right to make its own laws and be ruled by them.[145]

Olson further argued that an amendment to the Indian Civil Rights Act[146] and *United States v. Lara* confirmed that the MHA Nation had exclusive criminal jurisdiction over all Indians within its borders.[147] The court agreed, stating that Congress amended 25 U.S.C § 1301 "to grant"[148] tribes criminal jurisdiction "over all Indians."[149]

The second issue the court addressed was whether the deputy gained authority to arrest when called by the MHA officer. The state cited N.D.C.C. § 44-08-20 in support of this proposition.[150] The statute grants officers employed within North Dakota the power of a peace officer when requested by another jurisdiction.[151] However, authority to arrest must be created in the

141. *Id.* (quoting Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 147 (1984)). For more information on jurisdictional issues in Indian Country, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (Nell Jessup Newton ed., 2017).

142. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

143. *Id.* (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)).

144. The assumption of jurisdiction mentioned by the court would have occurred under a federal law that grants states civil jurisdiction over tribal land with the consent of a tribe – North Dakota has attempted to gain civil jurisdiction within Indian Country. N.D. CENT. CODE § 27-19-01 (2017). So far, no tribe has consented to the state's civil jurisdiction.

145. *Olson*, 2018 ND 94, ¶ 12, 909 N.W.2d 676.

146. 25 U.S.C. §§ 1301–1303 (2012). This amendment changed the Indian Civil Rights Act to "enlarge the *tribes'* own 'powers of self-government' to include the 'inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians,' including nonmembers." United States v. Lara, 541 U.S. 193, 198 (2004) (emphasis in original).

147. *Olson*, 2018 ND 94, ¶ 13, 909 N.W.2d 676. Neither the Indian Civil Rights Act nor *Lara* discusses a tribe's criminal jurisdiction to the exclusion of the state. *See generally Lara*, 541 U.S. 193.

148. *Olson*, 2018 ND 94, ¶ 14, 909 N.W.2d 676.

149. *Id.* at ¶ 14 (quoting *Lara*, 541 U.S. at 197–98).

150. *Id.* at ¶ 15.

151. *Id.* at ¶ 16; *see also* N.D. CENT. CODE § 44-08-20 (2017).

jurisdiction where the arrest is taking place.[152] A peace office lacks the authority to arrest in another state without authority from that state.[153]

As a corollary, the court also examined whether there was an agreement between MHA and the state to grant jurisdiction. The court analogized the present case to a previous North Dakota Supreme Court decision that also involved a DUI within the MHA boundaries.[154] However, in that case, the driver was on a right-of-way granted to the state for a highway.[155] Since there was no agreement between the MHA Nation and North Dakota to provide jurisdiction, and MHA Nation had no other law which would afford the deputy authority, the deputy did not gain authority through the MHA officer's request.[156] The court then concluded, "The MHA, through federal law, has criminal jurisdiction on tribal land over non-member Indians."[157]

Finally, the court contrasted the present case with *Minnesota v. Davis*.[158] There, the Minnesota Supreme Court held that tribal police were able to issue citations on behalf of the state under a Minnesota law.[159] The court found *Davis* was distinguishable because the underlying offenses, speeding and failing to provide proof of insurance, were civil/regulatory offenses.[160]

152. *Olson*, 2018 ND 94, ¶ 17, 909 N.W.2d 676.

153. *Id.* (citing City of Wahpeton v. Johnson, 303 N.W.2d 564, 567 (N.D. 1981); Piotrowski v. Comm'r of Pub. Safety, 453 N.W.2d 689, 691 (Minn. 1990); Minnesota v. Viver, 453 N.W.2d 713, 715–16 (Minn. Ct. App. 1990)).

154. Davis v. Dir., N.D. Dep't of Transp., 467 N.W.2d 420 (N.D. 1991).

155. *Id.* at 420–21.

156. *Olson*, 2018 ND 94, ¶ 20, 909 N.W.2d 676; *Davis* was decided six years before Strate v. A-1 Contractors, 520 U.S. 438 (1997), where the United States Supreme Court declared that the MHA Nation lost jurisdiction over a traffic accident involving non-Indians on a state highway because it took place on a right-of-way granted by the federal government that ran over trust land held for the MHA Nation.

