

2019 HOUSE JUDICIARY

HB 1534

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1534
2/6/2019
32303

- Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to driving under the influence of intoxicating liquor or any other drugs or substances, implied consent, and screening tests; and to declare an emergency.

Minutes:

1,2

Chairman Koppelman: Opened the hearing on HB 1534.

Aaron Burst, Association of Counties and Attorney with AG's office: (Attachment #1) Went through the bill and the handout. Discussed all the different criminal laws in relation to the driving under influence on various scenarios. (:40-15:35)

Rep. Vetter: On page 3, the addition of the word saliva; if it is not approved by the state lab, why do you want to put it in law?

Aaron Burst: Saliva will not be used until the state lab has it approved.

Rep. Rick Becker: I would like you to go through Section 1; what does it do?

Aaron Burst: Under the criminal justice system if I am charged with a DUI and I have been using narcotics prescribed to me by a doctor and they have influenced by behavior; so technically illegal so under current ND law it says you can't be convicted of a DUI if you took those prescription drugs as a prescription. It does require the defendant to get on the stand or call their doctor themselves.

Rep. Rick Becker: Then on Section 3: subsection 3 you are striking all of that. Why are we striking all of that instead of just urine and adding it to line 30?

Aaron Burst: The urine and the talk about getting the blood that is all criminal justice so the suggestion is by taking that out we go back to the 4th amendment analysis for the criminal justice system.

Rep. Rick Becker: If this is in law; how is the driver supposed to know if they refuse they are automatically a criminal?

Aaron Burst: I have thought about that and putting it into the 39-08.01. there is some possibility of doing that. no other crime do we tell somebody that these are consequences.

Chairman K. Koppelman: What is the current status with respect to refusal?

Aaron Burst: The US Supreme Court has said you can tell someone it is a crime to refuse for a breath test. Once I have been arrested for DUI because we don't do the screening test anymore. Once I am at the jail and there is a breath testing instrument; I can as a law enforcement officer, tell that individual if they don't take this breath test they will be charged with a crime. On the breath and urine to tell someone they have to take the blood test or the urine test and if they don't do so they can lose their DOT issued license. You can't talk about the criminal refusal until you first get a warrant.

Chairman K. Koppelman: So the warning would only apply to breath. We will have to look at that breath is the issue.

Aaron Burst: If the committee would like to make sure let's put it in the 39-08.01 e 1 on the criminal justice side. I would be happy to work on amendments on that. Section 4 should include an amendment that includes an appropriate amendment.

Chairman K. Koppelman: Bottom of page 4, the reference to 39-08.01 that is the actual physical control; what would be the consequences of not including that change?

Aaron Burst: I you need to take Section 4 out I understand.

Rep. Paur: On prescription drugs; taking it properly is a valid defense so if you were stopped for impaired driving then you can continue to drive impaired.

Aaron Burst: In theory that would work. In practice the law enforcement officer will make the arrest because they will not know.

Rep. Paur: What about medical marijuana?

Aaron Burst: Measure 3 was debated. The states attorneys did not come out against Measure 3.

Opposition: None

Neutral: None

Hearing closed.

Additional handout #2 passed out.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1534
2/13/2019
32711

- Subcommittee
 Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to driving under the influence of intoxicating liquor or any other drugs or substances, implied consent, and screening tests; and to declare an emergency.

Minutes:

1

Chairman Koppelman: Opened the meeting on HB 1534. (Attachment #1) Proposed amendment.

Motion Made to move the amendment Attachment #1 by Rep. Roers Jones; Seconded by Rep. Hanson

Chairman K. Koppelman: Went through the proposed amendment. Explained it is moved out of the criminal code into the driver license section of it. It is a technical correction.

Voice Vote Carried.

Do Pass as Amended by Rep. Jones; Seconded by Rep. Roers Jones

Discussion: None

Roll Call Vote: 12 Yes 0 No Absent 2 Carrier: Rep. Paulson

Closed.

DA 2/13/19

19.1020.01001
Title.02000

Adopted by the Judiciary Committee

February 13, 2019

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1534

Page 2, after line 6, insert:

"f. Subdivision e does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota."

Page 3, line 18, after "39-08-01" insert "or an equivalent offense"

Page 4, line 1, overstrike "A test administered under this section" and insert immediately thereafter "If an individual refuses to submit to testing under this section, proof of the refusal"

Page 4, line 25, after "39-08-01" insert "or an equivalent offense"

Renumber accordingly

2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES 1534

House Judiciary Committee

Subcommittee # 19.1020.01001

Amendment LC# or Description: PROPOSED ATTACHMENT

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Roers Jones Seconded By Hansen

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman			Rep. Buffalo		
Vice Chairman Karls			Rep. Karla Rose Hanson		
Rep. Becker					
Rep. Terry Jones					
Rep. Magrum					
Rep. McWilliams					
Rep. B. Paulson					
Rep. Paur					
Rep. Roers Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:
Vote carried

2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES 1534

House Judiciary Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Jones Seconded By Roers Jones

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	✓		Rep. Buffalo	✓	
Vice Chairman Karls	✓		Rep. Karla Rose Hanson	✓	
Rep. Becker	✓				
Rep. Terry Jones	✓				
Rep. Magrum	✓				
Rep. McWilliams	✓				
Rep. B. Paulson	✓				
Rep. Paur	✓				
Rep. Roers Jones	✓				
Rep. Satrom	✓				
Rep. Simons	✓				
Rep. Vetter	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Paulson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1534: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1534 was placed on the Sixth order on the calendar.

