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SEARCHES AND AUTOMOBILES - GROUNDS OR CAUSE: ASSESSING THE CONSTITUTIONALITY OF WARRANTLESS PRE-ARREST BREATH TESTS AND THE GROUNDS ON WHICH SUCH TESTS MAY BE REQUESTED

Barrios-Flores v. Levi, 2017 ND 117, 894 N.W.2d 888.

ABSTRACT

In *Barrios-Flores v. Levi*, the North Dakota Supreme Court *held* warrantless pre-arrest breath tests are not an unreasonable search under the Fourth Amendment. Additionally, the court found that under N.D.C.C. § 39-20-14, and based on the decisions of other state courts, law enforcement may request a preliminary screening test based on reasonable suspicion that a driver's body contains alcohol. This decision hinges on the United States Supreme Court's decision in *Birchfield v. North Dakota*, which held that warrantless breath tests given incident to an arrest do not violate the Fourth Amendment. In *Barrios-Flores*, the North Dakota Supreme Court found that preliminary breath tests bear a similar lack of intrusiveness as a breath test administered incident to an arrest. The court also found that nothing in *Birchfield* changes its previous analysis in *State v. Baxter*, which allowed preliminary breath tests to be administered on the basis of reasonable suspicion that a driver's body contains alcohol. *Barrios-Flores* analyzes an issue involving the constitutionality of warrantless breath tests that *Birchfield* did not. Its holding is important for many involved in DUI proceedings including defendants, defense attorneys, and courts. North Dakota has tried to combat drunk driving through a number of different means. The court's holding clearly does not want to impede upon or restrict these measures. Therefore, the court held that warrantless pre-arrest breath tests do not violate the Fourth Amendment, and they may be requested based on reasonable suspicion that a driver's body contains alcohol.

I. FACTS

In June of 2015, a law enforcement officer stopped a vehicle driven by Barrios-Flores for speeding.[1] The officer testified at an administrative hearing that Barrios-Flores had watery bloodshot eyes, appeared confused, admitted consuming alcohol, and appeared to have difficulty maintaining a normal walk while exiting his vehicle.[2] Before asking Barrios-Flores to submit to a preliminary onsite screening test of his breath, the officer read Barrios-

1. Barrios-Flores v. Levi, 2017 ND 117, ¶ 2, 894 N.W.2d 888, 889.
2. *Id.*

Flores the North Dakota implied consent advisory[3] in English.[4] The officer also used a language interpretation service to recite the advisory to Barrios-Flores in Spanish.[5] After reading Barrios-Flores the implied consent advisory, Barrios-Flores refused to take a preliminary onsite screening test of his breath.[6] The officer then arrested Barrios-Flores, repeated the implied consent advisory, and asked him to submit to a warrantless breath test incident to the arrest.[7] Barrios-Flores did not respond and was deemed to have refused the request for a breath test incident to arrest.[8]

Barrios-Flores requested an administrative hearing to contest the Department of Transportation's intention to revoke his driving privileges.[9] The hearing officer found that the law enforcement officer had reason to believe Barrios-Flores was involved in a moving traffic violation, was under the influence of alcohol, and that Barrios-Flores had refused to take the onsite screening test.[10] Barrios-Flores' driving privileges were revoked for two years for refusing the onsite screening test.[11] The district court affirmed the Department's decision.[12] Barrios-Flores appealed the decision to the North Dakota Supreme Court.[13] The North Dakota Supreme Court affirmed.[14]

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3. The implied consent advisory states that any individual who operates a motor vehicle on a public roadway or on public or private areas in the state are deemed to have given consent an onsite screening test of an individual's breath for purposes of estimating the alcohol concentration of that individual's breath upon request of a law enforcement officer who has reason to believe that the individual's body contains alcohol. *See* N.D. CENT. CODE § 39-20-14(1) (2017); *see also* N.D. CENT. CODE § 39-20-01(1) (2017) (stating that drivers are deemed to give consent to blood, breath, and urine tests after being placed under arrest).

4. *Barrios-Flores*, 2017 ND 117, ¶ 2, 894 N.W.2d 888.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* A law enforcement officer must inform the individual that they are required to submit to the test under North Dakota law and that refusal of such test may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. In addition, the law enforcement officer must inform the individual that refusing to take a breath or urine test is a crime punishable in the same manner as driving under the influence. N.D. CENT. CODE § 39-20-01(3)(a) (2017).