157. *Olson*, 2018 ND 94, ¶ 20, 909 N.W.2d 676.

158. 773 N.W.2d 66 (Minn. 2009).

159. *Davis*, 773 N.W.2d at 67; MINN. STAT. § 626.90, subd. 3 (2018).

160. *Olson*, 2018 ND 94, ¶ 22, 909 N.W.2d 676 (citing *Davis*, 773 N.W.2d at 69–70).

CRIMINAL PROCEDURE – SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL DURING VOIR DIRE
State v. Decker

In *State v. Decker*,[161] defendant Kevin Frank Decker appealed a judgment entered by the district court after being found guilty of disorderly conduct.[162] Decker argued the district court created a structural constitutional error by denying his Sixth Amendment right to a public trial when court staff excluded one member of the public from jury selection proceedings.[163] Decker further argued the state failed to present sufficient evidence for the jury to find him guilty of disorderly conduct.[164] The North Dakota Supreme Court determined that the district court's exclusion of one member of the public was too trivial to amount to a structural error and that the state provided sufficient evidence to sustain the conviction.[165]

On August 11, 2016, Decker participated in protests against the Dakota Access Pipeline.[166] The protest occurred at a construction site on North Dakota state highway 1806.[167] Decker stood at the front of the crowd near a line of police tape that officers used to cordon off the site.[168] After lifting the police tape several times, Decker was warned by Officer Gruebele, who was standing immediately opposite of Decker inside the police line.[169] Decker was arrested after he began pushing against Gruebele; however, Decker argued he was pushed by the crowd.[170] The state charged Decker with disorderly conduct.[171]

During the trial on January 31, 2017, and February 1, 2017, the district court instructed sheriff's deputies to prevent potential juror tainting.[172] The district court gave this instruction because some potential jurors received

161. 2018 ND 43, 907 N.W.2d 378.
162. *Decker*, 2018 ND 43, ¶ 1, 907 N.W.2d 378.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at ¶ 2.
167. *Id.*
168. *Decker*, 2018 ND 43, ¶ 2, 907 N.W.2d 378.
169. *Id.*
170. *Id.*
171. *Id.* at ¶ 3. Under N.D. CENT. CODE § 12.1-31-01 (2017), the state's disorderly conduct statute, "An individual is guilty of a class B misdemeanor if [the individual commits one of a specified list of actions], with the intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by the individual's behavior . . . ."
172. *Decker*, 2018 ND 43, ¶ 3, 907 N.W.2d 378.

copies of a pamphlet on jury nullification and "voting your conscience" during a previous trial scheduled in December 2016.[173] Decker and another defendant objected and asked for mistrials based on denial of the right to a public trial.[174]

The main argument made by Decker revolved around an attorney who was unconnected to the cases heard that day. Deputies restricted access to the courtroom during voir dire and denied attorney Bruce Nestor the ability to enter the courtroom.[175] The court staff testified they were instructed by the court to keep potential jurors separate from the public, and due to a large number of potential jurors in the jury pool, no seats would be available to the public.[176]

The North Dakota Supreme Court granted review to decide Decker's claim of a violation of his Sixth Amendment right to public trial.[177] Because of the constitutional implication, the court used a de novo standard and reviewed the case for any structural errors. A structural error applies in a case where a violation disrupts the framework of the trial as opposed to a mere procedural error.[178] The court applied four factors derived from a 1984 United States Supreme Court case to determine if a structural error occurred when the courtroom in Decker's trial was closed during voir dire. Those factors from *Waller v. Georgia*[179] are: (1) the claiming party must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.[180]

North Dakota adopted the standard set by *Waller* in 1989 and added that the trial court must make a finding regarding the violation of the structure of the trial prior to closure of the courtroom.[181] In making its decision, the North Dakota Supreme Court focused on the fact that the district court did not specifically order the closure of the courtroom.[182] The supreme court ruled that even though the district court did not intentionally close the courtroom to the