Page 2, after line 6, insert:

"f. Subdivision e does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota."

Page 3, line 18, after "39-08-01" insert "or an equivalent offense"

Page 4, line 1, overstrike "A test administered under this section" and insert immediately thereafter "If an individual refuses to submit to testing under this section, proof of the refusal"

Page 4, line 25, after "39-08-01" insert "or an equivalent offense"

Re-number accordingly

2019 SENATE JUDICIARY

HB 1534

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1534
3/13/2019
#33611 (30:48)

- Subcommittee
 Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact subsections 1 and 2 of section 39-08-01, section 39-20-01, and subsection 1 of section 39-20-14 of the North Dakota Century Code, relating to driving under the influence of intoxicating liquor or any other drugs or substances, implied consent, and screening tests; and to declare an emergency.

Minutes:

2 Attachments

Chair Larson opens the hearing on HB 1534.

Kim Koppelman, District 13 Representative, testifies in favor

Representative Koppelman: This is a clean-up bill dealing primarily with DUIs and some drug offenses. In the 2015 session, we introduced legislation to get tougher on DUI laws in ND. The main reason was that people were losing their lives on the highway and putting others at danger. Our response in ND to a DUI at that time was sort of a wink and a nod and a sigh of relief that “it wasn’t me that got caught”; we weren’t taking it seriously enough. Some thought we shouldn’t toughen those laws, but the results are that it is making a difference. Alcohol-related fatalities in our highways are down, and things like a designated driver or using Uber, Lyft and taxis are becoming more common when people have been out consuming alcohol. The good news is, because of the actions the legislature took, things are moving in the right direction, and I encourage your support for this.

(3:30) Aaron Birst, Association of Counties, testifies in favor (see attachment #1)

Birst: I would like to personally thank Representative Koppelman for this bill and for 2013 when the legislature decided to revamp our DUI laws, as he was the main sponsor. This is a technical bill, and I look forward in working with all of the stakeholders, including the defense bar, if they think there is something that needs to be addressed. Quite frankly, I don’t. I think we’ve got it pretty good, but I can guarantee we’ll be back here next session because we constantly have to talk about DUI law because it’s constantly changing through court cases. Unfortunately, in ND we have 65-7,000 arrests a year for DUI, and they’re the most litigated and complex cases. DUI is complex because there are two systems: the criminal justice

system and the DOT license suspension system. The DOT system is 39-20 code and the DUI is 39-08. They blend, and we have officers trying to do a lot out on the street on DUI. I handed out a sheet of paper that sets the tone. On 2012 and 2013, we were at a crisis point in traffic fatalities in ND. Out of 170 fatalities, 87 of those were alcohol-related. Alcohol-related means alcohol played some role in the crash. In 2013 the legislature then addressed the DUI law, and as you can see, there has been a steady decline in alcohol-related and traffic fatalities. Some would mention the decreasing oil prices, but we had a drop and didn't lose the oil prices until basically the end of 2014, so I can see no other real major change other than that legislative law. There was a lot of media campaign that went along with that as well, so people were taking traffic safety more seriously.

Vice Chairman Dwyer: The chart shows traffic fatalities, and you mentioned that there are 6-7,000 DUI arrests a year. Is that down as well?

Birst: Actually that's relatively consistent. However, no prosecutor in the world thinks arrest numbers are important because quite frankly that is driven by whether officers have enough time to be out on the street. What's only important to the prosecutors is the fatal numbers. If the fatal numbers are going down and we don't arrest anybody, we're doing our job. If the fatal numbers are going up, then we're going to do something different. Arrest numbers should not drive our decision making; the only thing that matters is whether we're saving lives. On the worst years, we had about 7,000 DUI arrests. We came down to about 6,200 in the last couple years and fluctuate about 6,500.

This bill is more of a clean-up bill, but there are some substantive changes that I will make you aware of. It does not increase penalties or deal with jail time; it's more of a technical change to try to help streamline the system that officers and the defendants will better understand how this is supposed to work. There has been a lot of DUI cases since we embarked on this in 2013. Justice Crothers is quoted in the sheet I handed out. Justices are saying that this is becoming very complicated even for them. In response to that is HB 1534.

