No. _____

# 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**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is this Court's ruling in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016)—that 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—a new substantive rule of federal constitutional law that applies retroactively to cases on collateral review?

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APPENDIX

# TABLE OF AUTHORITIES

Petitioner State of Minnesota respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

## OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 916 N.W.2d 674. Petition's Appendix ("App.") 1. The opinion of the Minnesota Court of Appeals is reported at 906 N.W.2d 861. App. 20. The written decisions of the District Court of Ramsey County addressing the relevant issue were not reported, but are reprinted at App. 31, 49.

## JURISDICTION

The Minnesota Supreme Court entered judgment on November 19, 2018. App. 60. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Minnesota Statutes section 169A.20, subdivision 2 (2016) reads:

> "It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)."

## STATEMENT OF THE CASE

### I. Factual History

In 2009, law enforcement stopped respondent Mark Jerome Johnson's vehicle for having expired tabs. Johnson showed indicia of alcohol impairment, failed field sobriety tests, and refused a preliminary breath test. Placed under arrest, Johnson refused to submit to blood or urine testing; he was not offered another breath test. At the time of the incident, Johnson had three or more qualified prior impaired-driving incidents within a 10-year period. App. 2, 21-22, 32.

Charged with one count of first-degree refusal to submit to a chemical test ("test refusal"), Johnson pleaded guilty. On July 16, 2010, the district court sentenced him to a stayed 48-month prison term, with probation for up to seven years. Johnson did not appeal his conviction. App. 2, 22, 32-33.

On June 20, 2014, while still on probation, Johnson was pulled over for erratic driving. He admitted he had been drinking alcohol. After a preliminary breath test showed Johnson had a 0.109 alcohol concentration, he refused to take a blood or urine test; he was not offered an official breath test. App. 2-3, 22, 50-51.

Charged with one count of first-degree test refusal, Johnson pleaded guilty. His failure to abstain from alcohol was a violation of his probation for his 2010 test-refusal conviction, so the district court executed his 48-month prison sentence. On April 23, 2015, pursuant to the plea agreement, the district court sentenced Johnson for his new test-refusal conviction to 51 months in prison with five years of conditional release following confinement. Johnson again did not appeal his conviction. App. 3, 22-23, 51-52.

## II. Proceedings Below

In December 2016, Johnson filed identical petitions for postconviction relief in his two test-refusal cases. He argued that the new rule announced in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), requires both of his test-refusal convictions to be vacated.[1] Different postconviction courts handled the two

[1] Following this Court's decision in *Birchfield*, the Minnesota Supreme Court applied *Birchfield* in two of its own decisions, *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016) (applying *Birchfield* to a refusal to submit to a warrantless blood test), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016) (holding that a urine test, like a blood test, is not a permissible search incident to an arrest). *See* App. 7 (characterizing *Trahan* and *Thompson* as

cases. Judge Frisch issued an order denying postconviction relief from Johnson's April 2015 conviction. App. 49-59. One week later, Judge Atwal issued a separate order denying postconviction relief from Johnson's July 2010 conviction. App. 31-48. Both judges held that the new rule was not retroactively applicable, and that, by pleading guilty, Johnson forfeited his right to challenge his convictions on Fourth Amendment grounds. App. 40-42, 44-46, 55-58.

Johnson appealed. The Minnesota Court of Appeals consolidated the two cases and affirmed. It held that the rule announced in *Birchfield* was a new rule of procedure that does not apply retroactively to Johnson's final test-refusal convictions. App. 30. The court explained that the new rule "relied on an individual's Fourth Amendment right to be free from unreasonable searches and seizures, and the Fourth Amendment does not limit the range of conduct the state may criminalize." App. 28. It reasoned that, because "[t]est refusal is still a crime where the actions of law enforcement comport with the Fourth Amendment," the new rule "did not place this category of conduct outside the state's power to punish." App. 29.

The Minnesota Supreme Court reversed. It held that "Johnson's guilty pleas did not forfeit his argument that the *Birchfield* rule applies retroactively," and that the *Birchfield* rule is a new substantive rule

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"application[s] of *Birchfield*"). Johnson based his initial postconviction petitions on *Trahan* and *Thompson*, but the Minnesota Supreme Court later analyzed the rule as emanating from *Birchfield*. *See* App. 5-7.

of federal constitutional law that applies retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). App. 2, 10-14.

