No. 19-____

IN THE
Supreme Court of the United States

JEFFREY ALAN OLSON,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's holding that states may not "impose criminal penalties on the refusal to submit to" a warrantless blood draw, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016), is substantive and therefore applies retroactively.

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Jeffrey Alan Olson petitions for a writ of certiorari to review the Supreme Court of Pennsylvania's judgment in this case.

OPINIONS BELOW

The Pennsylvania Supreme Court's opinion (Pet. App. 1a-28a) is published at 218 A.3d 863. The state intermediate appellate court's opinion (Pet. App. 29a-38a) is published at 179 A.3d 1134. The trial court's opinion (Pet. App. 39a-41a) is unpublished.

JURISDICTION

The Pennsylvania Supreme Court entered its judgment on October 31, 2019. On January 21, 2020, Justice Alito granted a 30-day extension of time to file this petition, making it due on February 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> 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.

U.S. Const. amend. IV.

INTRODUCTION

This petition concerns a direct and acknowledged conflict over whether this Court's holding that state implied consent laws cannot "impose criminal penalties on the refusal to submit to" a warrantless blood draw, *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), is retroactive on collateral appeal. *Id.* at 2185. Three state courts of last resort have held this rule "is substantive and applies retroactively" under *Teague v. Lane*, 489 U.S. 288 (1989), and have begun the process of unwinding unconstitutionally imposed criminal penalties. *Johnson v. State*, 916 N.W.2d 674, 682-84 (Minn. 2018); *Morel v. State*, 912 N.W.2d 299, 304-05 (N.D. 2018); *State v. Vargas*, 404 P.3d 416, 420 (N.M. 2017). In the decision below, a majority of the Pennsylvania Supreme Court noted those decisions, "disagree[d] with" them, and held *Birchfield*'s rule is procedural and not retroactive on collateral review. Pet. App. 16a.

That decision is plainly wrong under this Court's retroactivity precedent. And, either way, this conflict is important to thousands of criminal defendants—many of whom remain burdened by criminal penalties simply because they asserted their constitutional prerogative— and it is important to states—one of which recently asked this Court to intervene even in the absence of any conflict. This point of conflict was the sole issue decided by the Pennsylvania Supreme Court and, given its conscious decision to depart from its sister states, only this Court can eliminate the intolerable disparity.

STATEMENT OF THE CASE

1. In 2015, Petitioner pled guilty to committing a third offense of driving under the influence with refusal to consent to a blood draw, a first-degree misdemeanor under Pennsylvania law. Pet. App. 39a; 75 Pa. Cons. Stat. §§ 3802(a)(1) (2006), 3803(b)(4) (2014), 3804(c)(3) (2012). According to the factual basis for the plea, proffered by the prosecution and accepted by Petitioner and the court, an officer found Petitioner "asleep behind the wheel with the car running" with signs of impairment, including the odor of alcohol, and Petitioner "ultimately refused the blood draw." Transcript of Sept. 15, 2015 Guilty Plea Hearing at 3.[1]

Similar to several other states before this Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), Pennsylvania's implied consent laws imposed criminal penalties on a person who refused consent to a warrantless blood draw.[2] In addition to converting Petitioner's crime to a "misdemeanor of the first degree," 75 Pa. Cons. Stat. § 3803(b)(4) (2014), Petitioner's refusal to consent to a warrantless blood draw increased his mandatory minimum prison term from

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[1] The affidavit of probable cause attached to the charging document similarly recounted that an officer found Petitioner asleep in his vehicle and warned Petitioner that he would face criminal penalties under Pennsylvania's implied consent law if he refused a blood draw, and Petitioner nonetheless refused. *See also* 75 Pa. Cons. Stat. § 1547(b)(2)(ii) (2006) (requiring officers to warn about criminal penalties for refusal to consent to chemical testing), *amended following Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), 2017 Pa. Legis. Serv. Act 2017-30 (S.B. 553).

[2] The criminal penalties for "refused testing of blood" were added to Pennsylvania's implied consent laws in 2003. *See* 2003 Pa. Legis. Serv. Act 2003-24 (S.B. 8) (amending 75 Pa. Cons. Stat. §§ 1547 and 3804).

ten days, *id.* § 3804(a)(3)(i) (2012), to one year, *id.* § 3804(c)(3)(i) (2012); increased his maximum prison term from two years, 18 Pa. Cons. Stat. § 1104(2), to five years, *id.* § 1104(3); and increased his minimum fine from $500 to $2500, 75 Pa. Cons. Stat. § 3804(a)(3)(ii), (c)(3)(ii) (2012).

A conviction involving refusal to consent to a blood draw also triggers lifelong collateral consequences under federal law. For instance, where, as here, the refusal of a blood draw elevates the offense of conviction to a first-degree misdemeanor under Pennsylvania law, a person is forever banned from possessing a firearm, punishable by criminal prosecution and imprisonment under 18 U.S.C. §§ 922(g)(1), 921(a)(20)(B).[3]

In accordance with the increased penalties that were triggered by a blood draw refusal, Petitioner was sentenced to a five-year term, with at least 18 months of imprisonment, and a $2500 fine. Pet. App. 2a.

2. Six months after Petitioner's conviction became final, this Court decided *Birchfield*, which considered the constitutionality of state implied consent laws that "mak[e] it a crime to refuse" breath and alcohol

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[3] As mentioned above, a person like Petitioner who had prior DUIs and refused a blood draw committed a state misdemeanor subject to a maximum of two years imprisonment, *see* 75 Pa. Cons. Stat. § 3803(a)(2) (2014); 18 Pa. Cons. Stat. § 1104(2), and is therefore excluded from the federal ban on firearm possession, 18 U.S.C. §§ 922(g)(1), 921(a)(20)(B) (excluding state misdemeanors "punishable by a term of imprisonment of two years or less"). By elevating an offense to a first-degree misdemeanor and increasing the maximum punishment to five years, 75 Pa. Cons. Stat. §§ 3803(b)(4) (2014); 18 Pa. Cons. Stat. § 1104(3), persons who refused a blood draw are thereby subject to the lifetime criminal prohibition on possessing a firearm under § 922(g)(1).

during a DUI arrest. 136 S. Ct. at 2169. The Court held that the Fourth Amendment does not prohibit compelled breath tests incident to DUI arrests because "[t]he impact of breath tests on privacy is slight, and the need for BAC testing is great." *Id.* at 2184. But it reached "a different conclusion with respect to blood tests," which are "significantly more intrusive" and generally nonessential given the availability of breath tests. *Id.* at 2185; *see also id.* at 2178 (describing the substantial intrusion and long-term privacy interests associated with blood draws). The Court concluded that the imposition of criminal penalties for the refusal to submit to a warrantless blood draw cannot be sustained as a categorical rule, rejecting the justifications of search-incident-to-arrest and implied consent. *Id.* at 2185. While a state may impose civil penalties to incentivize consensual blood draws, it was "another matter" to "impose criminal penalties on the refusal to submit to such a test." *Id.*

Following *Birchfield*, Pennsylvania courts recognized that the state's implied consent statute "undoubtedly 'impose[d] criminal penalties on the refusal to submit to such a test'" and *Birchfield* thus "controls" to prohibit those penalties. *Commonwealth v. Evans*, 153 A.3d 323, 331 (2016); Pet. App. 5a-6a. The legislature accordingly amended Pennsylvania's implied consent law to limit its reach to refusals of a blood draw in the presence of "a valid search warrant." 75 Pa. Cons. Stat. § 3804(c) (2017).

3. Petitioner timely filed for postconviction relief in state court, seeking retroactive application of *Birchfield*. The trial court held Petitioner had waived the claim by failing to raise it on direct appeal. Pet. App. 41a.

4. On appeal, the Pennsylvania Superior Court rejected the trial court's conclusion that Petitioner had waived his *Birchfield* claim, explaining that claims going to the legality of a sentence are "reviewable and cannot be waived" under state procedure. Pet. App. 31-32 & n.5.

Applying "the *Teague* framework," the court held "*Birchfield* does not apply retroactively." Pet. App. 35a, 37a (footnote omitted). The court acknowledged that at the time of petitioner's conviction, Pennsylvania's implied consent laws "increase[d] the punishment when a driver refuses to consent to a blood test" and that *Birchfield* "precludes application" of the statute in that manner. Pet. App. 36a-37a. The court reasoned that, notwithstanding *Birchfield*'s limitation on the reach of the statute, "DUI remains a crime" and officers could constitutionally perform a blood draw "with a warrant or consent." Pet. App. 37a. According to the court, that meant *Birchfield* affected "only the manner of determining the degree of defendant's culpability and punishment," and was procedural. *Id.*

5. The Pennsylvania Supreme Court affirmed 5-2. The court reaffirmed that Petitioner's retroactivity argument was "nonwaivable" under state procedure. Pet. App. 5a.