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173. *Id.*
174. *Id.*
175. *Id.* at ¶ 4.
176. *Id.*
177. *Id.* at ¶ 6.
178. *Decker*, 2018 ND 43, ¶ 6, 907 N.W.2d 378 (citing Arizona v. Fulminate, 499 U.S. 279, 309–10 (1991)).
179. 467 U.S. 39 (1984).
180. *Waller*, 467 U.S. at 48.
181. *Decker*, 2018 ND 43, ¶ 9, 907 N.W.2d 378 (citing State v. Klem, 438 N.W.2d 798, 802 (N.D. 1989)).
182. *Id.* at ¶ 12.

public during voir dire proceedings, the closure still raised Sixth Amendment concerns.[183]

The court continued to analyze whether the closing of the courtroom by the sheriff's deputies was a trivial closure. A trivial standard[184] was applied to determine this. While applying this standard, the court determined Decker's right to a public trial was not violated because the courtroom was not formally closed.[185] The court came to this determination based on the presence of members of the press and public during voir dire. The court further stated, "Any potential inconsistency or impairment of the right to a public trial was mitigated by the presence of press and public during jury selection."[186]

Having addressed the issue of whether Decker's Sixth Amendment right to a public trial was violated, the court moved onto Decker's second claim. Decker argued the evidence presented at trial was insufficient to convict him of disorderly conduct.[187] Because Decker argued the conviction was based on insufficient evidence, the court reviewed the evidence and reasonable inferences most favorable to the verdict to ascertain if there was substantial evidence to warrant the conviction.[188]

Decker's primary argument was that he lacked the requisite intent for the crime because he had a legitimate purpose in protesting at the site, and that no testimony established he intended to adversely affect the safety, security, and privacy of another person.[189] The court quickly dismissed this argument, holding Decker's right to a public trial was not violated because the jury was able to hear testimony from the officer involved and found his account more credible. The court further held the actions performed by Decker, yelling at an officer, refusing multiple officer requests, and scuffling with officers, each had been found independently sufficient for disorderly conduct convictions.[190] Therefore, the court affirmed the conviction.

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183. *Id.*

184. *See* Peterson v. Williams, 85 F.3d 39, 42 (2d Cir. 1996) ("A trivial standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.'").

185. *Decker*, 2018 ND 43, ¶ 15, 907 N.W.2d 378.

186. *Id.*

187. *Id.* at ¶ 16.

188. *Id.* (citing State v. Noorlun, 2005 ND 189, 705 N.W.2d 819).

189. *Id.* at ¶ 17.

190. *Id.*

SEARCHES AND SEIZURES – FOURTH AMENDMENT AND REASONABLENESS IN GENERAL
State v. Broom

In *State v Broom*,[191] the defendant, Jessica Ann Broom, appealed a judgment of a conditional guilty plea to possession of a controlled substance with the intent to deliver.[192] The North Dakota Supreme Court determined that the police officer's invasive search of Broom's person violated her rights under the Fourth Amendment to the United States Constitution and N.D. Const. art. I, § 8.[193]

On March 3, 2017, Officers Jones and Girodat checked the license plate of a red 1998 Pontiac Grand Prix, which was stopped in front of them during their normal patrol.[194] The license plate check revealed that the car was stolen, causing the officers to stop and approach the vehicle.[195] Upon approaching the vehicle, the officers repeatedly instructed the occupants to put their hands up and the driver immediately complied.[196] However, the passenger, Jessica Broom, did not comply with the officers' orders, moved side to side in the vehicle, and made furtive movements in the passenger compartment.[197] The officers immediately noticed Broom from previous drug arrests.[198]

Officer Gallagher, a female officer, arrived at the scene and approached the officers as Broom was being handcuffed by Officer Girodat.[199] Officer Jones and Officer Girodat explained to Officer Gallagher that Broom was known to conceal items on her person, did not comply with commands, and appeared to be moving around in the vehicle after the stop.[200] Officer Gallagher conducted a pat-down of Broom's person and felt a large, soft bulge in Broom's bra that Broom claimed was cash.[201] When Officer Gallagher retrieved the money from the bra to verify Broom's claim, she also discovered a baggie filled with other baggies, a small glass vial, and a rolled up ten-dollar bill.[202] Officer Gallagher then put Broom in the back of her police car and placed her under arrest.[203]