Section 1 has one significant change. It changes the prescription drug user to an affirmative defense from a defense. If someone uses prescription drugs and is impaired, under ND law currently, that's a defense to DUI, but you have to use it as prescribed. The general difference between a defense versus an affirmative defense is who shoulders some of that burden. With defense, a prosecutor would have to prove beyond a reasonable doubt that that defense did not exist. That means a prosecutor would have to potentially subpoena a doctor and medical records to find out whether they were using it as prescribed. In fairness we don't do those for first time DUIs because it's not worth it for a b misdemeanor. This change would say it is not affirmative defense which means the prosecutor still has to prove beyond a reasonable doubt the DUI, but then it would be the defendant's responsibility to give the defense on using a prescribed drug. We think that makes more sense than just calling it a defense.

With section 2, when we originally passed the DUI bill in 2013, we criminalized refusal for both the evidentiary test and the screening test. In 2015 the legislative session and prosecutors got together and said there's no point to criminalize refusing the screening device on the side of the road, so we removed that from the statute. Section 2 contains a right to remedy if you are criminally convicted of the screening test. That language doesn't belong there anymore and should have been struck because there's no remedy and no crime of refusing a screening test. We're asking for that to be removed. That is language that is sitting there and doing nothing anymore.

Vice Chairman Dwyer: What is f on section 1?

Birst: That was the amendment that was stuck in. As I mentioned in 2013, we criminalized refusal. ND DUI law is complicated mainly because we tell individuals who are arrested for DUI they do not have to test. Regardless of the government having a warrant or not, we give defendants the right not to take a test. In fact, the statute says if a test is requested and they refuse, no tests shall be given. The Supreme Court calls that an “act of legislative grace”. In other words, our legislature has stepped in and says we don’t want people tested if they don’t want to be tested for DUI; that’s the law.

The legislature stepped in in the ‘80s and said they don’t have to test if they don’t want to, but if they exercise that option, there’s going to be longer license suspension process on the DOT. In other words, we really want you to do this, but if you don’t want to do this that’s fine, but now you’re going to have a license suspension for a longer period of time. Then in 2013 the legislature stepped in and put a little more pressure on those people to try to get them to take the test, and that’s why we call it “criminalizing refusal”. Under the current law now, it is a crime to refuse the test. In large part it’s to protect the defendant. Now we said if you don’t take the test, not only can you lose your license for a longer period of time, but you could also then be charged with criminal refusal.

Subsection f was inserted as an amendment that says you cannot be charged with criminal refusal unless you have been advised that it’s a crime to refuse. This is providing the protection. What we have currently in the system is an advisory that is statutorily based. The Supreme Court has said part of that statutory based advisory is now unconstitutional, in particular to the urine which I’ll get to later. Here we had in the law something that was unconstitutional and the officers were supposed to read everything to the individual. It gets very confusing if we specifically say what the officers have to say in the advisory because if something changes, then we tell the officers to change what they say, but then the defense bar argues that that’s not what the statute says. The concept is we agree that you should never be charged with criminal refusal unless you’ve been told that’s a crime, but then because we’ve had a case called Birchfield, there are different standards you have to meet before you’re told it’s a crime. As opposed to specifically writing that into the statutes, that’s why we’re just saying you must comply with the constitution. Therefore, if there’s a new case that comes down changing what advisory should be constitutionally, we don’t have to deal with the statute or ask you to change it. this just says comply with what the courts are saying.

Senator Myrdal: Earlier you said we criminalized the refusal in 2013 and changed it in 2015. Now you’re saying it is a crime to refuse?

Birst: In 2013 we criminalized both the screening test on the side of the road and also the evidence based test, like the blood test. In 2015 we said there’s no reason to criminalize the screening test. If they don’t want to take the screening test on the side of the road, that doesn’t have to be criminal, but we maintained the refusal for the evidence based test. In a typical DUI, the officer can ask you to perform tests including the screening tests, but you will not be arrested for refusing that screening test. Then if the officer arrests you for DUI, then you go to the jail where there’s the intoxilyzer or you go to a hospital to get a blood draw. There then we tell the individual that if they don’t take this test, now you can be charged with criminal refusal which is the same penalties as the underlying DUI. That was the distinction. The prosecutors agree you should never be charged with criminal refusal unless you’re

specifically told. We also agree that we shouldn't write it specifically what the officer has to say, let's use the case standards.

Vice Chairman Dwyer: You could say "you have the right to remain silent and a right to refuse this test" essentially.

Birst: Correct. We want to make sure at the evidentiary hearing, if you are charged with criminal refusal, the officer would have to say I told him he doesn't have to take the test, but I also told him if he invokes that right, that he could be charged with the crime.

Section 3 has one change that is not because of court cases, but it inserts the word "saliva". Under current law, ND only has the ability to do breath testing on the side of the road. That means you can only catch alcohol offenses. If someone is impaired with marijuana, there is no quick test you can do on the side of the road. By inserting saliva, there is an attempt by the commercial industry to have tests that are available on the side of the road that would detect certain drugs. That is not operational now, but I know our labs are looking at those changes to see if there is a test we could adopt. However, under our current law, because we don't have saliva in there, we wouldn't even be able to use those tests. We thought this would be a good addition in case the state lab ever does approve of some device that could test saliva for impairment. That's the suggestion.