5a. The majority concluded "that *Birchfield* set forth a 'procedural' rule for purposes of the *Teague* analysis, and, thus, does not apply retroactively." Pet. App. 1a (footnote omitted). It began its analysis by acknowledging that *Birchfield* rendered the criminal penalties imposed under Pennsylvania's implied consent statute "unconstitutional when based on a refusal to submit to a warrantless blood test." Pet. App. 5a (quoting *Commonwealth v. Monarch*, 200 A.3d 51,

57 (Pa. 2019)). But the majority reasoned that *Birchfield* was not a substantive rule that "alter[ed] 'the range of conduct or the class of persons that the law punishes'" within the meaning of this Court's caselaw. Pet. App. 19a (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

First, the majority concluded that *Birchfield* was not a rule "forbidding criminal punishment of certain primary conduct" because the state could still constitutionally obtain a blood draw with "the acquisition of a search warrant" or in circumstances involving exigent circumstances. Pet. App. 7a (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016)), 15a-16a. According to the court, this "potential" for a lawful blood draw meant that *Birchfield* was not substantive because it "did not designate the act of refusing a blood test as constitutionally protected conduct under all circumstances, and thus categorically outside the reach of the criminal law." Pet. App. 16a-19a. Instead, the court reasoned, "*Birchfield* placed a procedural obligation upon the *police* that, when satisfied, *authorizes* the demand for a blood test and thus permits criminal penalties for refusal." Pet. App. 19a.

Second, the majority concluded that *Birchfield* did not fit "the category of substantive rules that 'narrow the scope of a criminal statute by interpreting its terms,'" because "*Birchfield*'s holding was not premised upon the interpretation of any particular statute." Pet. App. 20a (quoting *Schriro*, 542 U.S. at 351).

The majority acknowledged that, even under its understanding of the *Teague* framework, "the *Birchfield* rule does not fit neatly into the definition of a 'procedural' rule." Pet. App. 21a. It also acknowledged that its conclusion conflicted "with the Supreme

Courts of North Dakota, Minnesota, and New Mexico." Pet. App. 16a.[4]

5b. Chief Justice Saylor and Justice Donohue dissented, explaining that they "agree with the jurisdictions which have held that the rule set forth in *Birchfield* . . . is substantive." Pet. App. 25a, 28a. The dissent reasoned that "'*Birchfield* bars criminal sanctions previously imposed upon a subject for refusing to submit to warrantless blood tests,' and therefore, places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Pet. App. 25a (quoting *State v. Vargas*, 404 P.3d 416, 420 (N.M. 2017)).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With Three Other State Courts Of Last Resort.

As the majority and dissenting opinions recognized, the decision below creates a conflict of authority. Before that, three state courts of last resort held in unanimous, reasoned decisions that *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) is substantive and retroactive under *Teague*:

1. In *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018), the Minnesota Supreme Court considered "the retroactivity of the *Birchfield* rule" under "the standard from *Teague*." *Id*. at 681. The court held *Birchfield*

[4] Justice Mundy authored a separate concurrence, in which he agreed that *Birchfield* announced a new procedural rule, but took issue with certain statements in the majority opinion concerning the application of Pennsylvania's new implied consent law to circumstances involving exigent circumstances. Pet. App. 22a-24a.

is substantive: It "does not merely regulate the manner in which a defendant is determined to be guilty or not guilty," but "instead changes who can be prosecuted for test refusal." *Id.* at 682.

The court explained that *Birchfield* is substantive under both of the tests this Court applies to determine whether a rule "alters the range of conduct or the class of persons that the law punishes." *Id.* at 681-82. First, *Birchfield* was "a constitutional determination that place[s] particular conduct or persons covered by the statute beyond the State's power to punish" because before *Birchfield*, a person "could be convicted of test refusal if they refuse[d] to submit to a chemical test of the person's blood, breath, or urine." *Id.* at 682 (quotation marks omitted). After *Birchfield*, however, a person could be convicted for refusing a blood draw "*only* if" they refuse the blood draw "*when* the police have a search warrant or a valid exception to the warrant requirement applies." *Id*. Thus, after *Birchfield* a person who refuses a blood draw without the presence of a warrant or exception, is "beyond the power of the State to punish." *Id.*

Second, *Birchfield* was "a decision that 'narrow[s] the scope of a criminal statute.'" *Id.* at 681 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). The court analogized to *Bousley v. United States*, 523 U.S. 614, (1998), and *Welch v. United States*, 136 S. Ct. 1257, (2016), in which this Court explained that rules which provide that "a 'criminal statute does not reach certain conduct'" are retroactive. *Johnson*, 916 N.W.2d at 682-83 & n.6 (quoting *Bousley*, 523 U.S. at 620). The court explained that "the same is true of Minnesota's test-refusal statute after *Birchfield*." *Id.*

2. The North Dakota Supreme Court has also held "the rule announced in *Birchfield* is substantive" and retroactive under *Teague*. *Morel v. State*, 912 N.W.2d 299, 304 (N.D. 2018). Like the Minnesota Supreme Court, it explained that "whether a rule is substantive or procedural under *Teague* . . . turns on the function of the rule, not whether the constitutional right underlying the new rule is substantive or procedural." *Id.* The court viewed this as a straightforward application of *Welch*, in which a rule has "changed the substantive reach" of a criminal statute. *Id*. "Before *Birchfield* . . . an individual could be criminally prosecuted for refusing a warrantless blood test," but "[a]fter *Birchfield*, the State has no authority to punish an individual for the same conduct. Therefore, the *Birchfield* rule is substantive." *Id*. at 305.

3. The New Mexico Supreme Court has also held that *Birchfield* is retroactive under *Teague*. In *State v. Vargas*, 404 P.3d 416 (N.M. 2017), the court explained that *Birchfield* "fits squarely within" *Teague*'s definition of a rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 420 (quotation marks omitted). This is so because *Birchfield* "bars criminal sanctions previously imposed upon a subject for refusing to submit to warrantless blood tests." *Id*.

In unanimously concluding that *Birchfield* is substantive and retroactive, each of these courts rejected states' arguments that *Birchfield* announced a procedural rule. *See Johnson*, 916 N.W.2d at 683-84 (rejecting the state's argument that *Birchfield* "must be procedural" because it "merely modified police conduct" and did not render "all cases" involving blood draws

unconstitutional); *Morel*, 912 N.W. 2d at 305 (reasoning that *Birchfield* "has nothing to do with the range of permissible methods a court might use to determine whether an individual may be prosecuted for refusing to submit to a warrantless blood test"); *Vargas*, 404 P.3d at 419-20.

II. The Decision Below Quite Obviously Conflicts With This Court's Precedent.

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court "continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees." *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016). Therefore, under *Teague*, "courts must give retroactive effect to new substantive rules of constitutional law." *Id.* at 728. Procedural rules, on the other hand, "generally do not apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004).

A procedural rule "'regulate[s] only *the manner of determining* the defendant's culpability.'" *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (quoting *Schriro*, 542 U.S. at 353) (emphasis in original). In other words, procedural rules affect "the range of permissible methods a court might use to determine" a defendant's guilt or punishment, such as a rule that "'allocate[s] decisionmaking authority' between judge and jury, or regulate[s] the evidence that the court could consider in making its decision." *Id.* (citation omitted) (quoting *Schriro*, 542 U.S. at 353). The rationale for respecting finality in the case of such rules is straightforward: "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 136 S. Ct. at 730. Thus, procedural rules

"merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* (quoting *Schriro*, 542 U.S. at 352).

A substantive rule, on the other hand, "alters the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264-65 (quoting *Schriro*, 542 U.S. at 353). This includes both "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" and "decisions that narrow the scope of a criminal statute." *Id.* at 1265. The rationale for retroactive application of substantive rules is also straightforward: Because a substantive rule "changes the scope of the underlying criminal proscription," it "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.* at 1266 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

1. The *Birchfield* rule is not procedural for a simple reason: No matter what procedures a court employs, it could not impose criminal penalties against a person who refused consent to a blood draw in the absence of a warrant or exception to the warrant requirement, such as exigency. In other words, "even the use of impeccable factfinding procedures could not legitimate" a criminal penalty against a person who chooses to refuse a blood draw in the absence of a warrant or any exigent circumstance. *Id.* at 2165 (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)). If no change in a court's procedures can render that outcome permissible, then the

rule cannot be said to "regulate only the *manner of determining* the defendant's culpability." *Id.* (quoting *Schriro*, 542 U.S. at 353).