9. *Id.* ¶ 3, 894 N.W.2d at 889. Before issuing an order of suspension, revocation, or denial under section 39-20-04 or 39-20-04.1, the director shall afford that person an opportunity for a hearing if the person mails or communicates by other means authorized by the director a request for the hearing to the director within ten days after the date of issuance of the temporary operator's permit. N.D. CENT. CODE § 39-20-05(1) (2017).

10. *Barrios-Flores*, ¶ 3, 894 N.W.2d at 889.

11. *Id.*

12. *Id.* Any person whose operator's license or driving privileges have been suspended, revoked, or denied, by the decision of a hearing officer through an administrative hearing may appeal within seven days after the date of such hearing. N.D. CENT. CODE § 39-20-06(1) (2017).

13. *Barrios-Flores*, ¶ 3, 894 N.W.2d at 889.

14. *Id.* ¶ 1, 894 N.W.2d at 894.

On appeal, Barrios-Flores argued that law enforcement officers did not have reasonable articulable suspicion that he was driving under the influence.[15] Barrios-Flores also argued that North Dakota's implied consent requirement violates the Fourth Amendment's protection against unreasonable searches and seizures.[16]

II. LEGAL BACKGROUND

Prior to *Barrios-Flores v. Levi*, the North Dakota Supreme Court, in *State v. Baxter*, was presented with the question of whether a law enforcement officer must have probable cause before a warrantless pre-arrest breath test may be requested or if the test may be requested on a basis of reasonable suspicion.[17] The *Baxter* court held that a warrantless pre-arrest breath test may be requested on the basis of reasonable suspicion.[18] Recently, in *Birchfield v. North Dakota*, the United States Supreme Court determined the constitutionality of warrantless breath and blood tests administered incident to an arrest.[19] The Court held that breath tests, but not blood tests, may be administered without a warrant incident to arrest.[20]

A. N.D.C.C. § 39-20-14 PERMITTING BREATH SCREENING TESTS

Under North Dakota law, motorists are deemed to have given consent to an onsite screening test of an individual's breath upon the request of a law enforcement officer if that officer has reason to believe that the individual's body contains alcohol.[21] At the time, N.D.C.C. § 39-20-14(1) stated that the officer must inform the individual that North Dakota law requires the individual to submit to the test, and that refusal of the test is a crime and may result in a revocation of that individual's driving privileges for at least 180 days and up to three years.[22] If such individual refuses to submit to such screening test, none may be given, but such refusal is admissible in court

15. Brief for Appellant at ¶ 22, Barrios-Flores v. Levi, 2017 ND 117, 894 N.W.2d 888 (No. 20160103).

16. Brief for Appellant, *supra* note 15, at ¶ 23.

17. State v. Baxter, 2015 ND 107, 863 N.W.2d 208.

18. *Id.* ¶ 10, 863 N.W.2d at 213.

19. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).

20. *Id.* at 2185.

21. N.D. CENT. CODE § 39-20-14(1) (2016).

22. N.D. CENT. CODE § 39-20-14(3) (2016). Under the current North Dakota statute, a law enforcement officer no longer has to state that refusal to take the test is a crime. *See* N.D. CENT. CODE § 39-20-14(1) (2017).

proceedings if the driver was arrested in violation of N.D.C.C. § 39-08-01[23] and did not take any additional tests requested by the officer.[24] Additionally, such refusal is sufficient grounds to revoke such individual's license or permit to drive.[25]

B. THE REASONABLE SUSPICION STANDARD ESTABLISHED IN *BAXTER*

In 2015, the North Dakota Supreme Court decided *State v. Baxter*.[26] The court in *Baxter* analyzed whether an onsite screening test may be administered on the basis of reasonable suspicion or probable cause.[27] The court held that the statutory language of N.D.C.C. § 39-20-14(1) requires reasonable suspicion of driving under the influence before a law enforcement officer may request an onsite screening test.[28]