In holding that Johnson's guilty pleas did not preclude him from arguing that *Birchfield* retroactively applies to his final convictions, the Minnesota Supreme Court concluded that Johnson's argument that the factual circumstances and police conduct in his cases did not justify the blood and urine tests asked of him—and therefore rendered his criminal test-refusal convictions unconstitutional—"attack[ed] the subject-matter jurisdiction of the district court." App. 8-9.

The court did not construe Johnson's argument as a claim that his Fourth Amendment rights were violated. Rather, in holding that the *Birchfield* rule is substantive (and thus applies retroactively), the Minnesota Supreme Court stated that the rule "placed a category of conduct outside the State's power to punish" because, post-*Birchfield*, "a suspected impaired driver may only be convicted of test refusal if that person refused a breath test or refused a blood or urine test that was supported by a warrant or a valid warrant exception." App. 14. But the Minnesota Supreme Court did not invalidate Johnson's test-refusal convictions; it remanded the cases to the district court "to apply the *Birchfield* rule and determine if the test-refusal statute was unconstitutional as applied to Johnson." App. 18.

The Minnesota Supreme Court entered its Judgment on November 19, 2018. App. 60.

## REASONS FOR GRANTING THE PETITION

This case presents a straightforward but important legal issue—one that will affect thousands of test-refusal and driving-while-impaired convictions in numerous states: did this Court's decision in *Birchfield* create a new rule of constitutional law that applies retroactively to cases on collateral review? App. 1-2, 5-6, 10. Under this Court's precedent, it did not.

### I. The Merits

In *Birchfield*, this Court consolidated three cases—one from Minnesota and two from North Dakota—to consider whether criminal test-refusal laws violate the Fourth Amendment prohibition against unreasonable searches. 136 S.Ct. at 2166-67, 2170-72. *Birchfield* held that under the search-incident-to-arrest exception, a warrantless breath test may be required of a person lawfully arrested for DWI. *Id.* at 2184, 2186, 2187. But *Birchfield* also held that the search-incident-to-arrest exception did not authorize a blood test following a lawful DWI arrest, and that under the Fourth Amendment, a blood test cannot be required of a person without a warrant or a recognized exception to the warrant requirement (such as exigent circumstances). *Id.* at 2172, 2184, 2185, 2186. More broadly, this Court held in *Birchfield* that a criminal test-refusal charge based on what would have been an unconstitutional search violates the Fourth Amendment. *Id.* at 2186.

*Birchfield* did not decide whether its new rule retroactively applies to final convictions on collateral review. That is the issue the Minnesota Supreme Court decided in this case. App. 1-2, 5, 10. It is well established that a new rule does not apply to a final conviction unless it falls within one of two exceptions to the general principle that new rules are not retroactive; here, there is no dispute that *Birchfield* set out a new rule that is not a watershed rule and therefore is retroactive only if it is substantive, not procedural. *See Teague*, 489 U.S. at 310-12; *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004); App. 10-11.[2]

The *Birchfield* rule is procedural because it governs what law enforcement must do, in a situation where there is no exception to the warrant requirement, before arresting a suspected impaired driver for refusing a blood test: obtain a warrant. It is not substantive because it does not preclude all convictions for blood-test refusal, or even all convictions for warrantless blood-test refusal. *See Schriro*, 542 U.S. at 351-53; *see also Montgomery v. Louisiana*, 136 S.Ct. 718, 732 (2016) (stating that if a new rule is substantive, "no resources marshaled by a State could preserve a

[2] As a threshold matter, this Court has jurisdiction to review the determination by the Minnesota Supreme Court that *Birchfield* announced a substantive constitutional rule under the *Teague* framework. App. 10-11, 14. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 729-32 (2016) (holding that, when a determination about whether a new rule announced by this Court constitutes a "substantive rule of constitutional law controls the outcome of a case[,]" this Court can review the determination made by a state court).

conviction or sentence that the Constitution deprives the State of power to impose").

The Minnesota Supreme Court erroneously treated this as an issue of the district court's subject-manner jurisdiction over a class of people, but this Court's decision in *Birchfield* turned on its analysis of the Fourth Amendment, and every blood-test-refusal prosecution turns on the Fourth Amendment's application to its unique facts: did the police obtain a valid warrant, or does an exception to the warrant requirement, like exigent circumstances, apply. 136 S.Ct. at 2167, 2172-86. Neither the words "due process" nor citation to any other constitutional provision occur anywhere in *Birchfield*. Mr. Birchfield's conviction for refusing a blood test was reversed because he "was threatened with an unlawful search." *Id.* at 2186.