Section 2 is cleaning up the specific language that an officer has to say. Essentially we're just saying the officer would still give them implied consent advisory, but you don't have to add all this extra language, and technically right now, officers essentially have to read this whole part of the statute. It just doesn't make sense. Generally, those individuals don't even know what they're saying. That is the proposal for that. The stricken lines 1-5 on page 4 is what we did in 2017 where we wrote what we thought the Supreme court was doing. We wrote it specifically in there that the officers should advise pursuant to that advisory. Again, by saying pursuant to the constitution, that will give us more flexibility so that we don't have to read specific words. Regardless of what you think of the bill, this struck section has to be changed because we included urine as part of the standard for the breath. The case with Birchfield went up to the U.S. Supreme Court. They said you can't criminalize refusal for blood tests unless you first secure a warrant but said breath tests you can criminalize without a warrant. It's a weird case, but that's the law.

(22:45) Chair Larson: I think it had to do with the taking of your bodily fluids rather than just your breath. Is that right?

Birst: Correct. They made a distinction between criminal refusal for breath versus blood. They did not address urine. The ND Supreme Court then later on in case called State vs. Helm did, and they said urine is going to be more like blood than breath. Very seldom do we use urine, but because the Helm decision came out after this law was passed, urine was included in the category of breath, so this has to be reworked regardless of whether you like the bill or not.

Section 4 is an attempt to try to unify the approach for law enforcement. It's for screening tests, and in particular what we call the actual physical control (APC) cases which you are not driving but you are in your vehicle under the influence in which the car might be running, but you are not driving. We don't have a lot of these cases, but occasionally we do. The standard for asking for a screening test on an APC is that you can only ask; you can't talk about the criminal penalties because of the way the statute was written. We're suggesting

that the screening test for even the APCs would follow the same standard as just the regular DUI. There are two separate operating procedures under the current law, and this says to do it the same for all cases whether APC or not.

Senator Myrdal: Someone is pulled over for erratic driving, likely a DUI. Upon what time does the officer give the language that he's now free to do?

Birst: On the roadside screening before they are arrested, the officer would still have to advise the individual of the DOT penalties that says if you don't want to take this screening test, you could lose your license for up to 3 years, a minimum of 180 days. That remains the same, but again we've taken out the criminal refusal. Then at some point if the officer arrests them for the DUI, then at the time they get to the hospital or the jail where the evidence based test is, now the officer will have to say essentially, "I don't care if you want to do this test or not, it's up to you, but I will advise you that if you don't do it, you could lose your license for up to 3 years, and you could be charged with criminal refusal".

Section 5 is the emergency clause. Sections 1 and 2 have an emergency clause, and section 3 should probably have an emergency clause. I don't know why section 3 was left out. If you pass this bill as is without amending it, I think we can probably make it work. I'm not sure if that will affect DOT, but I would probably ask you to consider putting section 3 on this. The legislature saved lives when you passed that law in 2013. You made the right decision then, and you're still making the right decisions now.

Chair Larson closes the hearing on HB 1534.

Senator Myrdal: Motions for a Do Pass.

Vice Chairman Dwyer: We should visit with Chairman Koppelman about the emergency clause for section 3.

Senator Myrdal: Withdraws the Motion.

Senator Luick: Why were emergency clauses only put on certain sections of the bill?

Birst: This bill has been a putting together of a number of sections on the fly sometimes. The main thing was to get that constitutional standard in. Section 2 was put in there through legislative counsel.

Chair Larson: In your visiting, is it your opinion that Chairman Koppelman would be amenable to the amendment?

Birst: I can't imagine that there would be a problem with this.

Chair Larson ends discussion on HB 1534.

Further testimony was emailed to the committee (see attachment #2)

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1534
3/18/2019
#33835 (3:31)

- Subcommittee
 Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact subsections 1 and 2 of section 39-08-01, section 39-20-01, and subsection 1 of section 39-20-14 of the North Dakota Century Code, relating to driving under the influence of intoxicating liquor or any other drugs or substances, implied consent, and screening tests; and to declare an emergency.

Minutes:

No Attachments

Chair Larson begins discussion on HB 1534.

Vice Chairman Dwyer: This was the one that changed the communication from law enforcement to people being arrested for DUIs. I've received an email concerned about this. Apparently this was something that former Senator Armstrong had worked on a couple of years ago. I think we need to do more work on it, so I'll check further into this.

Senator Myrdal: Aaron said it's a very complicated issue, the whole DUI testing. I think there are a couple issues there, one being prescription users that will have the responsibility to defend their usage and dose. Then there's the non-prescription user as far as a criminal refusal. It's convoluted to say the least.

Senator Luick: It also adds saliva to the list.

Chair Larson: If I remember correctly, the emailed concern from the attorney was that you have to admit, and you don't get to be informed that you have the right to an attorney.