2. It is equally clear under this Court's retroactivity jurisprudence that *Birchfield* is a substantive rule. First, this case fits the "the clearest instance" of a substantive rule, wherein the Constitution "place[s] particular conduct . . . beyond the State's power to punish." *Id.* at 1266-67. *Birchfield* was unambiguous that a state is constitutionally prohibited from "impos[ing] criminal penalties on the refusal to submit to [a blood] test" where the state has no warrant and there are no exigent circumstances. 136 S. Ct. at 2185.

Second, this Court's decision in *Birchfield* is plainly a decision which "narrow[ed] the scope of a criminal statute by interpreting its terms." *Welch*, 136 S. Ct. at 1265. The very question in *Birchfield* was whether state implied consent laws could constitutionally reach warrantless blood draws, and the Court granted relief to Birchfield because North Dakota's implied consent statute could not be applied to his refusal of a warrantless blood draw. 136 S. Ct. at 2186. *Birchfield* thus plainly held that a substantive criminal statute "does not reach certain conduct." *Bousley*, 523 U.S. at 620; *Welch*, 136 Ct. at 1267. And, as the majority below observed, *Birchfield* has the same effect on Pennsylvania's implied consent laws, rendering them "unconstitutional when based on a refusal to submit to a warrantless blood test." Pet. App. 5a (quoting *Commonwealth v. Monarch*, 200 A.3d 51, 57 (Pa. 2019)). *Birchfield* therefore "struck down part of a criminal statute that regulates conduct and prescribes punishment" and "thereby altered 'the range

of conduct or the class of persons that the law punishes.'" *Welch*, 136 S. Ct. at 1268 (quoting *Schriro*, 542 U.S. at 353).

3. The Pennsylvania Supreme Court's rationale for concluding that *Birchfield* is procedural directly conflicts with this Court's precedent.

3a. First, the court reasoned that *Birchfield* is procedural because it "did not designate the act of refusing a blood test as constitutionally protected conduct under all circumstances," namely, where there is a warrant or exigent circumstances. Pet. App. 16a-19a. According to the court, because *Birchfield* did not designate refusing blood tests "categorically outside the reach of the criminal law," it was not substantive. Pet. App. 19a. But this reasoning—that a rule must categorically deprive the government of some substantive power in order to be substantive—directly conflicts with *Montgomery*, *Welch*, and *Bousley*.

In *Montgomery*, the Court considered the retroactivity of its rule in *Miller v. Alabama*, 567 U.S. 460 (2012), "that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances." *Montgomery*, 136 S. Ct. 718, 725 (2016). The Court explicitly rejected the argument that this was a procedural rule because it did not "categorically bar" life without parole sentences for all juvenile offenders and therefore some would not be entitled to relief. *Id.* at 734. The Court explained that just because "life without parole could be a proportionate sentence for [some] juvenile offender[s], does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Id.*

Similarly, in *Welch* this Court considered the retroactivity of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the Armed Career Criminal Act's residual clause was unconstitutionally vague. There, the relevant constitutional rule did not designate *any* conduct as protected "under all circumstances." Pet. App. 19a. In fact, the Court explicitly recognized "Congress [wa]s free to enact a new version of the residual clause that impose[d] the same punishment on the same persons for the same conduct." *Welch*, 136 S. Ct. at 1267. The Court rejected the court-appointed amicus's argument that this mattered for retroactivity analysis, concluding that "the rule announced in *Johnson* is substantive" because it "alter[ed] the range of conduct or the class of persons that the law punishes." *Id.* at 1264-65 (quotation marks omitted).

And in *Bousley*, the Court considered the retroactivity of *Bailey v. United States*, 516 U.S. 137 (1995), which interpreted the "use" prong of 18 U.S.C. § 924(c)(1), to require "active employment of the firearm" and not mere possession. *Bousley*, 523 U.S. at 617. The Court had "no difficulty concluding that *Bailey* was substantive" and it "reached that conclusion even though Congress could (and later did) reverse *Bailey* by amending the statute to cover possession as well as use." *Welch*, 136 S. Ct. at 1267. As this Court recognized in *Welch*, *Bousley* "contradicts the contention" that a rule is substantive only where "Congress lacks some substantive power." *Id.*

Ultimately, the decision below conflates the inquiries of whether a rule is substantive in character and whether a particular defendant is ultimately eligible

for relief under that retroactive rule. *Miller* is substantive and retroactive, but a petitioner is not eligible for relief if it is shown he is incorrigible. *Montgomery*, 136 S. Ct. at 734-35. *Johnson* is substantive and retroactive, but a petitioner may still be "eligible for [his] sentence regardless of *Johnson*" based on one of ACCA's other clauses. *Welch*, 136 S. Ct. at 1268. And *Bailey* is substantive and retroactive, but the petitioner is eligible for relief only if the record indicates he "did not 'use' a firearm as that term is defined in *Bailey*." *Bousley*, 523 U.S. at 624.

So too here. *Birchfield* is substantive and retroactive because it placed non-exigent, warrantless blood draws "beyond the State's power to punish" and because it limited the reach of Pennsylvania's implied consent statute. The fact that the state may be able to show that certain petitioners' criminal penalties were nonetheless valid because it had a warrant or the record shows exigent circumstances goes to that particular petitioner's eligibility for relief, not whether *Birchfield* announced a substantive rule.

3b. Second, the court below concluded that *Birchfield* was a procedural rule under *Teague* because it "placed a procedural obligation upon the *police*" and did not depend on "the conduct of the *motorist* that is subject to punishment." Pet. App. 19a. This rationale misunderstands *Teague*'s definition of a procedural rule. This Court has always been careful to define a "procedural" rule as one which goes to the "permissible methods *a court* might use to determine whether a defendant should be sentenced under" a statute, such as the identity of the decisionmaker or "the evidence that the court could consider in making its decision." *Welch*, 136 S. Ct. at 1265 (emphasis added). It

is for this reason that new procedural rules challenge only "the accuracy of a conviction or sentence," *Montgomery*, 136 S. Ct. at 730, and "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Welch*, 136 S. Ct. at 1265. The constitutional prohibition on imposing criminal penalties in the absence of a warrant or exigent circumstances does not merely raise the possibility that a person who was punished in those circumstances could have been acquitted under proper procedures, it means that person was "convicted of conduct the law does not make criminal." *Id.*

The Pennsylvania Supreme Court's alternative definition of procedural—which would appear to encompass any rule requiring the state to do something additional in order to comply with the Constitution—would frustrate the clear line this Court has drawn. It would also untether *Teague* from its underlying purpose of balancing finality against the "imperative to ensure that criminal punishment is imposed only when authorized by law." *Id*. at 1266. Moreover, the line drawn below is untenable—it is superficial at best to say that refusing a blood draw when presented with a warrant and refusing a blood draw in the absence of any warrant involves "the same" conduct and "do[es] not depend upon the actions of the motorist." Pet. App. 19a.

3c. Finally, the Pennsylvania Supreme Court accepted the state's argument that this Court's definition of substantive rules which "narrow the scope of a criminal statute" does not apply because it is limited to decisions that are premised upon "statutory inter-

pretation." Pet. App. 14a, 20a. But this Court explicitly rejected that argument in *Welch*. There, the court-appointed amicus similarly argued that *Bousley* represents "an ad hoc exception" for "decisions that interpret statutes." 136 S. Ct. at 1267. The Court explained this argument was "not persuasive" and that "[n]either *Bousley* nor any other case from this Court treats statutory interpretation cases as a special class of decisions." *Id.* Rather, such rules are substantive "when they meet the normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes.'" *Id*. (quoting *Schriro*, 542 U.S. at 353).

III. The Question Presented Is Important.

Resolution of this conflict and the resulting disparity is of the utmost importance, both to criminal defendants and the states. For criminal defendants, it is the difference between whether they are liberated from criminal penalties and associated collateral consequences, or not. And, here, we are talking about criminal penalties that were not just unauthorized by law, but were imposed *because* someone exercised their constitutional right. In Pennsylvania, these penalties include elevating a person's criminal offense to a first-degree misdemeanor, greater penal and monetary sanctions, and lifelong collateral consequences, including a lifetime ban on possessing a firearm. *See supra* at 4-5 & n.3. The undoing of such criminal sanctions for people in Minnesota, New Mexico, and North Dakota, while similarly situated people in Pennsylvania remain burdened is intolerable to the rule of law—the very notion of "evenhanded justice requires that [a new rule] be applied retroactively to all who are similarly situated." *Teague*, 489 U.S. at 300.