The decision in *Baxter* accords with the view held by the vast majority of courts that field sobriety testing may be requested on the basis of reasonable, articulable suspicion of driver intoxication.[29] Courts generally have agreed that preliminary breath tests are not unconstitutional because they do not require probable cause to administer the preliminary breath test (also known as a PBT).[30] The *Baxter* court agreed with the vast majority of other courts that probable cause is not required before an onsite screening test may be offered by a law enforcement officer.[31]

Baxter relied heavily on the Vermont Supreme Court's decision in *State v. McGuigan*.[32] The Vermont Supreme Court considered whether probable cause is constitutionally necessary to support a request for a preliminary breath test.[33] The Vermont court relied on the balancing test established in

23. N.D. CENT. CODE § 39-08-01 is North Dakota's DUI statute prohibiting individuals from driving or being in actual physical control of a vehicle if that individual's blood alcohol content is above .08% by weight. *See* N.D. CENT. CODE § 39-08-01(1) (2017).

24. N.D. CENT. CODE § 39-20-14(3) (2016).

25. *Id.*

26. State v. Baxter, 2015 ND 107, 863 N.W.2d 208.

27. *Id.* ¶¶ 6-12, 863 N.W.2d at 211-13.

28. *Id.* ¶ 10, 863 N.W.2d at 213.

29. *Id.* ¶ 9, 863 N.W.2d at 212 (citing State v. Royer, 276 Neb. 173, 753 N.W.2d 333, 341 (2008), and cases collected therein; State v. Bernokeits, 423 N.J. Super. 365, 32 A.3d 1152, 1157-58 (App. Div. 2011), and cases collected therein; State v. Candace S., 274 P.3d 774, 778 (N.M. Ct. App. 2011)).

30. *Id.* ¶ 10, 863 N.W.2d at 213 (citing 61A C.J.S. Motor Vehicles § 1593 (2012)).

31. *Id.*

32. *Baxter*, 2015 ND 107, ¶ 10, 863 N.W.2d 208.

33. State v. McGuigan, 2008 VT 111, 184 Vt. 441, 965 A.2d 511, 516-17.

Terry v. Ohio[34] and found that the "level of intrusion occasioned by the administration of the tests was 'outweighed by the strong law enforcement interest in attempting to keep a suspected drunk driver off the roads.'"[35] The *Baxter* court relied heavily on the conclusion in *McGuigan* that found it reasonable under the Fourth Amendment "for an officer to administer a PBT to a suspect if she can point to specific, articulable facts indicating that an individual has been driving under the influence of alcohol."[36] Based on the findings of other courts, and because of the reasoning used in *McGuigan*, the *Baxter* court found that onsite screening tests may be administered based on reasonable suspicion rather than probable cause.[37]

Baxter appealed to the Supreme Court and certiorari was granted.[38] The Supreme Court remanded the case back to the North Dakota Supreme Court in light of *Birchfield v. North Dakota*.[39] The North Dakota Supreme Court vacated its opinion in *Baxter* and remanded to the district court to develop the issue involving refusals of a pre-arrest breath test.[40] Because of the vacated *Baxter* decision, the court was once again tasked, in *Barrios-Flores*, with determining whether a preliminary breath test may be administered on a basis of reasonable suspicion rather than probable cause.

C. CONSTITUTIONALITY OF WARRANTLESS BREATH TESTS ADMINISTERED INCIDENT TO ARREST DETERMINED IN *BIRCHFIELD*

In *Birchfield v. North Dakota*,[41] the United States Supreme Court consolidated three implied-consent cases to determine the constitutionality of warrantless breath and blood tests administered incident to a lawful arrest for drunk driving.[42] The Court's decision reaffirmed that "the taking of a blood sample or the administration of a breath test is a search."[43] The Court

34. Terry v. Ohio, 88 S. Ct. 1868 (1968). The Court in *Terry* held that a police officer, prior to an arrest, may conduct a carefully limited search of an individual's outer clothing in an attempt to discover weapons which might be used to assault him. *Id.* at 1884-85. Since *Terry*, courts have held that some searches implicate such limited intrusions on individual privacy that they are justified by substantial law enforcement interests and may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity. *See* Michigan v. Summers, 101 S. Ct. 2587 (1981).

35. *Baxter*, ¶ 10, 863 N.W.2d at 212.