Vice Chairman Dwyer: I thought that was the purpose of the bill.

Chair Larson: Me too. We'll continue to work on this.

Chair Larson ends discussion on HB 1534.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1534
4/2/2019
#34441 (13:05)

- Subcommittee
- Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact subsections 1 and 2 of section 39-08-01, section 39-20-01, and subsection 1 of section 39-20-14 of the North Dakota Century Code, relating to driving under the influence of intoxicating liquor or any other drugs or substances, implied consent, and screening tests; and to declare an emergency.

Minutes:

No Attachments

Chair Larson begins discussion on HB 1534.

Vice Chairman Dwyer: The reason I wanted to do extra work on this bill is because we received several emails from defense attorneys saying that we were doing the wrong thing or that we were undoing the work of former Senator Armstrong from two years ago. I know that Senator Armstrong did a great job providing information and leadership for the Senate on criminal matters. I wanted to make sure that we weren't doing anything that would have unintended consequences.

Vice Chairman Dwyer: Motions for a Do Pass.

Senator Luick: Seconds.

Vice Chairman Dwyer: Driving under the influence or actual, physical control. Actual, physical control is you're inebriated in your running vehicle sitting. Driving under the influence means your vehicle is moving. There's two separate offenses. This is a fourth amendment issue, the most litigated amendment of our constitution. This bill doesn't undo anything that Senator Armstrong worked on. It addresses Supreme Court opinions since 2017. There's two parts. If you are about to be arrested, an officer can give them a screening tests to see what your influence level is. You can refuse that test; it's not a crime, and you have the right. If the officer has probable cause, you can be arrested.

Chair Larson: Probable cause is like you probably did it. I can see that your eyes are bloodshot, smell alcohol on your breath, your slurring your speech, and you were driving all over the road. I don't have evidence, but I have probable cause to think that you're driving drunk.

Vice Chairman Dwyer: You can refuse that screening test, and the officer can still arrest you. Once you are then taken to jail, the officer has to advise you two separate things. One is that they can refuse an evidentiary test, but it's a crime to refuse- a class b misdemeanor. If an officer fails to provide that advisory, then this bill cleans that up a bit. Chief Justice VandeWalle called our law absurd. Before this law, your test can be inadmissible, but you could still be charged. However, if your test is inadmissible, there's no basis for being charged. The advisory has to be given and if it isn't, then that evidence is inadmissible. The legislature said breath and blood are the same, and the supreme court disagrees. Blood and urine are the same, and in order to have a test under blood and urine, officers have to get a warrant.

Chair Larson: to require it. You can submit that you will do it.

Vice Chairman Dwyer: Yes, you can agree to it, but before that test can be forced, you have to get a warrant. The breath is different; you don't have to get a warrant for that. If someone refuses any one of these three tests- breath, blood or urine- then the officer has to advise them that they can refuse, but under law it is a class b misdemeanor because I had probable cause to bring them in there. There's a whole separate part of the law where an officer has to advise if they refuse these tests, you can lose your license. If the person refuses one of the three evidentiary tests, the officer has to advise them of this DOT part as well. It's a class b misdemeanor, and you can lose your license. DOT will suspend it for a longer period of time than if you took the test and plead guilty or were convicted of. Kelly and Aaron combined the DOT and the criminal part. Now we're separating it because it's really two separate things. A lot of the emails I received from defense attorneys were based on the bill before it came to us. On page 2, they were worried that we were removing the advisory portion. You have to be advised of your rights under the 4th amendment. The House added lines 7-9, so the statute is not removing the requirement for an advisory from a law enforcement. It's in here. This advisory is for the criminal part. The bottom of page 3, 3a, that advisory is for the DOT part. This is to separate the DOT and criminal side and also respond to the supreme court opinions that have been handed down since 2017 which separated breath, blood and urine. You can refuse the screening test on the road, and it's not a crime. The statute has a provision for how to cure that, but it's no longer a crime; they fixed that in 2017. This bill makes sense.

Chair Larson: And they added saliva in.

Vice Chairman Dwyer: There are two more things. The courts have not issued any opinions on saliva, but it's the only way they can test for drugs. Page 2, line 12, it was a defense if you were on a prescription drug and were taking it properly. However, prosecution had to prove that you weren't. Now we're making it an affirmative defense so the defendant has to do some work. You have to bring in your prescription, show that you were taking it and plead that defense from the defendant's side rather than the prosecution's. This bill does many things, and it's a good bill I think.

Chair Larson: There's a criminal side being a crime to do that and an administrative side that the DOT can determine whether you get your license back or not. Those are two separate court proceedings. Blood and urine are bodily fluids, so you have more personal right to those things than your breath. That's why there's more protection for those.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent. Motion carries.

Vice Chairman Dwyer will carry the bill.

