No. 18-1084

In The
Supreme Court of the United States

STATE OF MINNESOTA,

Petitioner,

v.

MARK JEROME JOHNSON,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This Court should grant this petition because three state supreme courts have erroneously held that the ruling in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016)—that under the Fourth Amendment a motorist may not be criminally punished for refusing to submit to a blood test unless law enforcement has a warrant or an exception to the warrant requirement applies—is a new substantive rule that applies retroactively. A decision from this Court will affect numerous test-refusal and driving-while-impaired convictions in more than a dozen states. And it will provide useful guidance on the retroactivity of future Fourth Amendment decisions. Johnson's arguments for denial are meritless.

I. Federal Question

Johnson briefly asserts (BIO at 8) that this petition does not raise a federal question. It does. Johnson ignores the key case (discussed in the petition at 7 n.2) —*Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016).

In *Montgomery*, this Court held that it has jurisdiction to review a state court's determination of whether the United States Constitution requires a new rule to be applied retroactively in state-court collateral-review proceedings. Johnson cites *Danforth v. Minnesota*, 552 U.S. 264 (2008), but this Court explained in *Montgomery* that *Danforth* "held only" that *Teague v. Lane*, 489 U.S. 288 (1989), "does not prevent States from providing greater relief in their own

collateral-review courts," and left "open the question [of] whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law." 136 S.Ct. at 729. This Court answered that question in *Montgomery*, holding that *Teague*'s first exception for substantive rules is "binding on state courts," and thus its application in a state-court collateral-review proceeding—like this case—is reviewable by this Court. *Id.* at 729, 731-32.

II. Timeliness

Johnson's counsel repeats a timeliness argument previously made by that office, but ignores the State's previous and current rebuttal. BIO 6-7; Pet. 13 n.7.

"[A] petition for a writ of certiorari to review a *judgment* . . . entered by a state court of last resort . . . is timely filed when it is filed with the Clerk of this Court within 90 days after *entry of the judgment*." S. Ct. R. 13(1) (emphasis added). On November 19, 2018, the Minnesota Supreme Court entered its "Judgment." It states: "Pursuant to a decision of the Minnesota Supreme Court . . . it is determined and adjudged that the decision of the Ramsey County District Court . . . is reversed and remanded. *Judgment is entered accordingly*." App. 60 (emphasis added). The Clerk of this Court accepted the State of Minnesota's petition for filing on February 19, 2019, which was the next day that this Court was open in the 90 days after the Judgment. *See* S. Ct. R. 30(1).

Johnson claims that judgment was entered when the Minnesota Supreme Court issued its decision on August 22, 2018, and characterizes the November 19 Judgment as the "mandate." BIO 6. But the federal rules of appellate procedure upon which Johnson relies explicitly distinguish between a "judgment" and a "mandate"; what the Minnesota Supreme Court entered on November 19 squarely falls under the definition of a judgment. *Compare* Fed. R. App. P. 36 *with* Fed. R. App. P. 41.[1] The "judgment" referred to in this Court's Rule 13 is the filing, prepared and signed by the Minnesota Clerk of Appellate Courts, that was entered on November 19. It is not the decision. *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 25 (1924) ("It is apparent that, however final the decision may be, it is not the judgment.").

Furthermore, this Court's rules require that a petition for a writ of certiorari contain "the judgment sought to be reviewed if the date of its entry is different from the date of the opinion." S. Ct. R. 14(1)(i)(iv). This shows that "judgment" and "opinion" are not synonymous, as Johnson argues. And complying with this rule

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[1] These rules establish that "[a] judgment is entered when it is noted on the docket" and that "[t]he clerk must prepare, sign, and enter the judgment (1) *after receiving the court's opinion* . . . or (2) if a judgment is rendered *without an opinion*, as the court instructs." Fed. R. App. P. 36(a) (emphasis added). Here, nothing in the docket reflects a notation of judgment until November 19, when the Minnesota Clerk of Appellate Courts signed the document stating that "[j]udgment is entered accordingly." App. 60. Also, the fact that judgment can be entered "without an opinion" further distinguishes an opinion (or decision) from a judgment.

was not possible under Johnson's argument, because the petition had to be printed and filed one day after the Minnesota Supreme Court entered its Judgment on November 19. Pet. 13 n.7.