Thus, contrary to the Minnesota Supreme Court's decision, the issue here is a possible violation of the Fourth Amendment, not the constitutionality of the test-refusal statute as applied. App. 9-10. A test-refusal statute is unconstitutional as applied to one who refused an unlawful search only in the sense that a controlled-substance-crime statute is unconstitutional as applied to one whose drugs were found in an illegal search. Or as a terroristic-threats statute is unconstitutional as applied to a person with a gun who said "I'm going to shoot you" but did so in defense of another.

*Birchfield* is not about jurisdiction or membership in a class, and does not make all test refusal legal;

whether test refusal is a crime depends *solely* on what the police did (get a warrant or rely on an exception), not on the test refuser's "private individual conduct" that is no longer illegal. *Teague*, 489 U.S. at 311.[3] *Birchfield* created a fact-dependent test, not a new class of people constitutionally immune from punishment. App. 5-6. Defendants who cannot be prosecuted because critical evidence—in this case the test refusal—was

[3] This contrasts sharply with *Welch v. United States*, 136 S.Ct. 1257, 1260-61, 1268 (2016), in which this Court retroactively applied a decision that struck down a statutory provision (the "residual clause") of the Armed Career Criminal Act (ACCA). The criminal behavior at issue in *Welch* was "private individual conduct." The ACCA and its residual clause applied to any person who possessed a firearm after three violent felony convictions, and mandated that such an individual faced 15 years to life in prison. 136 S.Ct. at 1265. The conduct proscribed by the ACCA did not depend on whether the police obtained a warrant or there was an applicable exception to the warrant requirement. After the residual clause was struck down, a firearm-possessing individual would face no more than 10 years in prison. *Id.* In contrast, after *Birchfield*, some suspected impaired drivers can still be criminally prosecuted for refusing to submit to a blood test. Furthermore, this Court explained in *Welch* that a court determines "whether a new rule is substantive or procedural by considering the function of the rule." *Id.* The function of the *Birchfield* rule is *not* to legalize the refusal to submit to blood tests; rather, the function is twofold: (1) broadly, to ensure that all warrantless chemical tests comport with the Fourth Amendment; and (2) specifically, to limit the search-incident-to-arrest exception to authorizing warrantless breath tests, but not warrantless blood tests. *Birchfield* did not "affect the reach of the [test-refusal] statute"; warrantless blood tests still lawfully exist. *Id.* Rather, it affected "the judicial procedures by which the [test-refusal] statute is applied"—it requires a warrant *or* the existence of a valid exception to the warrant requirement. *Id.* Under *Welch*, the *Birchfield* rule is procedural. *See id.*

obtained in violation of the Fourth Amendment are not a new class of people, nor are defendants whose words were not illegal under the particular facts of their case.

That the *Birchfield* rule does not bar all convictions for blood-test refusal is the key difference between it and the rule that mandatory life without parole for juvenile murderers violates the Eighth Amendment ("the *Miller* rule") that this Court held was retroactive in *Montgomery*, 136 S.Ct. at 736. The *Miller* rule created a new class of people because it gave *everyone* in a particular class the right to a resentencing hearing. *See id.* In contrast, under *Birchfield* an individual convicted of refusing a warrantless blood test would not even be entitled to a new hearing—let alone the vacation of his or her conviction—if the existing record shows the presence of exigent circumstances or another exception to the warrant requirement. *Cf.* 136 S.Ct. at 2186 ("North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search."). The *Miller* rule invalidated every juvenile mandatory-life-without-parole sentence; as the Minnesota Supreme Court recognized, *Birchfield* did not similarly invalidate every conviction for refusing a warrantless blood test. App. 18. ("Even though the *Birchfield* rule applies to Johnson's convictions, reversal of those convictions is not automatic.").[4]

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[4] In addition, that *Montgomery* upset only old sentences is another critical distinction between the *Miller* and *Birchfield* rules. This is what allowed this Court in *Montgomery* to encourage states to simply allow juvenile homicide offenders to be

The bottom line is this: petitioner is not aware of any case that has ever held that a Fourth Amendment decision was retroactive to final convictions. Nor is petitioner aware of any case where a rule governing police conduct was made retroactive to final convictions where the police followed the law as it existed at the time, and if the police had been clairvoyant and taken the additional step later found to be necessary, then the conviction would have been valid (i.e., where the conduct has not been rendered per se legal).