36. *Id.* ¶¶ 10-11, 863 N.W.2d at 212-13.

37. *Id. see infra* Part II(C).

38. *See* Baxter v. North Dakota, 136 S. Ct. 2539 (2016).

39. *Id.*

40. Baxter v. North Dakota, 2016 ND 181, 885 N.W.2d 64.

41. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).

42. *Id.* at 2160.

43. *Id.* at 2173.

acknowledged that a search warrant must usually be secured to conduct a search.[44] The Court held that a warrant must be secured in order to administer a blood test, but the Fourth Amendment permits warrantless breath tests administered incident to an arrest.[45]

In making its decision, the Court considered the impact of blood and breath tests on individual privacy interests.[46] First, the Court held breath tests do not "implicat[e] significant privacy concerns."[47] The Court determined that the physical intrusion of a breath test is almost negligible because breath tests "do not require piercing the skin" and "entail a minimum of inconvenience."[48] The Petitioner argued that breath tests do involve significant intrusion because the arrestee is required to place the mouthpiece of the machine into his or her mouth.[49] Striking down this argument, the Court compared a breath test to the act of drinking a beverage out of a straw, which is a common practice that is neither painful nor strange.[50]

Petitioner also argued that a breath test was a significant intrusion because it required "deep lung air" rather than an ordinary amount of air routinely exhaled by humans in public.[51] The Court disagreed with this argument by claiming that humans do not have a possessory interest or emotional attachment to any of the air in their lungs.[52] The Court advanced its argument by pointing out that exhalation is a natural process that is necessary for human life, and that the air from a person's lungs would be exhaled with or without the test.[53] The Court also hinged its argument on two prior cases involving DNA testing.[54] The Court in *Maryland v. King*[55] held that swab-

44. *Id*.
45. *Id*. at 2185.
46. *Id*. at 2176.
47. *Birchfield*, 136 S. Ct. at 2176 (citing Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 609 (1989)).
48. *Id*. (quoting *Skinner*, 489 U.S. at 609).
49. *Id*. at 2177.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Birchfield*, 136 S. Ct. at 2177.
54. *Id*.
55. 133 S. Ct. 1958 (2013).

bing the inside of a person's cheek to obtain DNA was a negligible intrusion.[56] In *Cupp v. Murphy*,[57] the Court held that scraping underneath a person's fingernails was a very limited intrusion.[58] The Court determined that a breath test is no more intrusive than either of these procedures.[59]

Second, the Court held that breath tests are not overly invasive to an individual's expectation of privacy because they only reveal a minimal amount of information.[60] The Court contrasted breath tests with the DNA test administered in *King*, which put into the hands of law enforcement a sample from which a wealth of highly personal information was able to be obtained.[61] Unlike DNA tests, breath tests only provide an individual's BAC level, and no sample of anything is left in the hands of law enforcement.[62]

Finally, the Court determined that a breath test does not enhance the embarrassment that is inherent in an arrest.[63] Just like blowing into a straw, the Court reasoned that a breath test is not an inherently embarrassing task.[64] The Court further reiterated the fact that most tests are administered in private at a police station, in a police car, or in a mobile testing facility, out of public view.[65]

The *Birchfield* Court only analyzed the constitutionality of warrantless breath tests administered incident to an arrest. It did not consider the constitutionality of warrantless breath tests administered prior to an arrest (preliminary breath tests). This unaddressed issue was what the North Dakota Supreme Court analyzed in *Barrios-Flores*.

III. ANALYSIS

In *Barrios-Flores v. Levi*, the North Dakota Supreme Court analyzed the legality of warrantless pre-arrest breath screening tests in the context of an administrative license revocation hearing.[66] The court held that a law enforcement officer may administer a preliminary breath screening test based