Johnson's reliance on *County of Sonoma v. Eva Isbell*, 439 U.S. 996 (1978), which denied a petition as untimely, is misplaced. As Justice Stevens (joined by two other justices) pointed out in a statement issued in conjunction with that denial, "a denial of certiorari has no precedential value." *Id.* In observing that this Court's precedent appears to conflict on the issue of when a petition is timely, Justice Stevens cited *Puget Sound*, which held that the state-court judgment—not the state-court decision—starts the 90-day clock for filing a petition for writ of certiorari. 264 U.S. at 24-25.[2]

This Court should grant this petition to put Johnson's timeliness argument to rest, or to put practitioners on notice that state-court judgments are not "the judgment" for certiorari deadline purposes (which would overrule *Puget Sound*).

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[2] Johnson also erroneously relies on *Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010), which did not determine when the 90-day period begins for filing a petition for a writ of certiorari. BIO 6. The *Moua* court merely decided when a conviction is deemed final for determining the beginning of the period for filing a petition for state-court postconviction review. For the purpose of the finality that is necessary for review in this Court, it does not matter when a judgment is deemed final under state law. *Wick v. Superior Court*, 278 U.S. 575 (1928) (holding that "the judgment sought to be reviewed is not final within the meaning of [the applicable federal statute], however it may be regarded in state procedure").

III. Merits

Johnson's defense of the three state supreme courts that have found retroactivity essentially comes down to a claim that *Birchfield* does not involve a Fourth Amendment issue, but rather a "Fifth and Fourteenth Amendment due process claim." BIO 14-15. He is wrong. *Birchfield* expressly held that the search here—a request for a blood sample—is an illegal search under the Fourth Amendment unless it is supported by a warrant or a warrant exception. 136 S.Ct. at 2172-74, 2184-86. *Birchfield* does not mention any other amendment; nor does the Minnesota Supreme Court's decision.

Birchfield is not a due-process case; it did not create a new class of people—people who cannot be punished for refusing an unconstitutional search (BIO 5, 10, 12, 13)—because it has never been legal to punish someone for refusing an unconstitutional search.

To put it differently, the "function" of *Birchfield* is not to place conduct beyond the State's power to punish, because the State can still punish blood-test refusal if, for example, there are exigent circumstances. BIO 12, 15; App. 18 n.8. *Birchfield* only changes what police must do: have a warrant or some other exception to the warrant requirement before requesting a blood test. Police need not inform the suspect about an exception to the warrant requirement. Indeed, whether there are exigent circumstances—for example, because in 2014 there may not have been a judge available to

sign a warrant before the dissipation of the alcohol in Johnson's blood—might not be confirmed until later.

The State is not arguing that "*Birchfield* cannot be retroactive because it has a procedural component." BIO 13. It is not retroactive because it is a Fourth Amendment decision that governs police conduct and does not render the conduct at issue (blood-test refusal) per se legal. The issue here is not jurisdictional, just as there is no jurisdiction issue when the question is whether a confession necessary to a conviction was legally obtained.[3]

Johnson relies on *Montgomery v. Louisiana*, but it did not involve a Fourth Amendment issue. And because the sentencing problem it addressed could be solved by granting parole eligibility, it did not "impose an onerous burden on the States, nor . . . disturb the finality of state convictions." 136 S.Ct. at 736. *Montgomery* cites precedent "holding non-retroactive the rule that forbids instructing a jury to disregard