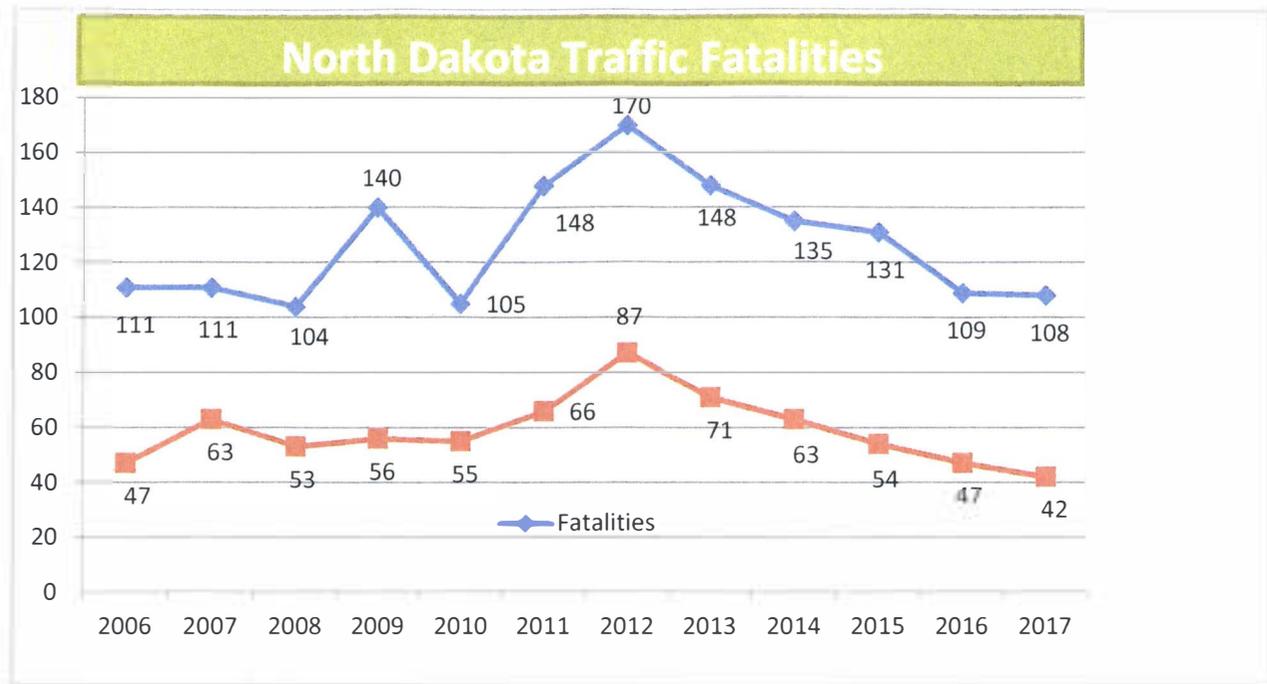
REPORT OF STANDING COMMITTEE

HB 1534, as engrossed: Judiciary Committee (Sen. D. Larson, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1534 was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

HB 1534

FF1
HB1534
2-6-18
P31



Schoon, v. ND DoT 2018 ND 210

Finally, I invite the Legislature to consider whether the statutory implied consent advisory and statutory exclusionary rule should be retained. The implied consent advisory in N.D.C.C. § 39-20-01(3) has become so nuanced and conditioned that serious questions have been raised whether it is **overly confusing and its utility has expired**. See, e.g., *Schmidt v. Levi*, 2016 ND 80, ¶ 8, 877 N.W.2d 808 (driver argued implied consent advisory was confusing); *State v. Bauer*, 2015 ND 132, ¶ 12, 863 N.W.2d 534 (driver argued issuance of *Miranda* warnings and an implied consent advisory provide contradicting admonitions); *State v. Ayala*, 2017 ND 126, ¶ 6, 894 N.W.2d 865 (driver argued advisory could not simply be read and something more is required to "inform" a driver). Even if the advisory itself is not repealed, I urge the Legislature to consider removing the exclusionary rule so that cases can be decided on the traditional grounds of whether the implied consent advisory adversely affected an operator's consent to chemical testing. See *State v. Fleckenstein*, 2018 ND 52, ¶ 9, 907 N.W.2d 365 (totality of the circumstances approach must be taken in determining voluntariness of consent to a blood test).

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Watford City

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2/6/2019

8:30 AM – Prairie Room

Urge a DO NOT Pass Recommendation for HB 1155

Chairman Koppelman and members of House Judiciary,

Thank you for the opportunity to share Watford City's concerns with HB 1155 and to stand with the North Dakota Chief of Police Association in asking you to recommend and DO NOT Pass on this bill. The bill is contrary to the people's voice when they voted down Measure 3 in November of 2018, rejecting the opportunity to decriminalize recreational Marijuana.

If passed, 1155 would subvert the efforts of the state of North Dakota to institute an effective Medical Marijuana program.

Again, Chairman Koppelman and members of House Judiciary, thank you for your consideration of our concerns with HB 1155.