191. 2018 ND 135, 911 N.W.2d 895.
192. *Broom*, 2018 ND 135, ¶ 1, 911 N.W.2d 895.
193. *Id.* at ¶ 1.
194. *Id.* at ¶ 2.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Broom*, 2018 ND 135, ¶ 2, 911 N.W.2d 895.
199. *Id.* at ¶ 3.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

The district court denied Broom's motion to suppress the evidence that was obtained in the search, finding that under the totality of the circumstances the officers had sufficient concern for their safety, and therefore, the search was permissible under the Fourth Amendment.[204] Broom appealed the district court's decision, arguing that Officer Gallagher exceeded the scope of a permissible *Terry* frisk by searching in her bra, and as a result, the evidence obtained should have been suppressed.[205]

Under the Fourth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, and Article I, Section 8, of the North Dakota Constitution, individuals are protected from unreasonable searches and seizures.[206] A law enforcement officer may conduct a limited *Terry* frisk, or a pat-down search, of the outer clothing of a person only when the officer possesses an articulable suspicion that an individual is armed and dangerous.[207] When an outside clothing search reasonably suggests the objects might be a weapon, the searching officer is entitled to continue the search to the suspect's inner garments to determine whether the object is in fact a weapon.[208] The officer does not need to be absolutely certain that the individual is armed; however, a reasonably prudent person in the circumstances must believe that his or her own safety or the safety of others was in danger at the time.[209]

The state argued that Officer Gallagher's more invasive search of Broom's person was reasonable due to the totality of the circumstances, which was similar to two previous decisions.[210] In *Heitzmann*, for example, the officer was aware that the defendant's vehicle contained an unloaded pistol, and therefore, the officer conducted a proper inner-garment search in concern for the officer's safety.[211] In *Tollefson*, the officer felt a hard cylindrical object three to four inches long, which reasonably suggested that it was a weapon, and thus, the court found that the inner-garment search of the defendant was proper because of the officer's concern for her safety.[212]

Although Broom did not comply with the officers and appeared to be making furtive movements in the vehicle, neither Officer Jones nor Officer Girodat testified that they were in fear for their safety or that there was a true

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204. *Broom*, 2018 ND 135, ¶ 4, 911 N.W.2d 895.
205. *Id.* at ¶ 5.
206. *Id.* at ¶ 7 (citing State v. Kaul, 2017 ND 56, ¶ 4, 891 N.W.2d 352).
207. *Id.* at ¶ 8 (citing State v. Heitzmann, 2001 ND 136, ¶¶ 11–13, 632 N.W.2d 1).
208. *Id.*
209. *Id.* (citing State v. Heitzmann, 2001 ND 136, ¶ 13, 632 N.W.2d 1).
210. *Broom*, 2018 ND 135, ¶ 9, 911 N.W.2d 895.
211. *Id.*; *see* State v. Heitzmann, 2001 ND 136, ¶¶ 14–15, 632 N.W.2d 1.
212. *Broom*, 2018 ND, 139, ¶ 9, 911 N.W.2d 895; *see* State v. Tollefson, 2003 ND 73, ¶¶ 14–15, 600 N.W.2d 575.

concern that Broom was armed and dangerous.[213] Officer Gallagher testified that the other officers informed her of Broom's history of concealing contraband on her person, which concerned the officers that Broom may have been armed and attempting to hide a weapon in the car.[214] Also, Officer Gallagher testified that the large, soft bulge in Broom's bra did not feel like anything similar to a weapon, gun, or knife.[215]

Uncertainty as to what the object is that a person is concealing does not justify a more intrusive search; however, an officer may conduct this sort of search when the pat-down reasonably suggests the object might be a weapon.[216] Thus, the North Dakota Supreme Court found that under the totality of the circumstances, Officer Gallagher did not have a reasonable and articulable suspicion that Broom was armed and dangerous after conducting the outside clothing pat-down in order to justify the more intrusive search.[217] Since Broom's rights were violated under the Fourth Amendment and the North Dakota Constitution, the court reversed the criminal judgment and remanded for further proceedings, concluding that the district court erred in denying Broom's motion to suppress evidence.[218]

213. *Broom*, 2018 ND 135, ¶ 10, 911 N.W.2d 895.
214. *Id.* at ¶ 11.
215. *Id.* at ¶ 14.
216. *Id.* at ¶ 13.
217. *Id.*
218. *Id.* at ¶¶ 15–16.