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[3] Another analogous example: If this Court were to hold that a warrant is required for the use of a drug-sniffing dog, this would not create a new class of people—those whose drugs had been illegally detected by dogs—but would simply add them to a preexisting class of people: those who cannot be convicted because the evidence against them was illegally obtained. That their drugs were illegally detected does not mean that their possession of drugs was constitutionally protected, or that a court has no jurisdiction over them. Similarly, if a court found that police wrongly seized and failed to Mirandize a suspect, who then made a terroristic threat, the threat would be suppressed, but the court would not lose jurisdiction. Ultimately, all of Johnson's arguments fail because, again, *Birchfield* was indisputably decided based solely on the Fourth Amendment. 136 S.Ct. at 2172-74, 2184-86.

mitigating factors not found by unanimous vote." *Id.* at 735 (citing *Beard v. Banks*, 542 U.S. 406, 408 (2004)). Under Johnson's erroneous argument about what constitutes a new class of people, *Beard* created a new class: those sentenced following a jury instruction to disregard mitigating factors not found by unanimous vote. But as in *Beard* there is no new class of people here; unlike *Montgomery*, *Birchfield* does not require relief for the "vast majority" of "a class of defendants because of their status." 136 S.Ct. at 734. *Birchfield* just requires a case-by-case determination of whether police requested an illegal search. 136 S.Ct. at 2184-86.

Similarly, *Welch v. United States* involved the retroactivity of a decision that "affected the reach of the underlying statute." 136 S.Ct. 1257, 1265 (2016). Refusing to submit to testing remains illegal, but under the Fourth Amendment police must obtain a warrant or have a warrant exception before requesting a blood test. The benefit of retroactivity here "does not justify the cost of vacating a conviction whose only flaw is that its procedures 'conformed to then-existing constitutional standards.'" *Id.* at 1266 (quoting *Teague*, 489 U.S. at 310).

Notably, the Minnesota Supreme Court departed from one of the principles used to determine when a new rule is substantive and thus retroactive. When a rule is substantive, no procedural mechanism can guarantee the validity of the conviction, "[e]ven [with] the use of impeccable factfinding procedures." *Montgomery*, 136 S.Ct. at 730 (quoting *United States v. U.S.*

Coin & Currency, 401 U.S. 715, 724 (1971)). Here, the Minnesota Supreme Court held that every old blood-test-refusal conviction should be subject to a postconviction factfinding procedure.

Because of the "need for finality," there is "a general rule against retroactivity . . . and all new rules are barred unless they fit within the exceptions for substantive or 'watershed' procedural rules." *Welch*, 136 S.Ct. at 1275 (Thomas, J., dissenting). Johnson does not argue that *Birchfield* is a watershed procedural rule; it is not substantive because refusing to submit to blood testing remains illegal so long as police follow the proper procedure.

IV. Importance Of This Issue

Johnson offers no support for his assertion that the "vast majority" of the more than 6,700 recent test-refusal convictions in Minnesota are breath-test refusals, or for his contention that it is "highly likely the same is true of the 45,596 [2011] test-refusal arrests in [12] other states." BIO 8-9; Amicus Br. 8. The State of Minnesota has been unable to obtain statistics breaking down test refusals into breath, urine, and blood, but it seems unlikely that breath tests are the "vast majority" of refusals because breath tests are useless if a driver's impairment is from opioids, marijuana, or other controlled substances.[4] And even if ninety

[4] Further, breath tests are not always possible. There may be no working official breath-test machine nearby or no certified operator of the machine available, or the suspect may have (or

percent of refusals involve breath tests, that still leaves thousands of refusals that may have to be reviewed if *Birchfield* is retroactive. Johnson concedes that in less than nine months his counsels' office has identified dozens ("fewer than forty") of indigent defendants to whom *Johnson* applies. He does not indicate how many files were reviewed in reaching this number, or attempt to estimate how many non-indigent defendants are eligible for relief under *Johnson*.[5]

Regardless of whether the number of affected defendants in the fifteen states with criminal test-refusal laws is in the hundreds or the thousands, this issue is

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claim to have) asthma or some other medical condition that prevents him or her from providing an adequate breath sample. *See*, *e.g.*, *State v. Sterling*, 782 N.W.2d 579, 581-82 (Minn. Ct. App. 2010); Minn. Stat. § 169A.51, subd. 4(3).