56. *Id.* at 1969.
57. 412 U.S. 291 (2000).
58. *Id.* at 296.
59. *Birchfield*, 136 S. Ct. at 2177.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Birchfield*, 136 S. Ct. at 2177.
66. Barrios-Flores v. Levi, 2017 ND 117, ¶ 11, 894 N.W.2d 888, 891. Under N.D. CENT. CODE § 39-20-05(3), the limited scope of an administrative hearing for refusing to submit to an onsite screening test requires a determination of: (1) whether the law enforcement officer had reason to believe the person committed a moving traffic violation or was involved in an accident as a driver;

on reasonable suspicion, as opposed to probable cause, that the driver's body contained alcohol.[67] The court further held that warrantless preliminary breath screening tests do not violate the Fourth Amendment.[68] The court relied on its previous decision in *Baxter* in deciding that preliminary breath tests may be administered on a basis of reasonable suspicion.[69] Additionally, the Court found no difference in a preliminary breath screening test and a breath test given incident to arrest, of which the constitutionality was determined in *Birchfield*.[70]

A. THE MAJORITY OPINION

The North Dakota Supreme Court decided 4-1 in favor of the State of North Dakota. Justice Carol Ronning Kapsner wrote for the majority.[71] Justices McEvers and VandeWalle joined in the majority opinion.[72]

1. Constitutionality of Warrantless Pre-Arrest Breath Tests

Barrios-Flores argued that the Fourth Amendment's protection against unreasonable searches and seizures applies to the administration of warrantless pre-arrest breath tests.[73] Specifically, Barrios-Flores argued that warrantless pre-arrest breath tests are unconstitutional because N.D.C.C. § 39-20-14 penalizes the constitutional right to withhold consent to a warrantless search.[74] However, the majority rejected Flores' contention.[75]

Relying on *Birchfield*, the court found that warrantless pre-arrest screening tests do not violate the Fourth Amendment.[76] Analyzing the same factors

(2) whether in conjunction with the violation or accident, the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol; and (3) whether the person refused to submit to the onsite screening test. *Id.* ¶ 13, 894 N.W.2d at 892.

67. *Id.* ¶ 17, 894 N.W.2d at 893.

68. *Id.*

69. *Id.* ¶¶ 14-17, 894 N.W.2d at 892-93.

70. *Id.* ¶ 16, 894 N.W.2d at 893.

71. *Id.* ¶ 1, 894 N.W.2d at 889.

72. *Barrios-Flores*, ¶ 20, 894 N.W.2d at 893. Surrogate Judge Dale V. Sandstrom wrote a special concurrence in which he agreed with the decision of the majority to affirm Barrios-Flores' license revocation, but disagreed with how they arrived at its decision. Because there was probable cause for law enforcement to request that Barrios-Flores submit to a preliminary breath test, Sandstrom argues that the majority should not have even decided the constitutionality of warrantless pre-arrest breath tests or that such tests may be administered on the basis of reasonable suspicion that a driver's body contains alcohol. *See generally Barrios-Flores*, 2017 ND 117, ¶¶ 22-36, 894 N.W.2d 888.

73. Brief for Appellant at ¶ 23, Barrios-Flores v. Levi, 2017 ND 117, 894 N.W.2d 888 (No. 20160103).

74. Brief for Appellant, *supra* note 73, at ¶ 35.

75. Barrios-Flores v. Levi, 2017 ND 117, ¶ 17, 894 N.W.2d 888.

76. *Id.* ¶¶ 15-17, 894 N.W.2d at 893-94.

as the Court did in *Birchfield*, the North Dakota Supreme Court found that preliminary breath screening tests do not implicate significant privacy concerns.[77] That is, that preliminary breath screening tests are not overly intrusive, only reveal a minimum amount of information, and that breath tests are not inherently embarrassing; therefore, warrantless pre-arrest onsite screening tests implicate a similar lack of intrusiveness as a breath test given incident to an arrest.[78] Because of the similarities between a preliminary breath test and a breath test given incident to an arrest, the North Dakota Supreme Court found that warrantless preliminary breath screening tests do not violate the Fourth Amendment.[79]

2. Requesting Warrantless Pre-Arrest Breath Tests Based on Reasonable Suspicion

In light of the Supreme Court's decision in *Birchfield*, the North Dakota Supreme Court revisited its previous decision in *Baxter* to find that law enforcement may administer a preliminary breath screening test on the basis of reasonable suspicion that a driver's body contains alcohol.[80] Even though *Baxter* addressed a criminal conviction, the court found that its holding can be applied to administrative license proceedings.[81] In considering the requirements for requesting a warrantless pre-arrest breath test, the court pointed to *Baxter's* reliance on the decisions of other courts and their use of the balancing test established in *Terry v. Ohio*.[82] Because of the *Terry* test used by many other states allowing warrantless pre-arrest breath tests based on reasonable suspicion, the *Baxter* court said probable cause was not necessary for law enforcement to request such tests.[83] Additionally, the *Baxter* court construed N.D.C.C. § 39-20-14(1) to require reasonable suspicion of driving under the influence before law enforcement may request a pre-arrest breath test.[84]

