No. 18-8754

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD D. POMEROY ------PETITIONER

vs.

MUNICIPALITY OF ANCHORAGE ------ RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Superior Court for the State of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should civil penalties been imposed on petitioner (Pomeroy) for refusal to submit to a breath test, when an intrusive blood test was administered to petitioner after being arrested for a minor traffic infraction.

II. Was there probable cause for the arresting officer to insist petitioner take a blood test, which petitioner did, when a nurse extracted parts of petitioner body with a needle after petitioner had already been charged with refusal to submit to a breath test.

III. Was petitioner correct in interpreting and retroactively applying the findings and new rulings in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) to petitioner appeal.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1 (b), petitioner Pomeroy certifies the names of all parties to this proceeding appear in the caption of this case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully preys that a writ of certiorari issue to review judgment below.

OPINIONS BELOW

This is a State Court unpolished opinion, see Alaska Superior Court case 3AN-17-10292 ci, petitioner has attached a copy of the final order or opinion for this court review, see Appendix A.

JURISDICTION

The date on which the Alaska Supreme Court see case S-17212, decided my case was November 5th 2018, when denying petitioner petition for hearing, a copy of that decision appears at Appendix B.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

TABLE OF AUTHORITIES CITED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

On October 8th 2008, petitioner (Pomeroy) was pulled over by an Anchorage police officer for a minor traffic infraction to wit going over the speed limit. The officer then requested petitioner to step out of the car and conducted a number of field variety test. The officer requested petitioner to take a breath test by blowing into a device that determines the blood alcohol content (BAC) in a person blood. Petitioner refuse and the officer place petitioner in restraint of petitioner liberty. Petitioner was transported to a police sub-station where the officer insisted petitioner blow into the device. Petitioner continued to refuse and the officer charged petitioner with refusal to submit to a breath test under AS 28.35.032., see Appendix C, (complaint).

The officer then brought up the issue of petitioner taking a blood test by having a nurse extract part of petitioner body with a needle, a consent form was produce where the officer and nurse both signed off on it, however petitioner never signed it with the officer writing in handcuffed where petitioner signature should had been. With no probable cause or a search warrant being issued or petitioner being warned of the consequences for giving a blood test, a nurse administered the intrusive blood test to petitioner, with the officer placing petitioner blood sample into evidence, see Appendix D, (police property report). Officer Henie then charged petitioner with one count of Operating a Vehicle Under the Influence, OUI, under AS 28.35.031. Refer back to Appendix C. Both Alaska Statutes fall under AS 28.35.031, Implied Consent Law. See Appendix E pages 1-3, police report for a full summary of what transpired at the time of arrest.

Petitioner was then transported to a pre-trial facility. A year later on October 12th 2010, a plea agreement was reach between petitioner and respondent, with petitioner pleading to one count of refusal to submit to a breath test, see Appendix F. Respondent dismissed the charge of operating a vehicle under the influence OUI, which was held over petitioner head prior to and during plea agreement proceedings.

Petitioner was hit with civil penalties to include but not limited to fines; ninety (90) day suspension of driver license, car insurance increase; paying impound vehicle fees; jail time; and required to pay for and attend alcohol treatment program.

After the *Birchfield* ruling came out in June of 2016, on July 15th 2016, petitioner applied the new ruling and findings published in *Birchfield v. North Dakota*, No. 14-1468, as retroactive, filing a motion to dismiss petitioner conviction of refusal to submit to a breath test with the District Court. Petitioner cited and preserved constitutional right violations under search and seizure laws, see case 3AN-09-11606 CR, Appendix G.

The District Court denied petitioner motion with petitioner appealing to the Superior Court, see 3AN-16-08347. The court remanded back down to the District Court giving petitioner a chance to file a post-conviction relief application. The District Court denied petitioner application, see 3AN-17-04677ci. Petitioner then appealed once more to the Superior Court that upheld the lower court dismissing petitioner application, refer to Appendix A.

The Alaska Court of Appeals and Supreme Court denied petitioner petition

for a hearing. Petitioner now prays for relief through this Petition for Writ of Certiorari.

ARGUMENT

A. Birchfield Applies Retroactively to Petitioners Case.

When petitioner appealed to the Superior Court, the court ruled even if petitioner (Pomeroy) applied *Birchfield* retroactively it would not affect his conviction, see Appendix A page 4.

At the time petitioner filed a motion to dismiss with the district court, petitioner conviction became final six years prior to the Birchfield ruling coming out. In *Teague v Lane,* 489 U.S. 288, (1989) this court took Justice Harlan's view that new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review is the appropriate approach. Unless they fall within one of Justice Harlan's suggested exceptions to this general rule, that a new rule should be applied retroactively (1) if it places "certain kinds of primary private individual conduct beyond the power of the criminal lawmaking authority to proscribe, *Mackey v. United States,* 401 U.S. 667, 401 U.S. 692, or (2) if it requires the observance of "those procedures that ...are implicit in the concept of ordered liberty,"

Petitioner meets these exceptions as applied in *State v. Vargas,* 404 P.3d 416 New Mexico (2017), 1) when petitioner preserved and made claims of fundamental federal and state constitutional right violations under search and seizure laws when filing in the District Court, see Appendix G, 2) there exist a question of general

1. Id. at 401 U.S. 693

public interest via the fourteenth amendment, and 3) the ruling in *Birchfield* is a 'new ruling' that pertains to search and seizure laws that apply to petitioner criminal case..