Shawn Doble, Chief of Police
City of Watford City
sdoble@nd.gov

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1534

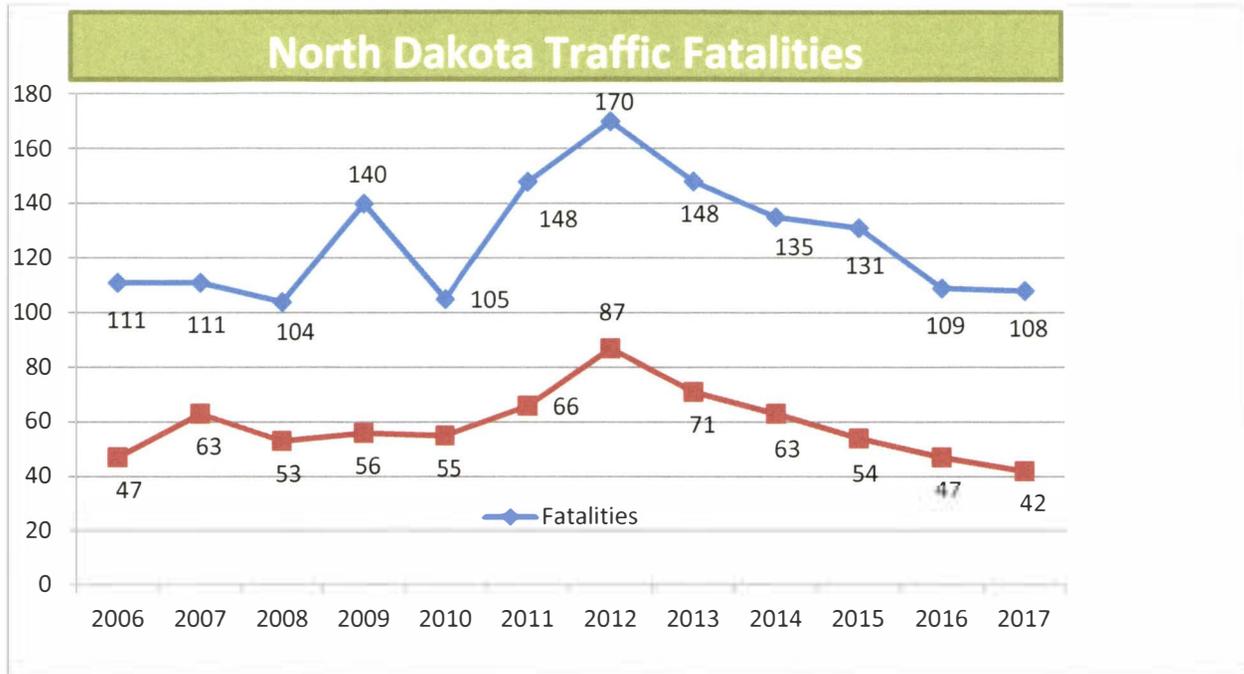
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Page 2, after line 6 insert "3. An individual is not subject to an offense under subsection e of this section unless they have been advised of the consequences for refusing a chemical test consistent with the Federal and State Constitutions."

Page 3, line 18, after "section 39-08-01" insert "or an equivalent ordinance"

Page 4, line 1, after "b." insert "If a person refuses to submit to testing under this section proof of the refusal" then strike "A test administered under this section"

Page 4, line 25, after "section 39-08-01" insert "or an equivalent ordinance"



Schoon, v. ND DoT **2018 ND 210**

Finally, I invite the Legislature to consider whether the statutory implied consent advisory and statutory exclusionary rule should be retained. The implied consent advisory in N.D.C.C. § 39-20-01(3) has become so nuanced and conditioned that serious questions have been raised whether it is **overly confusing and its utility has expired**. See, e.g., *Schmidt v. Levi*, 2016 ND 80, ¶ 8, 877 N.W.2d 808 (driver argued implied consent advisory was confusing); *State v. Bauer*, 2015 ND 132, ¶ 12, 863 N.W.2d 534 (driver argued issuance of *Miranda* warnings and an implied consent advisory provide contradicting admonitions); *State v. Ayala*, 2017 ND 126, ¶ 6, 894 N.W.2d 865 (driver argued advisory could not simply be read and something more is required to "inform" a driver). Even if the advisory itself is not repealed, I urge the Legislature to consider removing the exclusionary rule so that cases can be decided on the traditional grounds of whether the implied consent advisory adversely affected an operator's consent to chemical testing. See *State v. Fleckenstein*, 2018 ND 52, ¶ 9, 907 N.W.2d 365 (totality of the circumstances approach must be taken in determining voluntariness of consent to a blood test).

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From: Luke T. Heck <lheck@vogellaw.com>
Sent: Wednesday, March 13, 2019 8:35 AM
To: Larson, Diane K. <dklarson@nd.gov>
Subject: HB 1534 Written Testimony (Email Format)

Dear Members of the Senate Judiciary Committee:

My name is Luke Heck, and I am a criminal defense attorney at the Vogel Law Firm in Fargo, ND. I am submitting this written testimony in opposition to HB 1534 for a myriad of reasons. HB 1534 was presented to the House Judiciary Committee as a set of technical corrections to our current DUI law, and was then submitted to the House Floor under the same premise. HB 1534 is not a "house-cleaning" bill. Rather, it is a proposal that diminishes motorists' rights for the convenience of law enforcement and prosecutors.