Resolution of the conflict is also of immense practical significance to the states. Minnesota, New Mexico, and North Dakota have already begun to invest the resources reviewing and rolling back final convictions based on *Birchfield*. Indeed, one state and amicus viewed the question presented as sufficiently important to warrant this Court's intervention even before any conflict had emerged.[5] The state represented that *Birchfield*'s retroactivity would affect thousands of its residents alone, who would be able to "demand that the case be reopened" and "demand immediate release, or termination of probation, or to have restrictions on driving privileges removed."[6]

Irrespective of who is correct on the merits, these are problems that tend to get harder, if not impossible, to correct if this Court does not resolve them quickly. Now that a conflict has emerged, the Court should intervene.

IV. The Question Presented Is Squarely Presented.

The question presented was the sole issue decided by the court below and the question is thus squarely presented for review.

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[5] *See* Pet. for Writ of Cert., *Minnesota v. Johnson*, 139 S. Ct. 2745 (Feb. 19, 2019) (No. 18-1084), 2019 WL 852261 ("Minn. Pet."); Amicus Br. of Mothers Against Drunk Driving in Supp. of Cert., *Minnesota v. Johnson*, 139 S. Ct. 2745 (2019) (No. 18-1084), 2019 WL 1327057.

[6] Minn. Pet. 6, 12.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEFFREY ALAN OLSON, Appellant	No. 26 WAP 2018 Appeal from the Order of the Superior Court entered February 14, 2018 at at No. 158 WDA 2017, affirming the Order of the Court of Common Pleas of Somerset County entered December 22, 2016, at No. CP-56-CR-0000544-2015. Argued: April 10, 2019

OPINION

JUSTICE WECHT DECIDED: OCTOBER 31, 2019

We granted allowance of appeal to consider whether the holding of *Birchfield v. North Dakota*, __ U.S. __, 136 S.Ct. 2160 (2016), constitutes a new rule of law that applies retroactively on post-conviction collateral review. The Superior Court concluded that *Birchfield* set forth a "procedural" rule for purposes of the *Teague*[1] analysis, and, thus, does not apply retroactively. We affirm.

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[1] *See Teague v. Lane*, 489 U.S. 288 (1989) (plurality). This Court applies the *Teague* framework to questions of retroactivity on collateral review. *See*, *e.g.*, *Commonwealth v. Washington*, 142

I. Background

Jeffrey Alan Olson entered an open guilty plea to one count of driving under the influence of alcohol—general impairment ("DUI") on September 18, 2015. This was Olson's third DUI offense, and, at the time, he was subject to a sentence enhancement due to his refusal to submit to blood alcohol concentration ("BAC") testing. On December 21, 2015, the trial court sentenced Olson to a term of eighteen months' to five years' imprisonment, applying the then-applicable mandatory minimum sentencing provisions.[2] Olson did not file a direct appeal, and his judgment of sentence became final on January 20, 2016.

On June 23, 2016, the Supreme Court of the United States decided *Birchfield*. As discussed further below, the *Birchfield* Court held, *inter alia*, that a

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A.3d 810 (Pa. 2016).

[2] Olson pleaded guilty to an offense under 75 Pa.C.S. § 3802(a)(1). At the time of Olson's sentencing, the applicable sentencing statute provided, in relevant part, that:

> An individual who violates section 3802(a)(1) and refused testing of blood or breath . . . shall be sentenced as follows:
>
> * * *
>
> (3) For a third or subsequent offense, to:
>
> (i) undergo imprisonment of not less than one year;
>
> (ii) pay a fine of not less than $2,500; and
>
> (iii) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

75 Pa.C.S. § 3804(c)(3) (amended July 20, 2017). This provision since has been amended so as to apply to individuals who "refused testing of breath . . . or testing of blood *pursuant to a valid search warrant*." 75 Pa.C.S. 3804(c) (emphasis added).

state may not "impose criminal penalties on the refusal to submit" to a warrantless blood test. *Id*. at 2185.

On August 17, 2016, Olson filed a timely, *pro se* petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, challenging, *inter alia*, the legality of his sentence in light of *Birchfield*. The PCRA court appointed counsel for Olson, and held a hearing on October 24, 2016. Olson filed a counseled, amended PCRA petition on November 8, 2016. After the PCRA court dismissed Olson's petition on December 23, 2016, Olson appealed the PCRA court's order to the Superior Court.

The Superior Court affirmed. *Commonwealth v. Olson*, 173 A.3d 1134 (Pa. Super. 2018). The court recognized that *Birchfield* rendered unconstitutional the imposition of enhanced criminal penalties due to the refusal to submit to warrantless blood testing, such that "a sentencing court today could not have sentenced [Olson] to the mandatory minimum sentence under Section 3804(c)(3)." *Id.* at 1138. However, because Olson's judgment of sentence already was final, the Superior Court reasoned, Olson would be entitled to benefit from *Birchfield*'s application only if the decision were deemed to apply retroactively on collateral review.

Setting forth the governing legal standard, the Superior Court noted that, pursuant to the *Teague* framework, "an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Id*. at 1139 (quoting *Commonwealth v. Ross*, 140 A.3d 55, 59 (Pa. Super. 2016)). New rules apply retroactively in a collateral proceeding, the court

observed, only if the rule is "substantive," or constitutes a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id*. (internal quotation marks omitted). With regard to the distinction between substantive and procedural rules, the Superior Court summarized: "Substantive rules are those that decriminalize conduct or prohibit punishment against a class of persons. Rules that regulate only the manner of determining the defendant's culpability are procedural." *Id*. (quoting *Ross*, 140 A.3d at 59; capitalization modified).

After observing the operation of the applicable sentencing statute, which "effectively increases the punishment when a driver refuses to consent to a blood test," *id*., the Superior Court applied the *Teague* standard as follows:

> The new *Birchfield* rule, as it applies to Pennsylvania's DUI statutes providing for enhanced penalties, does not alter the range of conduct or the class of persons punished by the law: DUI remains a crime, and blood tests are permissible with a warrant or consent. Rather, the new rule precludes application of this mandatory minimum sentencing provision providing an enhanced penalty for [Olson's] refusal to submit to blood testing. This change in the Pennsylvania sentencing enhancements applicable to DUI convictions is procedural because the new *Birchfield* rule regulates only the manner of determining the degree of defendant's culpability and punishment.

Id. Having deemed the *Birchfield* rule "procedural" rather than "substantive," the Superior Court thus

determined that "*Birchfield* does not apply retroactively in Pennsylvania to cases pending on collateral review." *Id.* Accordingly, although Olson received a sentence that was facially invalid under *Birchfield*, the Superior Court concluded that Olson could not benefit from *Birchfield*'s application because his judgment of sentence was final when *Birchfield* was decided.

We granted Olson's petition for allowance of appeal in order to address the following questions:

a. Does *Birchfield v. North Dakota*, __ U.S. __, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), apply retroactively where the petitioner challenges the legality of his sentence through a timely petition for post-conviction relief?
b. Does *Birchfield v. North Dakota*, __ U.S. __, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), render enhanced criminal penalties for blood test refusal under 75 Pa.C.S. §§ 3803-3804 illegal?

II. Analysis

(A) Legality of Sentence

After we granted allowance of appeal in this matter, this Court decided *Commonwealth v. Monarch*, 200 A.3d 51 (Pa. 2019), which resolved the second question presented. In *Monarch*, we concluded that "[u]nder *Birchfield*, it is clear the enhanced mandatory minimum sentences authorized by the statute are unconstitutional when based on a refusal to submit to a warrantless blood test." *Id.* at 57. We held that a challenge to such a sentence implicates the sentence's legality, and thus is nonwaivable and may be raised by a court *sua sponte*. Accordingly, the

question in this appeal relating to the legality of sentence is fully answered by *Monarch*. However, this observation does not resolve the matter of Olson's sentence, inasmuch as "a new rule of law does not automatically render final- pre-existing sentences illegal." *Washington*, 142 A.3d at 814. Rather, a "finding of illegality, concerning such sentences, may be premised on such a rule only to the degree that the new rule applies retrospectively." *Id*. We therefore turn to the central issue raised in this appeal.