CRIMINAL LAW – POST-CONVICTION RELIEF – RULE OF CONSTITUTIONAL LAW RETROACTIVE ON COLLATERAL REVIEW
Parshall v. State

In *Parshall v. State*,[219] Russell Bruce Parshall pleaded guilty to driving under the influence on July 28, 2015.[220] Previously, North Dakota imposed criminal punishment on drivers suspected of driving under the influence who refused to submit to a blood, breath, or urine test.[221] The wording of Parshall's plea would become relevant, as it appeared differently in different sections.[222] Parshall's Rule 43[223] Change of Plea and Sentencing Appearance Waiver did not include the parenthetical "(First Offense Refusal)," indicating the offense was for refusing a blood, breath, or urine test.[224] However, the "formal plea agreement section of the document" and Parshall's criminal conviction both included the parenthetical.[225]

After *Birchfield v. North Dakota*, which found imposition of criminal penalties for refusing to submit to warrantless blood tests to be a violation of the Fourth Amendment,[226] Parshall filed for post-conviction relief. Parshall claimed the *Birchfield* holding "was a retroactively applicable substantive rule of constitutional law that prohibited the State from imposing criminal liability for refusing a warrantless blood test."[227] The district court denied Parshall's petition, finding that he pleaded guilty to driving under the influence generally, not just refusal.[228] Additionally, Parshall admitted to the factual basis surrounding his arrest, including the officer's observations and failing the field sobriety test.[229] Because of the guilty plea for driving under the influence generally and Parshall's admission of facts, the district court declined to rule on *Birchfield's* retroactivity, stating "The Court need not make that ruling, as the Court finds that the ruling in *Birchfield* made the statute regarding conviction by refusal to provide a blood sample unconstitutional from the moment of passage."[230]

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219. 2018 ND 69, 908 N.W.2d 434.
220. *Parshall*, 2018 ND 69, ¶ 2, 908 N.W.2d 434.
221. Birchfield v. North Dakota, 136 S. Ct. 2160, 2162–63 (2016).
222. *Parshall*, 2018 ND 69, ¶ 2, 908 N.W.2d 434.
223. N.D. R. CRIM. P. 43.
224. *Parshall*, 2018 ND 69, ¶ 2, 908 N.W.2d 434.
225. *Id.*
226. *Birchfield*, 136 S. Ct. at 2184.
227. *Parshall*, 2018 ND 69, ¶ 3, 908 N.W.2d 434.
228. *Id.*
229. *Id.*
230. *Id.* at ¶ 4.

Post-conviction relief of criminal judgments is civil in nature,[231] and a district court's findings of fact will not be disturbed unless they are clearly erroneous.[232] "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law . . . ."[233] Questions of law are fully reviewable on appeal of a post-conviction proceeding.[234] Plea agreements are interpreted according to general contract principles, with appellate courts looking for errors of interpretation.[235]

The state asserted the same argument it presented at trial: Parshall admitted to driving under the influence generally, not just refusing to submit to a blood test.[236] However, the North Dakota Supreme Court disagreed, stating "the plain language indicated" that Parshall was pleading guilty to refusing to submit to a blood test.[237] This plain language came from the use of the parenthetical in the plea agreement signed by Parshall and the criminal judgment itself.[238]

Having decided that Parshall pleaded guilty to refusal to submit to a blood test, not to driving under the influence generally, the court began to discuss how *Birchfield* would affect his conviction.[239] Parshall argued that *Birchfield* retroactively voided his conviction, and that he was entitled to a return of the fine and fees he paid as a result.[240] "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give effect to that rule."[241] States are required to return funds when a conviction is later invalidated.[242] However, the majority declined to present an opinion on these issues.[243] Instead, it reversed the district court's order and remanded because the district court had not ruled on these issues.[244]

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231. *Id.* at ¶ 5 (quoting Burke v. State, 2012 ND 169, ¶ 101, 820 N.W.2d 349).

232. *Id.*; N.D. R. CIV. P 52(a)(6).