The Supreme Court of New Mexico ruled and applied the above analysis even though Vargas did not preserve amendment argument in the court in regards to constitutional right violations. The court found there is a question involving public interest [or] fundamental right which is a matter of general public interest via the fourteenth amendment, as in petitioners case.[2/]

B. The Police Officer Needed Probable Cause to Request a Blood Sample from Petitioner, After Charging Petitioner with Refusal to Submit to a chemical test.

When Alaska Legislation enacted its Implied Consent Law under AS 28.35.031, guidelines were set for a police officer prior to the administering a blood or urine sample from a person involved in a traffic violation as followed;

> "g"...A person who operates or drives a motor vehicle in this state shall be considered to have **given consent** to a chemical test or tests of a content of the person's breath and **blood** for the purpose of determining the alcoholic content of the person's breath and blood and shall be considered to have given consent to a chemical test or tests of the person's **blood and urine** for the purpose of determining the presence of controlled substances in the person's **blood** and urine **if** the person is involved in a motor vehicle accident that causes death or serious physical injury to another person. The test or tests may be administered at the direction of a law enforcement officer who

2. *Id* at 2017-NMCA-023,¶19.

> has **probable cause** to believe that the person was operating or driving a motor vehicle in this state that was involved in and accident causing death or serious physical injury to another person."

Petitioner (Pomeroy) was pulled over for a minor traffic infraction, was never involved in a motor vehicle accident that cause death or serious physical injury to another person, see Appendix E, pages 1-3, (police report), Under implied consent laws Officer Henie had no probable cause to request petitioner take a warrantless intrusive blood test to begin with, especially once he charged petitioner with refusal to submit to a breath test which in itself makes no since as how can a person be charged with refusal to take a chemical test after a blood test was administered to petitioner.

Most important there is a question of public interest at hand, with the question, 1) how can petitioner plead out to refusal to submit to a chemical test when in fact a chemical test (blood test) was administered to petitioner after being charged with refusal, and 2) should had petitioner been informed by officer Henie of the consequences of taking the blood test when charging petitioner (Pomeroy) with operating a vehicle under the influence OUI.

Petitioner attorney never challenge the blood withdraw, nor informed the court prior to and during plea agreement proceedings that in fact a chemical test was administered to petitioner.

Applying the new ruling in Birchfield, petitioner inherit rights under search and seizure laws were violated when the police officer failed to obtain a search warrant or have probable cause to have a nurse administer a blood test to petitioner. Moreover, petitioner due process and equal protection under the law rights were also violated when the police officer failed to inform petitioner of the consequences of giving up parts of petitioner body as evidence, refer to Appendix D,

C. Petitioner was Punished with Civil Penalties and Evidentiary Consequences for Refusal to Submit once a Blood Test was Administered to Petitioner.

This court recently took up the issue of warrantless blood test in *Birchfield v. North Dakota,* Nos, 14-1468, (2016). In their findings the court held 1) the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood test, Pp 2176-2178, (a) taking a blood sample or administering a breath test is a search governed by the Fourth Amendment.[3/] The analysis begins by considering the impact of breath and blood test on individual privacy interests, Pp. 2176-2178. (1) Breath tests do not "implicate[e] significant privacy concerns.[4/] The physical intrusion of blood tests almost negligible, breath test do not require piercing the skin and entail a minimum of inconvenience. (2) the same cannot be said about blood tests. They require piercing the skin and extracting a part of the subject's body, Skinner, Supra at 625, 109 S.Ct. 1402, and

3. see *Skinner v.Railway Labor Executives' Assn*, 489 U.S. 602, 616-617, 109 S.Ct. 1402, 103 L. Ed 2d 639, *Schmerber v. California,* 384 U.S. 757, 767-768, 86 S.Ct. 1826, 16 L.ED.2d 908.

4. Id *Skinner*, 489 U.S., at 626, 109 S.Ct. 1402.

thus are significantly more intrusive then blowing into a tube. The blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading.

This is what happen in petitioner case when an intrusive warrantless blood sample was taken from petitioner without any justification to do so, however after petitioner gave a blood sample, petitioner was punished for refusal to submit to a breath test when fines were imposed, made to pay for alcohol treatment classes, payed the thirty (30) day impound fee to get petitioner vehicle back; having petitioner driver license suspended for ninety (90) days.

In *Birchfield* this court had great concerns in regard to the following;

> "....It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit" *Birchfield* Pp. 2185-2186.

This is the exact scenario that played out in petitioner (Pomeroy) case.

CONCLUSION

The blatant disregard for petitioner (Pomeroy) inherit constitutional rights under search and seizure laws should not go unaddressed, as what transpired in petitioner case can happen to any Alaska citizen. There is still the issue even were this court were not to issue a writ, petitioner blood samples are still out there and petitioner cant request the evidence be destroyed unless a ruling states the blood test were in violation of petitioners constitutional rights under search and seizure laws.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard B. Jones

Date: 1/29/2019