(B) Retroactivity

The determination of whether a new rule is to be applied retroactively on collateral review presents a question of law, as to which our standard of review is *de novo* and our scope of review is plenary. *Washington*, 142 A.3d at 814. In order to situate the parties' competing approaches to this question, it is helpful to summarize both the rationale of *Birchfield* and the legal standard that this Court applies to questions of retroactivity—the *Teague v. Lane* framework.

(1) The *Teague* Framework

When a decision of the Supreme Court of the United States results in a "new rule," that "rule applies to all criminal cases still pending on direct review." *Schriro v. Summerlin*, 542 U.S. 347, 351 (2004) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).[3] However, "[u]nder *Teague*, a new

[3] A "new" ruling is "defined as one that 'breaks new ground or imposes a new obligation on the States or Federal Government,' or, stated otherwise, where 'the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Commonwealth v. Hughes*, 865 A.2d 761, 780 (Pa. 2004) (quoting *Teague*, 489 U.S. at 301).

constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced." *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 728 (2016). There are, however, "two categories of rules" that are exempt from *Teague*'s "general retroactivity bar," *id*., which a defendant may invoke notwithstanding the finality of his or her judgment of sentence. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro*, 542 U.S. at 351. Second, a much narrower class of "watershed rules of criminal procedure" also apply retroactively. The High Court has described such "watershed" rules as those that "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Id*. at 352 (internal quotation marks omitted). Because no party in the instant case contends that *Birchfield* announced a "watershed" rule of criminal procedure, we are here concerned only with the first category, and its attendant determination of whether the *Birchfield* rule is "substantive." *See Commonwealth v. Spotz*, 896 A.2d 1191, 1243 (Pa. 2006) ("For purposes of retroactivity analysis, we distinguish between new rulings involving substantive criminal law, which are applied retroactively on collateral review, and new procedural rulings of constitutional dimension, which are general subject only to prospective application.").

Substantive rules include those "forbidding criminal punishment of certain primary conduct" or "prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 136 S.Ct. at 729. Procedural rules, by contrast, "are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Id*. at 730

(quoting *Schriro*, 542 U.S. at 353) (emphasis omitted). "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro*, 542 U.S. at 352.

With these classifications in mind, we survey, the Court's reasoning in *Birchfield* and the contours of the rule articulated therein.

(2) *Birchfield*

Birchfield concerned the legality of a particular consequence—criminal punishment—widely imposed by state "implied consent" laws. By way of background, because DUI laws generally prohibit the operation of a motor vehicle with a BAC over a specified level, and because the acquisition of BAC evidence necessitates testing procedures with which a motorist's cooperation is either required or highly preferred, states all have adopted "implied consent" laws in order to "find a way of securing such cooperation." *Birchfield*, 136 S.Ct. at2168. "These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws." *Id*. at 2166. One common consequence of BAC test refusal was the imposition of criminal penalties. It was this consequence that was the focus of the *Birchfield* Court's analysis. *See id*. at 2172 ("We granted certiorari . . . in order to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.").

The most common BAC tests—breath tests and blood tests—both indisputably constitute searches under the Fourth Amendment. *See Birchfield*, 136 S.Ct. at 2173 (citing *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 616-17 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966)). Thus, although one of the petitioners in *Birchfield* refused a blood test, one refused a breath test, and one submitted to a blood test following a police officer's provision of "implied consent" warnings, the Court's overarching approach to all three cases was the same:

> Despite these differences, success for all three petitioners depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate. If, on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant.

Id. at 2172. The Court, thus, analyzed the question before it "by considering whether the searches demanded in these cases were consistent with the Fourth Amendment." *Id.* at 2173.

The *Birchfield* Court ultimately drew a constitutionally significant line between breath testing and blood testing. The Court held that, because "breath tests are significantly less intrusive than blood tests and in most cases amply serve law

enforcement interests, . . . a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id*. at 2185. Because a warrantless breath test thus is categorically valid under the search-incident-to-arrest exception to the warrant requirement, the Court held, a motorist has "no right to refuse it," and criminal penalties may be imposed upon the failure to submit to it. *Id*. at 2186. By contrast, the Court held that "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." *Id*. at 2184. The Court observed that the government had "offered no satisfactory justification for demanding the more intrusive alternative without a warrant." *Id*. Thus, the *Birchfield* Court found no categorical exception to the warrant requirement for blood tests.[4] Absent a valid basis upon which to demand an intrusive blood test without a search warrant, the Court held that a state cannot "impose criminal penalties on the refusal to submit to such a test." *Id*. at 2185.

Accordingly, although *Birchfield* has significant implications for the legality of criminal sentencing, *see Monarch*, *supra*, such considerations are derivative of the Court's reasoning with regard to the validity of the

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[4] Recently, in *Mitchell v. Wisconsin*, __ U.S. __, 139 S.Ct. 2525 (2019) (plurality), the Court held that the exigent circumstances exception to the warrant requirement generally will apply to blood tests conducted upon motorists who are "unconscious and therefore cannot be given a breath test." *Id*. at 2531. Although the *Mitchell* Court did not cast its holding as a "categorical" exception to the warrant requirement, it nonetheless stated that the exigency exception will "almost always" apply to unconscious motorists. *Id*.

underlying search. We now consider the parties' respective positions as to whether the *Birchfield* rule should be deemed "substantive" for purposes of *Teague*'s retroactivity analysis.

(3) Arguments

Preliminarily, we note that there is no dispute that *Birchfield* announced a "new" rule of law. The Commonwealth observes that, before *Birchfield*, warrantless blood tests were viewed as categorically valid under *Schmerber*, *supra*, and *South Dakota v. Neville*, 459 U.S. 553 (1983), and that "*Birchfield* dramatically departed from that precedent and is clearly new." Brief for Commonwealth at 6 n.2. Accordingly, and because *Teague*'s exception for "watershed rules of criminal procedure" is not at issue, *see id*. at 7, the parties focus narrowly upon the definition of a "substantive" rule for purposes of *Teague*.

Olson relies heavily upon *Montgomery*, wherein the Supreme Court of the United States held that the constitutional rule of *Miller v. Alabama*, 567 U.S. 460 (2012), which prohibited mandatory sentences of life imprisonment for juveniles, is substantive and applies retroactively. Olson emphasizes *Montgomery*'s statement that substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishment altogether beyond the State's power to impose." Brief for Olson at 12 (quoting *Montgomery*, 136 S.Ct. at 729). This characterization fits *Birchfield*, Olson contends, because "*Birchfield* set forth a categorical constitutional guarantee against the criminalization of the refusal blood draws, which put beyond Pennsylvania's power [the imposition of] enhanced criminal laws and punishment." *Id*. at 13.

Thus, Olson argues, "any Pennsylvania statute that criminalizes the refusal of a blood test is unconstitutional." *Id*.

Olson further analogizes *Birchfield* to *Miller*—which announced the juvenile sentencing rule later deemed substantive in *Montgomery*—noting that both decisions "resulted in the invalidation of state mandatory sentencing statutes." *Id*. Finally, Olson argues that the *Birchfield* rule cannot be deemed procedural because an "invalid procedural rule can be applied at trial, but result in a legal and just conviction." *Id*. The failure to apply *Birchfield* in a DUI case involving blood test refusal, however, will result in imposition of the enhanced criminal penalties that the *Birchfield* Court forbade, producing an "unjust and illegal result." *Id*. at 14. Thus, Olson contends, *Birchfield* set forth a substantive rule that should be applied retroactively on collateral review, entitling him to relief.

The Commonwealth disagrees with Olson's suggestion that *Birchfield* placed a "categorical" prohibition upon criminal punishment for blood test refusal, inasmuch as the Court "held only that a warrant or exigent circumstances are necessary to justify the demand for the test." Brief for Commonwealth at 9. This is unlike certain other types of "primary" conduct that the Supreme Court has placed beyond the power of the government to punish, the Commonwealth observes, such as consensual homosexual activity, or the burning of an American flag. *Id*. at 10 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Texas v. Johnson*, 491 U.S. 397 (1989)). Unlike these sorts of conduct, blood test refusal is not altogether beyond the government's power to criminalize. Rather, the Commonwealth argues,

Birchfield merely placed a condition that must be satisfied before punishment may be imposed: "The state must take steps—obtaining a warrant or proving exigent circumstances—to justify its demand for a blood test, as a Fourth Amendment search, in order to criminally sanction refusal." *Id*. at 11. "But the 'primary, private individual conduct,' both before and after the new decision," *i.e.*, blood test refusal, "remains exactly the same." *Id*.