233. *Parshall*, 2018 ND 69, ¶ 5, 908 N.W.2d 434 (quoting Greywind v. State, 2004 ND 213, ¶ 5, 689 N.W.2d 390).

234. *Id.* (quoting Peltier v. State, 2003 ND 27, ¶ 6, 657 N.W.2d 238).

235. *Id.* at ¶ 7 (citing State v. Lium, 2008 ND 33, ¶ 12, 744 N.W.2d 775); *see* State v. Hamann, 262 N.W.2d 495, 502 (N.D. 1978); State v. Thorstad, 261 N.W.2d 899, 902 (N.D. 1978); Gen. Elec. Credit Corp. of Tenn. v. Larson, 387 N.W.2d 734, 736 (N.D. 1986).

236. *Parshall*, 2018 ND 69, ¶ 8, 908 N.W.2d 434.

237. *Id.* (citing Bakken v. Duchscher, 2013 ND 33, ¶ 16, 827 N.W.2d 17).

238. *Id.*

239. *Id.* at ¶ 9.

240. *Id.*

241. *Id.* (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016)).

242. *Parshall*, 2018 ND 69, ¶ 9, 908 N.W.2d 434 (citing Nelson v. Colorado, 137 S. Ct. 1249, 1255–56 (2017)).

243. *Id.* at ¶¶ 9–10.

244. *Id.* (citing Overboe v. Farm Credit Serv. of Fargo, 2001 ND 58, ¶ 14, 623 N.W.2d 372).

Justice McEvers concurred in the judgment to point out that "Parshall could have moved the district court to allow him to withdraw his guilty plea or pleas under the principles of N.D.R.Crim.P 11(d)(2), if he can show a manifest prejudice."[245] Justice McEvers argued that showing the statutory provision for a criminal conviction was unconstitutional demonstrated manifest injustice.[246]

Justice McEvers was skeptical that fines and fees could be refunded, however.[247] The district court sentenced Parshall for driving under the influence and failure to submit to the blood test concurrently and did not specify if any particular fee amount applied to either charge.[248] Justice McEvers also pointed out that in a case Parshall relied on in his brief, the petitioners were completely exonerated by the new rule of constitutional law.[249] Parshall, on the other hand, would still have been guilty of a class B misdemeanor driving with a suspended license offense.[250] This difference, coupled with the fact that these fines would be reasonable for either charge on their own, led Justice McEvers to suggest that Parshall would need to withdraw both of his guilty pleas in order to seek recovery of the fines and fees.[251]

Justice Jensen concurred in part and dissented in part.[252] While Justice Jensen agreed with the majority that the plea agreement was limited to refusal to submit to a blood test, Justice Jensen dissented with the majority's decision to remand on whether *Birchfield* affected Parshall's conviction.[253] Justice Jensen argued that the effect of *Birchfield* on Parshall's conviction was a question of law raised at the district level and properly raised on appeal.[254] Because of these factors, Justice Jensen stated that "resolution of this issue on appeal was properly requested, and it is appropriate to resolve the issue within this appeal."[255] With this in mind, Justice Jensen provided his analysis for how *Birchfield* impacted Parshall's case.

After providing a more thorough summary of *Birchfield*,[256] Justice Jensen provided the three-part test used by the United States Supreme Court to

245. *Id.* at ¶ 12.
246. *Id.* at ¶ 13 (quoting Lindsey v. State, 2014 ND 174, ¶ 16, 852 N.W.2d 383).
247. *Id.* at ¶ 14.
248. *Parshall*, 2018 ND 69, ¶ 5, 908 N.W.2d 434.
249. *Id.* (citing Nelson v. Colorado, 137 S. Ct. 1249 (2017)).
250. *Id.*
251. *Id.*
252. *Id.* at ¶ 16.
253. *Id.*
254. *Parshall*, 2018 ND 69, ¶ 18, 908 N.W.2d 434
255. *Id.*
256. *Id.* at ¶¶ 19–20.

determine when a right applies retroactively:[257] (1) determine when the conviction became final; (2) decide if the Constitutional precedent of that time would have compelled the rule,[258] and; (3) determine whether the rule "falls within either of the two exceptions to nonretroactivity."[259] The exceptions are: (1) "the rule is substantive or places a class of private conduct beyond the power of the State," or (2) the new rule is "a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[260]