In light of the Supreme Court's decision in *Birchfield*, the North Dakota Supreme Court vacated its decision in *Baxter*.[85] *Barrios-Flores* concludes that *Birchfield* does not change the North Dakota Supreme Court's analysis in *Baxter* for pre-arrest onsite screening tests of an individual's breath for

77. *Id.* ¶¶ 15-16, 894 N.W.2d at 893.
78. *Id.*
79. *Id.* ¶¶ 16-17, 894 N.W.2d at 893-94.
80. *Id.* ¶ 14, 894 N.W.2d at 892-93.
81. Barrios-Flores, ¶ 15, 894 N.W.2d at 893.
82. *Id.* ¶ 14, 894 N.W.2d at 892-93.
83. *Id.*
84. *Id.* ¶ 14, 894 N.W.2d at 892.
85. *See generally* State v. Baxter, 2016 ND 181, 885 N.W.2d 64.

purposes of administrative license proceedings.[86] The North Dakota Supreme Court, based on its previous decision in *Baxter*, concluded that because of the decisions of other state's courts allowing warrantless pre-arrest breath test under a limited *Terry* search, and because of the statutory language in N.D.C.C. § 39-20-14(1), law enforcement may administer a warrantless pre-arrest breath test based on reasonable suspicion that a driver's body contains alcohol.[87]

3. The Majority Opinion's Conclusion

The Court in *Birchfield* found that breath tests administered incident to an arrest do not violate the Fourth Amendment because they are minimally invasive.[88] The majority in *Barrios-Flores* found that warrantless pre-arrest breath tests implicate a similar lack of invasiveness as breath tests administered incident to an arrest.[89] Therefore, because the Court in *Birchfield* held that warrantless breath tests given incident to an arrest do not violate the Fourth Amendment, the North Dakota Supreme Court held that warrantless pre-arrest breath tests also do not violate the Fourth Amendment.[90] Because it was held that warrantless pre-arrest breath tests do not violate the Fourth Amendment, the court then analyzed the requirements necessary for law enforcement to request a warrantless pre-arrest breath test.[91] The court found that because nothing in *Birchfield* changed the analysis of the court's previous *Baxter* decision, law enforcement may request a warrantless pre-arrest breath test based on reasonable suspicion that the driver's body contains alcohol.[92]

B. THE DISSENTING OPINION

Justice Crothers was the lone dissenting justice in *Barrios-Flores*.[93] Justice Crothers argued that both preliminary breath tests and breath tests administered incident to an arrest should not be administered on less than probable cause.[94] Crothers argued that if the court is going to use a similar analysis for pre-arrest breath tests as the Court used in *Birchfield* for tests

86. *Barrios-Flores*, ¶ 17, 894 N.W.2d at 893-94.
87. *Id.*
88. *Id.* ¶ 15, 894 N.W.2d at 893.
89. *Id.* ¶ 16, 894 N.W.2d at 893.
90. *Id.* ¶ 17, 894 N.W.2d at 893-94.
91. *Id.* ¶ 14, 894 N.W.2d at 892-93.
92. *Barrios-Flores,* ¶ 17, 894 N.W.2d at 893-94.
93. *Id.* ¶ 38, 894 N.W.2d at 898.
94. *Id.* ¶ 68, 894 N.W.2d at 905.

incident to an arrest, then neither test may be administered unless probable cause exists.[95]

Crothers contested the fact that the majority arrived at is conclusion primarily because the appeal before the court stemmed from an administrative license proceeding rather than a criminal proceeding.[96] He believed that the constitutionality of pre-arrest breath tests based on implied consent should be analyzed under traditional Fourth Amendment analysis no matter if the issue is appealed from an administrative proceeding or a criminal proceeding.[97] The traditional Fourth Amendment analysis assesses the degree of intrusion upon an individual's privacy and the degree to which the search promotes a legitimate government interest.[98] Crothers asserted that *Birchfield* does not allow any breath test to pass the constraints of the Fourth Amendment.[99] He believed that "the Fourth Amendment balance of privacy and governmental need could be struck by treating the warrantless search [the breath test] as reasonable when performed incident to an arrest."[100]