To start, HB 1534 removes multiple protections to motorists under N.D.C.C. § 39-20-01. First, the bill removes the requirement that law enforcement must advise DUI arrestees that it is a crime to refuse a post-arrest chemical breath test under N.D.C.C. § 39-20-01(3)(a). This proposed change serves no purpose. N.D.C.C. § 39-08-01 would still criminalize refusing a chemical breath test requested at the direction of a law enforcement officer under N.D.C.C. § 39-20-01. However, the proposal seeks to remove the requirement from N.D.C.C. § 39-20-01 that individuals be told they would be committing a crime if they refused the chemical breath test.

This modification would be contrary to public policy. It is good public policy to advise arrestees of their rights and obligations under the law. The modification would also be counterintuitive to our state's desire to have arrestees submit to chemical testing, as the likelihood that someone would submit to a chemical breath test increases if they are told of the criminal consequences they face if refuse. Furthermore, there are significant due process concerns that come with charging an individual with a crime without first advising them that their decision has criminal implications. HB 1534 seeks to make our DUI law less transparent, when transparency is not only good public policy, but also assists in getting individuals to submit to testing.

HB 1534 also removes the exclusionary rule under N.D.C.C. § 39-20-01(3)(b) from criminal proceedings, and is designed to only provide a protection to individuals who refuse post-arrest chemical tests. N.D.C.C. § 39-20-01(3)(b) was created in 2014 to make chemical tests inadmissible in administrative and criminal proceedings when officers fail to adequately advise arrestees of their obligations under the implied consent law. The provision was enacted as a result of law enforcement only providing arrestees with a portion of the advisory, or no advisory at all, becoming commonplace. This provision is the only remedy our courts have in circumstances when police provide DUI arrestees with inaccurate, incomplete, or misleading implied consent advisories. The removal of this provision does nothing more than remove protections for motorists, while simultaneously removing any incentive for police to advise individuals of their obligations under the law.

The likely response from HB 1534's proponents is that the addition of N.D.C.C. § 39-08-01(1)(f) addresses my concerns. Simply put, it does not. The addition of N.D.C.C. § 39-08-01(1)(f) would protect individuals from being charged with refusing a warrantless chemical blood or urine test, as recent United States Supreme Court and North Dakota Supreme Court opinions have deemed it

unconstitutional for individuals to be criminally charged with refusing a warrantless blood or urine test. This provision does not, however, do anything to protect individuals who refuse a chemical breath test, the most common chemical test requested by law enforcement across North Dakota. In other words, the proposed law fails to protect the majority of DUI arrestees, because criminalizing the refusal of a warrantless post-arrest chemical breath test is perfectly fine. Our law must maintain the protections we currently have in place for chemical breath tests.

Next, HB 1534 seeks to remove the requirement that law enforcement advise motorists that they are being placed under arrest for DUI. This proposed modification to our law is contrary to public policy. Why should law enforcement not be required to advise someone of the reason for their arrest? There is no legitimate reason. Instead, the practical purpose behind the amendment is that our state's implied consent law is not triggered until this step occurs under N.D.C.C. § 39-20-01(2). HB 1534 seeks to remove this requirement in order to eliminate a defense for motorists if an officer fails advise them of that they are being placed under arrest for DUI. Our DUI law should not be made less transparent in order to streamline DUI convictions and license suspensions.

Finally, HB 1534 seeks to make lawful prescription drug use an affirmative defense to DUI. Currently, our law requires the government to prove beyond a reasonable doubt that an individual's impairment was predominantly caused by prescription drugs, and that the drugs were taken improperly. HB 1534 switches the burden of proof to motorists, who would be required to prove that they took their medication "as prescribed" by a preponderance of the evidence. A driver would have to prove 1) their impairment was caused by their lawful prescription drugs; and 2) that they took the drugs "only as cautioned or directed." Prescriptions are meant to make people normal. Our law should not be designed to shift the burden onto citizens to prove their innocence for convenience sake.

Here is an example: Driver A takes a certain medication, and is instructed to take the medicine with food. Driver A takes the drug, but forgets his toast on the counter on the way out the door. If Driver A gets stopped and arrested for DUI, he now has no defense, as he did not take his medication precisely as cautioned. Our DUI laws should not put the burden on motorists and require them to prove that they ate their toast before they got behind the wheel.

HB 1534 does not solve any problems that may exist within our current DUI statutes. Instead, it creates more. I respectfully ask that you deny this proposed legislation, and instead work towards legislative changes to our DUI law that would clarify any existing ambiguities without removing protections to motorists. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Luke Heck | Attorney



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