In this regard, the Commonwealth compares *Birchfield* to *Alleyne v. United States*, 570 U.S. 99 (2013), wherein the High Court held that any fact that increases the mandatory minimum sentence for a crime is an "element" that must be submitted to the jury and proved beyond a reasonable doubt. *See* Brief for Commonwealth at 11. *Alleyne* did not prohibit mandatory minimum sentences as a categorical matter, the Commonwealth explains, but rather set forth a procedural requirement that must be satisfied in order to justify their imposition. The Commonwealth maintains that the "same is true of *Birchfield*." *Id*. The Commonwealth further notes that, in *Washington*, *supra*, this Court concluded that the *Alleyne* rule is not substantive. The Commonwealth encourages us to reach the same conclusion here.

The Commonwealth volunteers three decisions of our sister states that have characterized the *Birchfield* ruled as substantive. *See id*. at 15 (citing *Morel v. State*, 912 N.W.2d 299 (N.D. 2018); *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018); *State v. Vargas*, 404 P.3d 416 (N.M.2017)). The Commonwealth contends that these decisions were erroneous because each viewed the conduct in question as *warrantless* blood test refusal, rather than

simply blood test refusal. The Commonwealth argues that this overlay is misguided because the conduct of the motorist—refusing to submit to a blood test—is the same regardless of whether police officers obtain a search warrant for the test. Further, it is inaccurate to characterize *Birchfield* as categorically barring criminal sanctions for "warrantless refusal," the Commonwealth argues, because there are situations in which a blood test may be valid under the Fourth Amendment even absent a warrant, to wit, where exigent circumstances are present. *Id.* at 15. Accordingly, the Commonwealth encourages us not to follow the holdings of North Dakota, Minnesota, and New Mexico courts.

Finally, the Commonwealth observes that other categories of substantive rules have no application herein, such as the class of rules that "narrow the scope of a criminal statute by interpreting its terms," or prohibit "a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 16-17 (quoting *Welch v. United States*, __ U.S. __, 136 S.Ct. 1257, 1265 (2016); *Montgomery*, 136 S.Ct. at 732). With regard to statutory interpretation, the Commonwealth notes that *Birchfield* did not hinge upon the interpretation of any particular statute, but rather set forth a constitutional rule of widespread application. Further, unlike *Miller* and *Montgomery*, which were premised upon "group characteristics" of juveniles, *Birchfield* "did not define a class, or discuss the characteristics of any group, much less immunize anyone due to the attributes of their class." *Id.* at 16-17. Accordingly, the Commonwealth maintains that the *Birchfield* rule does not fit within any of the categories that define substantive rules, and, thus, should not be held to

apply retroactively to defendants whose judgments of sentence are final.

(4) Discussion

We agree with the Commonwealth in all material respects. First, as is clear from the manner in which the *Birchfield* Court approached the question before it, the prohibition of criminal penalties for blood test refusal was in no way "categorical." Rather, *Birchfield* held that, as searches within the meaning of the Fourth Amendment, compliance with breath or blood testing may be compelled, and criminal penalties may be imposed for refusal to comply therewith, provided that the tests are "consistent with the Fourth Amendment." *Birchfield*, 136 S.Ct. at 2173. In other words, the lawfulness of the criminal penalty that attaches to BAC test refusal is solely dependent upon the validity of the test as a Fourth Amendment matter. If the test—indisputably a search—is valid under the Fourth Amendment, "it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant." *Id*. at 2172.

The fact that the *Birchfield* Court identified no categorical exception to the warrant requirement for blood testing, as it did for breath testing, does not mean that criminal penalties for blood test refusal are "altogether beyond the State's power to impose." *Montgomery*, 136 S.Ct. at 729. Most obviously, the acquisition of a search warrant indisputably validates such a test; renders it "consistent with the Fourth Amendment," *Birchfield*, 136 S.Ct. at 2173; vitiates the right of the motorist to refuse it; and thus serves as a valid justification for the imposition of enhanced

criminal penalties for the refusal to comply.[5] Further, the *Birchfield* Court repeatedly referred to the potential applicability of the exigent circumstances exception to the warrant requirement, which, if established, also may validate a warrantless blood test. *See*, *e.g.*, *id*. at 2184 ("Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not."). Because a warrantless blood test that is justified by an exigency also would "comport with the Fourth Amendment," *id*. at 2172, *Birchfield* does not prohibit the imposition of criminal penalties for the refusal to submit to such a test.

The potential applicability of the exigent circumstances exception is one reason that we respectfully disagree with the Supreme Courts of North Dakota, Minnesota, and New Mexico. As the Commonwealth observes, in *Morel*, *Johnson*, and *Vargas*, the Courts viewed the conduct in question as the refusal to submit to a *warrantless* blood test. *See Morel*, 912 N.W.2d at 305 ("The *Birchfield* decision held unconstitutional the imposition of criminal penalties for refusing to submit to a warrantless blood test . . . effectively altering the range of conduct the law punishes."); *Vargas*, 404 P.3d at 420 ("*Birchfield* bars criminal sanctions previously imposed upon a subject for refusing to submit to warrantless blood tests."); *Johnson*, 916 N.W.2d at 683 ("The *Birchfield* rule has placed a category of conduct outside the

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[5] In this regard, it is noteworthy that the General Assembly has recognized when a motorist is convicted of DUI and "refused testing of breath . . . or testing of blood *pursuant to a valid search warrant*." 75 Pa.C.S. 3804(c) (emphasis added); *see supra* n.2.

State's power to punish. Now, a suspected impaired driver may only be convicted of test refusal if that person refused a breath test refused a blood or urine test that was supported by a warrant or a valid warrant exception. The *Birchfield* rule therefore is substantive."). However, because the exigent circumstances exception can provide a means to validate a warrantless blood test, and because it is the validity of the search under the Fourth Amendment that is significant to the *Birchfield* rule, it is clear that the prohibition of criminal punishment for *warrantless* blood test refusal is not categorical.

Chief Justice Saylor dissents as to this point, astutely observing that a motorist faced with a demand for a warrantless blood test generally will be unable to discern whether such a warrantless search is justified by exigent circumstances, inasmuch as that determination often will depend upon an array of factors known only to law enforcement. *See* Dissenting Opinion at 2. We agree with the Chief Justice that this scenario presents a number of difficulties that, as a practical matter, may render exigent circumstances an inadequate substitute for a search warrant as it concerns a motorist's ability to ascertain whether a demand for a blood test is valid, and consequently whether enhanced criminal penalties lawfully may attach to a refusal. The Chief Justice also correctly observes that an inquiry into the existence of exigent circumstances is not encompassed within the relevant statutory provision, as amended. *Id*. (citing 75 Pa.C.S. § 3804(c)); *see supra* nn. 2 & 5.

Nonetheless, the determination of whether a constitutional rule is substantive for purposes of *Teague* does not depend upon case-specific outcomes, nor does it turn upon the attributes of any particular

statutory scheme. Our task is to ascertain the character of the rule as a constitutional matter. Despite the Chief Justice's apt criticism of the viability of reliance upon the exigent circumstances exception in this arena, the fact remains that the *Birchfield* Court's articulation of its rule revolved around the validity of the search under the Fourth Amendment, and such validity may be established by a demonstration of exigent circumstances.[6] Thus, notwithstanding the difficulties that may arise in practice, and notwithstanding whether the applicable statute allows for such an inquiry in Pennsylvania courts, *Birchfield* suggests that, as a purely constitutional matter, the presence or absence of exigent circumstances remains relevant to the analysis. This observation, in turn, reveals the absence of a *categorical* prohibition of criminal penalties for refusal to submit to warrantless blood testing.

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[6] Indeed, in applying its holding to the cases before it, the *Birchfield* Court reasoned:

> Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is no indication in the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against Birchfield. *And North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search.* Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, we conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.

Birchfield, 136 S.Ct. at 2186 (emphasis added; citation omitted).

In any event, the potential applicability of the exigent circumstances exception is not alone dispositive of the character of the *Birchfield* rule. More fundamentally, we agree with the Commonwealth that *Birchfield* did not alter "the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. Without regard to the presence or absence of a search warrant, the "conduct" of the motorist remains the same: refusing to submit to a blood test. As the Commonwealth emphasizes, *Birchfield* did not designate the act of refusing a blood test as constitutionally protected conduct under all circumstances, and thus categorically outside the reach of the criminal law. To the contrary, *Birchfield* placed a procedural obligation upon the *police* that, when satisfied, *authorizes* the demand for a blood test and thus permits criminal penalties for refusal. Stated otherwise, the permissibility of compelling compliance with a blood test, and the concomitant availability of criminal penalties for refusal, do not depend upon the actions of the motorist. Rather, the dispositive consideration is whether the actions of the police officers comport with the Fourth Amendment. Accordingly, we reject our sister states' overlay of the absence of a warrant upon the characterization of the conduct of the *motorist* that is subject to punishment.