Other courts that have concluded that *Birchfield* is retroactive have also erred. They have inaccurately held that, after *Birchfield*, individuals can no longer be prosecuted for refusing to submit to warrantless blood tests. *See State v. Vargas*, 404 P.3d 416, 420 (N.M. 2017); *Morel v. State*, 912 N.W.2d 299, 305 (N.D. 2018). But *Birchfield* did not bar all criminal penalties for blood-test refusal. A person can still be prosecuted for refusing a warrantless blood test if any exception to the

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considered for parole, rather than resentencing them. 136 S.Ct. at 736. Retroactive application of the *Birchfield* rule involves challenges to convictions. Both this Court and Justice Scalia (in dissent) noted in *Montgomery* how "impossible" it would be to actually relitigate each old case. *Id.* at 736, 744 (Scalia, J., dissenting). The Minnesota Supreme Court's disregard of this reality (*see* App. 17 n. 7) flies in the face of the principles adopted in *Teague*. *See Mackey v. United States*, 401 U.S. 667, 691 (1971) (separate opinion of Harlan, J.) ("This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed.").

warrant requirement existed—exigent circumstances, the person's probation conditions, etc.

## II. The Importance Of This Issue

This is an important question of federal law that should be settled by this Court. Three state supreme courts have decided the question in a way that conflicts with this Court's retroactivity jurisprudence. The impact of these decisions is immediate and puts lives in danger.

At least fifteen states have criminal test-refusal laws.[5] In Minnesota alone there have been over 6700 test-refusal convictions since 2013;[6] under the Minnesota Supreme Court's decision, every one of these defendants who was convicted for refusing a blood or urine test can demand that the case be reopened for determination of whether a warrant exception justified the request for a test. If there was no warrant exception, then each defendant can demand immediate release, or termination of probation, or to have restrictions on driving privileges removed. Habitual drunk drivers like Mr. Johnson will be back on the road, unencumbered by probationary restrictions on drinking or driving. Also, if *Birchfield* is retroactive,

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[5] They are Alaska, Arkansas, California, Florida, Hawaii, Kentucky, Louisiana, Maine, Minnesota, Nebraska, North Dakota, Rhode Island, Tennessee, Vermont, and Virginia. https://www.responsibility.org/alcohol-statistics/state-map/issue/test-refusal/.

[6] https://dps.mn.gov/divisions/ots/reports-statistics/Pages/impaired-driving-facts.aspx.

anyone who was convicted of blood or urine test refusal, and later sentenced for another crime, will be able to demand a resentencing hearing if the previous refusal conviction led to a longer sentence on the later crime.

"Drunk drivers take a grisly toll on the Nation's roads." *Birchfield*, 136 S.Ct. at 2166. "*Teague* warned against the intrusiveness of '*continually* forc[ing] the States to marshal resources in order to keep in prison defendants whose trial and appeals conformed to then-existing constitutional standards.' 489 U.S. at 310." *Montgomery*, 136 S.Ct. at 732. Erroneous retroactive application of *Birchfield* will heavily burden states and add to drunk driving's toll.[7]



[7] In a previous response to a cert. petition, the Office of the Minnesota Appellate Public Defender argued that the petition was untimely because the 90 days to file ran from the date of the decision, not from the date of entry of the judgment. Petitioner responded to that argument on pages two and three of its Reply Brief in Support of Petition for Writ of Certiorari on Minnesota v. Chute, No. 18-48. Notably, the date of entry of the Judgment here was 89 days after the decision. Under the Public Defender's date-of-decision-not-judgment approach, this left a single day after entry of the Judgment to attach it, as required, and file a cert. petition. But "[i]t is apparent that, however final the decision may be, it is not the judgment." *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 25 (1924) (finding "no doubt that that which the Washington statute calls the judgment is the judgment referred to in the [federal statute] fixing the time in which writs of error must be applied for and allowed," and denying motion to dismiss the writ as untimely filed).

## CONCLUSION

This Court should grant this petition for a writ of certiorari.

Dated: February 19, 2019

Respectfully submitted,

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