[5] Also, additional cases to which *Birchfield* could be retroactively applied will continue to be discovered in the months (and years) ahead. For instance, if a defendant who has an old blood-test-refusal conviction—but who has completed the sentence for that conviction—is charged with a new crime, that old test-refusal conviction will: if the new crime is impaired-driving related, serve as a predicate offense that enhances the consequence for the new crime (Minn. Stat. § 169A.24, subd. 1); or, regardless of what the new crime is, contribute to the defendant's criminal history score, and thus to the length of the sentence. And Johnson misunderstands the point raised by the amicus that retroactively applying *Birchfield* may impact more than just blood-test-refusal convictions. Amicus Br. 9-10; BIO 14 n.5. *Birchfield* held that "consent" obtained "on pain of committing a criminal offense" is not constitutionally sufficient consent. 136 S.Ct. at 2186. Thus, any pre-*Birchfield* "consent" that a driver gave for a warrantless blood test may be legally suspect—and the possible subject of a petition for postconviction relief based on a change in the law—if *Birchfield* is retroactive.

important. If *Birchfield* is retroactive, numerous hearings—requiring significant resources—will have to be held on old blood-test-refusal convictions. In many cases, it is likely that evidence is no longer available, and memories have significantly faded. Given the difficulty of establishing exigent circumstances or other warrant exceptions many years later, it is probable that numerous defendants will have restrictions on their driving privileges lifted. Those defendants will, like Johnson, present a danger to the public.[6]

Johnson repeatedly emphasizes that he was not charged with impaired driving for the 2009 and 2014 incidents, but that is because he refused official chemical testing. BIO 3, 4, 10, 11, 13. Without such test results, it is much harder to obtain an impaired-driving conviction, which is the reason for test-refusal laws—to prevent a suspect from gaining a tactical advantage by refusing testing. The police here had no reason under the existing law to obtain a warrant before requesting a chemical test, and the State had no reason to also charge Johnson with impaired driving.

Johnson is hardly alone in being a repeat drunk driver. The ability to continue to limit the driving of those with old blood-test-refusal convictions, and to

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[6] Johnson's claim that he is not a habitual drunk driver is belied by his record. BIO 10, 13. He had three or more prior impaired-driving incidents within a ten-year period before he failed field sobriety tests in 2009. Pet. 2. In 2014, while still on probation, he admitted he had been drinking alcohol, and his preliminary-breath-test result was more than one-third over the legal limit. Pet. 3.

enhance future sentences if they are caught again—both of which are jeopardized by the *Johnson* decision—are important to public safety given the high recidivism rate of impaired drivers.[7]

Finally, ignoring the arguments to the contrary, Johnson predictably asserts that this Court should let this issue percolate. BIO 11; Amicus Br. 10-12. But he does not dispute that this is a straightforward legal issue, or argue that more facts or analysis are necessary. He just claims that we do not know exactly how many defendants will be entitled to relief if *Birchfield* is retroactive. This is true, but irrelevant given the importance of this issue.

Furthermore, even though three state supreme courts have held that *Birchfield* is retroactive, there is confusion between them about what retroactivity means. The Minnesota Supreme Court did not invalidate any test-refusal convictions; rather, it required individual, case-by-case determinations of whether the requested test comported with the Fourth Amendment. App. 18. In contrast, the North Dakota Supreme Court, in holding that *Birchfield* applied retroactively, "remand[ed] with instructions that the district court vacate the criminal judgment." *Morel v. State*, 912 N.W.2d 299, 305 (N.D. 2018).

Johnson does not dispute the "grisly toll" of drunk driving. *Birchfield*, 136 S.Ct. at 2166. This decision will

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[7] National Highway Traffic Safety Administration, DWI Recidivism in the United States . . . (Traffic Safety Facts, March 2014). https://tinyurl.com/yy43sf5h

only add to that toll. The retroactivity of *Birchfield* is a question that "should be[] settled" by this Court. Sup. Ct. R. 10(c).

CONCLUSION

This Court should grant this petition for writ of certiorari.

Dated: May 30, 2019

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