Crothers did not believe that *Birchfield* gave any reason to conclude that warrantless pre-arrest breath tests and warrantless breath tests incident to an arrest should be subject to different constitutional analysis.[101] Crothers suggested that because probable cause has already been established before a breath test is administered incident to an arrest that the test is therefore reasonable under the Fourth Amendment.[102] But, if the court is to subject a preliminary breath tests to the same analysis as tests given incident to an arrest, then probable cause must be established.[103] This is because a preliminary breath test is a search, and under traditional Fourth Amendment analysis, a search may only be conducted when probable cause exists.[104]

Justice Crothers believed that allowing law enforcement to request a warrantless pre-arrest breath test based on reasonable suspicion is "an impermissibly low bar."[105] He especially believed this to be true because the breath tests analyzed in *Birchfield* were justified as a search incident to arrest.[106]

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95. *Id*.
96. *Id*. ¶ 65, 894 N.W.2d at 905.
97. *Id*.
98. *Barrios-Flores*, ¶ 66, 894 N.W.2d at 905.
99. *Id*. ¶ 67, 894 N.W.2d at 905.
100. *Id*.
101. *Id*. ¶ 68, 894 N.W.2d at 905.
102. *Id*.
103. *Id*.
104. *Barrios-Flores*, ¶ 68, 894 N.W.2d at 905.
105. *Id*. ¶ 44, 894 N.W.2d at 899.
106. *Id.*

Justice Crothers would overrule *Baxter* and hold that an onsite screening test cannot be requested under N.D.C.C. § 39-20-14 absent probable cause or a DUI-related arrest.[107]

IV. IMPACT

Barrios-Flores analyzed the law in an area that *Birchfield* did not discuss.[108] The North Dakota Supreme Court held that warrantless pre-arrest breath tests do not violate the Fourth Amendment and may be requested by law enforcement on the basis of reasonable suspicion.[109] This came by way of an appeal of an administrative decision to suspend Barrios-Flores' driver's license for two years following a finding by the administrative agency that he had refused a preliminary breath screening test.[110] This decision will almost certainly be utilized in administrative and criminal proceedings regarding DUI arrests.

Even though this case likely does not come as a shock to most practitioners and legal scholars, it clarifies the law in an area that *Birchfield* did not analyze. Because law enforcement may administer a warrantless preliminary breath test on the basis of reasonable suspicion, drivers may come to expect that they will be tested if officers have even a slight inkling that they have consumed alcohol. However, in most cases, officers can establish reasonable suspicion even before a preliminary breath test is requested.[111] Had the court decided that a warrantless pre-arrest breath tests could not be requested unless law enforcement established probable cause that the driver's body contained alcohol, there may have been more ways for defendants and defense attorneys to escape a DUI conviction. Because of the relatively low reasonable suspicion standard established, it will be much harder for defendants and attorneys to show that officers did not have the right to request a breath test. This puts drivers in the tough position of deciding whether to submit to a breath test in which an officer may not have grounds to request, or to refuse the test and still be faced with penalties under North Dakota's implied consent laws.[112]

Barrios-Flores largely puts to bed the constitutional question involving warrantless breath tests in almost all scenarios. It is unlikely that courts will have to face this question on any subsequent cases in the future. Courts will

107. *Id*.
108. *See* Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
109. *Id*.
110. *Barrios-Flores*, ¶ 1, 894 N.W.2d at 889.
111. State v. Baxter, 2015 ND 107, ¶ 9, 863 N.W.2d 208, 212.
112. *See* N.D. CENT. CODE § 39-20 (2017).

now be faced with deciding whether law enforcement had reasonable suspicion to administer a breath test given the facts on a case-by-case basis. Given the low bar of reasonable suspicion, it is unlikely that many DUI cases will be dismissed by courts because law enforcement did not meet their burden of proof, and it is likely an argument that defense attorneys will seldom raise.