We also find merit in the Commonwealth's analogy to *Alleyne*, at least in broad strokes. As the Commonwealth emphasizes, *Alleyne* did not prohibit mandatory minimum sentences as a categorical matter. Instead, *Alleyne* set forth a procedural requirement that must be satisfied before such a sentence may be imposed: "any fact that increases the mandatory minimum is an 'element' that must be

submitted to the jury." *Alleyne*, 570 U.S. at 103. *Birchfield*, likewise, set forth a procedural requirement that must be satisfied before the refusal to submit to a blood test may be criminally punished: compliance with the warrant requirement. Neither decision places a category of punishment "altogether beyond the State's power to impose." *Montgomery*, 136 S.Ct. at 729. Rather, both decisions set forth conditions necessary to the imposition of such punishment. As noted, this Court already has concluded that the *Alleyne* rule is not substantive for purposes of *Teague*. *See Washington*, *supra*.

Olson's reliance upon *Montgomery* is misplaced. *Montgomery*'s characterization of the *Miller* rule as substantive was premised upon class-based considerations relating to juvenile offenders. *See Montgomery*, 136 S.Ct. at 734 ("Because *Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law.") (internal citations omitted). Unlike *Miller* and *Montgomery*, *Birchfield* did not hinge upon the attributes of any particular class of defendants. Further, because *Birchfield*'s holding was not premised upon the interpretation of any particular statute, the category of substantive rules that "narrow the scope of a criminal statute by interpreting its terms," *Schriro*, 542 U.S. at 351, is plainly inapplicable.

We recognize that the *Birchfield* rule does not fit neatly into the typical definition of a "procedural" rule as one that is "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery*, 136 S.Ct. at 730 (quoting *Schriro*, 542 U.S. at 353) (emphasis omitted). However, *Teague* sets forth a "general retroactivity bar" for purposes of collateral review, *id*. at 728, and substantive rules are an exception are an exception to that general rule. Accordingly, if a new rule does not meet the definition of "substantive" within the meaning of *Teague*, that conclusion is dispositive.

Because *Birchfield* did not set forth a "categorical constitutional guarantee" that places criminal punishment for blood test refusal "altogether beyond the State's power to impose," *id*. at 729, but, rather, established a procedural requirement that, once satisfied, authorizes that punishment, the *Birchfield* rule is not substantive. Accordingly, *Birchfield* does not apply to retroactively on post-conviction collateral review.

The order of the Superior Court is affirmed.

Justices Baer, Todd and Dougherty join the opinion.

Justice Mundy files a concurring opinion.

Chief Justice Saylor and Justice Donohue file dissenting opinions.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEFFREY ALAN OLSON, Appellant	No. 26 WAP 2018 Appeal from the Order of the Superior Court entered February 14, 2018 at at No. 158 WDA 2017, affirming the Order of the Court of Common Pleas of Somerset County entered December 22, 2016, at No. CP-56-CR-0000544-2015. Argued: April 10, 2019

CONCURRING OPINION

JUSTICE MUNDY DECIDED: OCTOBER 31, 2019

I join the majority's holding that *Birchfield v. North Dakota*, __ U.S. __, 136 S.Ct. 2160 (2016), announced a new procedural rule that does not apply retroactively to matters on collateral review. I write to distance myself from the majority's discussion casting doubt on what it has indicated is the "potential applicability" of the exigent circumstances exception to the warrant requirement in the DUI arena. Majority Op. at 14-15.

As the majority notes, the *Birchfield* Court explicitly acknowledged the exigent circumstances exception was a viable exception to the Fourth Amendment warrant requirement when it noted the validity of a search "may be established by a demonstration of exigent circumstances." *Id.* at 15

(citing *Birchfield*, 136 S.Ct. at 2186 (noting "North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless test of Birchfield's blood[.]")). The *Birchfield* Court did not question the continuing validity of applying exigent circumstances analysis to Fourth Amendment warrant requirements in DUI cases, noting that *Schmerber v. California*, 384 U.S. 757 (1966), "adopted a case-specific analysis depending on 'all of the facts and circumstances of the particular case.'" *Birchfield*, 136 S.Ct. at 2173. The Court further reasoned, this approach was reaffirmed in *Missouri v. McNeely*, 569 U.S. 141 (2013), when the Court opted not to adopt a rule of *per se* exigency based solely on the dissipation of alcohol in the blood, and rather "refused to 'depart from careful case-by-case assessment of exigency[.]'" *Id.* at 2174 (citing *McNeely*, 569 U.S. 142). Further, in *Michell v. Wisconsin*, __ U.S. __, 139 S.Ct. 2525 (2019) (plurality), the Supreme Court reiterated that "an officer may conduct a BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant." *Id.* at 2531.

Despite the concerns raised in this matter, the validity of the exigent circumstances exception to the warrant requirement and the interplay of the amendment to Section 3804 which criminalizes "refusing . . . testing of blood pursuant to a valid search warrant[,]" would be better left to a future discussion in an appropriate case. *See* Majority Op. at 15; Dissenting Op. (Saylor, C.J.) at 2 (citing Pa.C.S. § 3804(c)). Accordingly, I distance myself from any

analysis of the viability of the exigent circumstances exception. I join the majority in all other respects.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEFFREY ALAN OLSON, Appellant	No. 26 WAP 2018 Appeal from the Order of the Superior Court entered on 2/14/18 at No. 158 WDA 2017, affirming the order of the Court of Common Pleas of Somerset County entered 12/22/16 at No. CP-56-CR-0000544-2015. Argued: April 10, 2019

DISSENTING OPINION

CHIEF JUSTICE SAYLOR
DECIDED: OCTOBER 31, 2019

I respectfully dissent, since I agree with the jurisdictions which have held that the rule set forth in *Birchfield v. North Dakota*, __ U.S. __, 136 S. Ct. 2160 (2016), is substantive in character. *See Johnson v. State*, 916 N.W.2d 674, 684 (Minn. 2018); *Morrel v. North Dakota*, 912 N.W.2d 299, 305 (N.D. 2018); *New Mexico v. Vargas*, 404 P.3d 416, 420 (N.M. 2017). Specifically, "*Birchfield* bars criminal sanctions previously imposed upon a subject for refusing to submit to warrantless blood tests," and therefore, places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 307, 109 S. Ct. 1060, 1073 (1989)).

The majority places substantial reliance on the availability of the exigent circumstances exception to the warrant requirement to demonstrate that refusals are not beyond the power of the Legislature to forbid. *See* Majority Opinion, *slip op.* at 13-14. No explanation is provided, however, of how a person subject to a request (or demand) by police to submit to a blood test is to know whether, or to what extent, officers are faced with exigent circumstances. Indeed, most often the exigent circumstances determination will depend on close *post hoc* judgments by reviewing courts concerning an array of factors that would at the time be known only to police (including the pressing nature of their investigative duties, the availability of personnel and resources, and the proximity of facilities and necessary equipment). If the majority's rationale is to prevail, I fail to see how the constitutional right of refusal confirmed in *Birchfield* could be afforded meaningful protection, given that the availability of this ostensible right will likely be unknowable to individuals at the time they are subject to law enforcement demands. Accordingly, in the terms of the Fourth Amendment itself, it seems to me that -- relative to the criminalization of refusals -- reliance on exigent circumstances to defeat the right to refuse is "unreasonable." U.S. CONST., amend. IV.

Notably, in the aftermath of *Birchfield*, the Pennsylvania Legislature has not attempted to criminalize refusals in the presence of exigent circumstances. It did, however, amend Section 3804 of the Vehicle Code to criminalize blood-test refusals where police have secured a valid search warrant. *See* 75 Pa.C.S. §3804(c). This is in line with the Commonwealth's argument that the warrant requirement itself serves as a procedural measure

curing the flaw in the supplanted statute. *See* Brief for Appellant at 5.