For the first element, North Dakota law determines when a conviction becomes final.[261] One of the ways a conviction becomes final is when the time for an appeal to the North Dakota Supreme Court expires.[262] Parshall's time to appeal his conviction expired on August 27, 2015, so Parshall met the first element.[263]

The dissent then examined whether the rule from *Birchfield* was new to meet the second element.[264] A new rule is announced when a case's result was not dictated by existing precedent.[265] A case is controlled by precedent when a conviction was "apparent to all reasonable jurists" when the conviction became final.[266] The dissent argued that language like "[l]acking such guidance" in the *Birchfield* opinion indicated that the rule was new, meeting the second element.[267]

Finally, the dissent considered whether the *Birchfield* rule met either exception to nonretroactivity.[268] Specifically, Justice Jensen examined whether the rule was substantive or procedural.[269] A rule is substantive if it alters the range of conduct punished by law.[270] By holding that imposing criminal penalties for refusing to submit to a warrantless blood test unconstitutional, *Birchfield* "altered the range of conduct that the law punishes" and therefore

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257. *Id.* at ¶ 21; *see* Beard v. Banks, 542 U.S. 406, 411 (2004).

258. *Beard*, 542 U.S. at 411 ("That is, the court must decide whether the rule is actually 'new.'").

259. *Parshall*, 2018 ND 69, ¶ 21, 908 N.W.2d 434 (quoting *Beard*, 542 U.S. at 411).

260. *Id.* at ¶ 21 (citing Teague v. Lane, 489 U.S. 288, 311 (1989)).

261. N.D. CENT. CODE § 29-32.1-01(2) (2017).

262. *Id.*

263. *Parshall*, 2018 ND 69, ¶ 22, 908 N.W.2d 434.

264. *Id.* at ¶ 23.

265. *Id.* (quoting Burton v. Fabian, 612 F.3d 1003, 1008 (8th Cir. 2010)).

266. *Id.* (quoting Burton v. Fabian, 612 F.3d 1003, 1008 (8th Cir. 2010)).

267. *Id.* (quoting Birchfield v. North Dakota, 136 S. Ct. 2160, 2176 (2016)).

268. *Id.* at ¶ 24.

269. *Parshall*, 2018 ND 69, ¶ 24, 908 N.W.2d 434.

270. *Id.* (citing Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).

satisfied the third prong of the test for retroactive application.[271] The dissent compared this outcome to *Welch v. United States*.[272]

In *Welch*, the United States Supreme Court examined whether a clause in the Armed Career Criminal Act, which had been found void for being unconstitutionally vague the previous year, altered the range of punishable criminal conduct.[273] The United States Supreme Court found that the voided clause could "no longer mandate or authorize any sentence" and was therefore substantive, not procedural.[274]

Before concluding, the dissent also discussed *Johnson v. State*,[275] a Minnesota Court of Appeals case that reached the decision that *Birchfield* was procedural, not substantive. However, after the *Parshall* case was decided, the Minnesota Supreme Court reversed *Johnson*, finding *Birchfield* was substantive.[276] Although not discussed in the dissent, it is noteworthy that the Minnesota Supreme Court used the same analytical framework as the dissent and found that the *Birchfield* rule was retroactive.[277] And indeed, only three months after the decision in *Parshall*, the North Dakota Supreme Court revisited *Birchfield's* retroactivity.[278] This time, in an opinion written by Chief Justice VandeWalle that mirrored Justice Jensen's *Parshall* dissent and the Minnesota Supreme Court's decision, the court determined that *Birchfield* applied retroactively on collateral review.[279]

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271. *Id.*
272. 136 S. Ct. 1257 (2016).
273. *Welch*, 136 S. Ct. at 1262 (citing Johnson v. United States, 135 S. Ct. 2551, 2560 (2015)).
274. *Id.* at 1268.
275. 906 N.W.2d 861 (Minn Ct. App. 2018).
276. Johnson v. State, 916 N.W.2d 674, 684 (Minn. 2018).
277. *See id.* at 681–84.
278. Morel v. State, 2018 ND 141, 912 N.W.2d 299.
279. *Id.* at ¶ 18.