The court allows warrantless pre-arrest breath tests to take place as a mechanism in deterring drunk drivers and as a matter of public safety.[113] In 2015, North Dakota was ranked the worst state in the nation for alcohol related traffic fatalities and DUI arrests.[114] The number of alcohol related traffic deaths over the past decade was 11.3 (per 100,000 population) compared to the national average of 3.3 deaths.[115] Furthermore, nearly half of all traffic fatalities in the state over the past decade have been alcohol related.[116] This has forced the North Dakota Legislature to enact stricter penalties for DUI offenders.[117] Programs such as the 24/7 program have also been enacted for subsequent offenders.[118] Additionally, the North Dakota Department of Transportation's Highway Safety Plan requires local law enforcement agencies to conduct at least one enforcement activity, such as saturation patrol or sobriety checkpoints, per quarter.[119] It would significantly hinder law enforcement if they were not able to conduct reasonable tests during such enforcement periods. The court has recognized the goals of the legislature and state agencies in combating drunk driving across North Dakota.[120] Therefore, it has decided not to impede on these goals and has allowed law enforcement to request a reasonable search through preliminary breath tests for the purposes of public safety.[121] This allows North Dakota to continue to enact policies that deter drunk driving and protect public safety.

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113. *See Barrios-Flores*, 2017 ND 117, ¶ 14, 894 N.W.2d 888; *see also Baxter*, 2015 ND 107, ¶ 10, 863 N.W.2d 208.

114. Bart Jansen, *These are the most dangerous states for drunken driving*, USA TODAY (Apr. 28, 2016), https://www.usatoday.com/story/news/2016/04/28/survey-northern-states-worst-drunken-driving/83537526/.

115. CTR. FOR DISEASE CONTROL AND PREVENTION, SOBERING FACTS: DRUNK DRIVING IN NORTH DAKOTA 1 (2014).

116. NORTH DAKOTA DEP'T OF TRANSP., 2015 NORTH DAKOTA CRASH SUMMARY 14 (2015).

117. *Compare* N.D. CENT. CODE § 39-08-01 (2012), *and* N.D. CENT. CODE § 39-08-01.2 (2012), *and* N.D. CENT. CODE § 39-08-01.3 (2012), *and* N.D. CENT. CODE § 39-08-01.4 (2012), *and* N.D. CENT. CODE § 39-20-01 (2012), *with* N.D. CENT. CODE § 39-08-01 (2017), *and* N.D. CENT. CODE § 39-08-01.2 (2017), *and* N.D. CENT. CODE § 39-08-01.3 (2017), *and* N.D. CENT. CODE § 39-08-01.4 (2017), *and* N.D. CENT. CODE § 39-20-01 (2017).

118. *See* OFFICE OF ATTORNEY GENERAL, SOBRIETY PROGRAM GUIDELINES (2013).

119. NORTH DAKOTA DEPARTMENT OF TRANSPORTATION, NORTH DAKOTA HIGHWAY SAFETY PLAN 18 (2017).

120. *See* Beylund v. Levi, 2015 ND 18, ¶ 25, 859 N.W.2d 403, 413.

121. *See* State v. Baxter, 2015 ND 107, ¶ 10, 863 N.W.2d 208, 212 (citing State v. McGuigan, 2008 VT 111, 184 Vt. 441, 965 A.2d 511, 516-17).

V. CONCLUSION

In *Barrios-Flores*, the North Dakota Supreme Court *held* that warrantless pre-arrest breath tests do not violate the Fourth Amendment of the Constitution. Additionally, the court found that nothing in *Birchfield* contradicted with its previous ruling in *Baxter*. Therefore, the court upheld its previous ruling in *Baxter* deciding that law enforcement may request a preliminary breath test based on reasonable suspicion that a driver's body contains alcohol. This case decides an important issue that the Court in *Birchfield* did not analyze. *Barrios-Flores* allows law enforcement to administer breath tests on a mere inkling that a driver has consumed alcohol. The court recognizes North Dakota's attempts to reduce the number of alcohol related traffic fatalities. Even though this case does not come as a surprise to most in the legal field, and does not dramatically change the current state of the law, its importance is critical to the law and DUI proceedings.

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