This argument appears to me to be very strong as concerns the constitutionality of the amended statute. Regarding the retroactive application of *Birchfield*, however, the difficulty is that the right to be free from unreasonable warrantless searches enshrined in the Fourth Amendment has material substantive attributes. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 282, 93 S. Ct. 2041, 2076 (1973) ("In the context of the Fourth Amendment, the relevant *substantive* requirements are that searches be conducted only after evidence justifying them has been submitted to an impartial magistrate for a determination of probable cause." (emphasis added)). In other words, the constitution itself embeds what otherwise may be regarded as a procedural mechanism into the sensitive arena of substantive individual rights.

In view of the above, in my judgment, the default rule should be that *Birchfield* applies retroactively, subject to other material considerations such as waiver. *See United States v. Booker*, 543 U.S. 220, 268, 125 S. Ct. 738, 769 (2005) explaining that federal retroactivity analysis does not preclude "reviewing courts [from] apply[ing] ordinary prudential doctrines, determining, for example, whether the issue was raised below or whether it fails the 'plain error' test.").

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEFFREY ALAN OLSON, Appellant	No. 26 WAP 2018 Appeal from the Order of the Superior Court entered February 14, 2018 at at No. 158 WDA 2017, affirming the Order of the Court of Common Pleas of Somerset County entered December 22, 2016, at No. CP-56-CR-0000544-2015. Argued: April 10, 2019

DISSENTING OPINION

JUSTICE DONOHUE
DECIDED: OCTOBER 31, 2019

I join the Dissenting Opinion authored by Chief Justice Saylor in all respects other than the last paragraph, which addresses the possibility of waiver of a *Birchfield* claim.

APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA

[filed February 14, 2018]

COMMONWEALTH OF PENNSYLVANIA, v. JEFFREY ALAN OLSON, Appellant	No. 158 WDA 2017

Appeal from the PCRA Order December 22, 2016 In the Court of Common Pleas of Somerset County Criminal Division at No.: CP-56-0000544-2015

BEFORE: OLSON, J., DUBOW, D., and STEVENS, P.J.E.*

OPINION BY DUBOW, J.:

Appellant, Jeffrey Alan Olson, appeals from the December 22, 2016 Order entered in the Somerset County Court of Common Pleas dismissing his first Petition filed under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. Relying on *Birchfield*[1], Appellant challenges the legality of his sentence. After careful review, we conclude that *Birchfield* does not apply retroactively in

* Former Justice specially assigned to the Superior Court.

[1] *Birchfield v. North Daokta*, __ U.S. __, 136 S.Ct. 2160, 195 L.Ed. 2d 560 (2016).

Pennsylvania to cases pending on collateral review. We, thus, affirm.

On September 18, 2015, Appellant entered an open guilty plea to one count of Driving Under the Influence ("DUI").[2,3] On December 21, 2015, the trial court sentenced Appellant to an aggregate term of 18 months' to 5 years' imprisonment, applying the mandatory minimum sentencing provision set forth in 75 Pa.C.S. § 3804(c)(3) (imposing a mandatory minimum sentence of one year of imprisonment and a find of $2,500 for failing to consent to a blood test). Appellant did not file a direct appeal. Appellant's Judgment of Sentence, therefore, became final on January 20, 2016. *See* 42 Pa.C.S. § 9545(b)(3); Pa.R.A.P. 903(a).

Appellant filed the instant *pro se* PCRA petition, his first, on August 17, 2016, challenging, *inter alia*, the legality of his mandatory sentence pursuant to *Birchfield*.[4] The PCRA court appointed counsel, and conducted a hearing on October 26, 2016. The PCRA

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[2] 75 Pa.C.S. § 3802(a)(1).

[3] The Commonwealth withdrew several summary charges in exchange for Appellant's guilty plea, but there was no agreement with respect to Appellant's sentence.

[4] In *Birchfield*, *supra*, filed June 23, 2016, the United States Supreme Court held that warrantless blood tests taken pursuant to implied consent laws are an unconstitutional invasion of privacy. *Id*. at 2185. The Supreme Court stated that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186. In contrast, the Court held that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. *Id*. at 2184. In *Commonwealth v. Ennels*, 167 A.3d 716, 724 (Pa. Super. 2017), this Court held that Pennsylvania's implied consent scheme was unconstitutional insofar as it threatened to impose enhanced criminal penalties for the refusal to submit to a blood test.

court held the matter under advisement, and counsel filed an Amended PCRA Petition on November 8, 2016. On December 23, 2016, the PCRA court dismissed the Petition.

Appellant filed a timely Notice of Appeal on January 18, 2017. Both Appellant and the PCRA court complied with Pa.R.A.P. 1925.

Appellant presents three issues for our review:

> I. Whether lower court erred in dismissing Appellant's PCRA Petition based on the reasoning that [A]ppellant "waived" the constitutional challenge to his sentence?
>
> II. Whether the lower court erred in not applying [*Birchfield*] retroactively to [A]ppellant's sentence?
>
> III. Whether this Court should reverse the decision of the lower court or reinstate Appellant's appellate right *nunc pro tunc* based on equitable principles?

Appellant's Brief at 3.[5]

We review the denial of a PCRA Petition to determine whether the record supports the PCRA court's findings and whether its Order is otherwise free of legal error. *Commonwealth v. Fears*, 86 A.3d 795, 803 (Pa. 2014). To be eligible for relief pursuant to the PCRA, Appellant must establish, *inter alia*, that

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[5] Appellant's *Birchfield* claim regarding his sentence implicates the legality of his sentence and such issues cannot be waived. *Commonwealth v. Dickson*, 918 A.2s 95, 99 (Pa. 2007). Moreover, this Court may raise legality issues *sua sponte*. *See*, *e.g.*, *Commonwealth v. Foster*, 17 A.3d 332, 352 (Pa. 2011). Thus, the PCRA court's and the Commonwealth's claims regarding waiver are misplaced.

his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa.C.S. § 9543(a)(2). Appellant must also establish that the issues raised in the PCRA petition have not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). An allegation of error "is waived if the petition could have raised it but failed to do so before a trial, at trial, during unitary review, on appeal[,] or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b).

As long as this Court has jurisdiction over the matter, a legality of sentencing issue is reviewable and cannot be waived. *Commonwealth v. Jones*, 932 A.2d 179, 182 (Pa. Super. 2007). However, a legality of sentencing issue must be raised in a timely filed PCRA Petition over which we have jurisdiction. *See* 42 Pa.C.S. § 9545(b); *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999) ("Although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto."); *Commonwealth v. Miller*, 102 A.3d 988, 995-96 (Pa. Super. 2014) (explaining that the decision in *Alleyne*[6] does not invalidate a mandatory minimum sentence when presented in an untimely PCRA Petition); *Commonwealth v. Ruiz*, 131 A.3d 54, 60-61 (Pa. Super. 2015) (remanding for resentencing without mandatory minimum where defendant was sentenced 12 days before *Alleyne*, his judgment of sentence was not final *Alleyne* was

[6] In *Alleyne*, the U.S. Supreme Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proved beyond a reasonable doubt. *Alleyne v. United States*, 133 S.Ct. 2151, 2160-61 (2013).

decided, and the defendant filed a timely PCRA Petition over which this Court had jurisdiction).

In his first two issues on appeal, Appellant claims his PCRA Petition is timely filed within one year of his Judgment of Sentence pursuant to 42 Pa.C.S. § 9545(b)(1). He essentially claims that he is entitled to relief because the court sentenced him pursuant to a mandatory minimum sentencing statute that was rendered unconstitutional by *Birchfield*. Appellant's Brief at 9-15. He also contends that *Birchfield* provides a new substantive rule that is fully retroactive on timely collateral review. While we recognize that new substantive rules are fully retroactive on timely collateral review, we conclude that *Birchfield* does not constitute a new substantive rule.[7]

This Court recently described the *Birchfield* holding as follows:

> In *Birchfield*, the United States Supreme Court recognized that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Birchfield*, 136 S.Ct. at 2185. Of particular significance, *Birchfield* held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2185-86. Accordingly, this Court has

[7] Appellant is not contesting a conviction based on any law criminalizing the refusal to consent to blood testing as a separate crime. Thus, we do not opine on the retroactivity of the main holding in *Birchfield* as it applies to such criminal laws. Rather, we are narrowly addressing the retroactivity of *Birchfield* insofar as that holding implicates Pennsylvania's DUI statutes.

> recognized that Pennsylvania's implied consent scheme was unconstitutional insofar as it threatened to impose enhanced criminal penalties for the refusal to submit to a blood test. *Commonwealth v. Ennels*, 167 A.3d 716, 724 (Pa. Super. 2017), *reargument denied* (Sept. 19, 2017) (noting that "implied consent to a blood test cannot lawfully be based on the threat of such enhanced penalties"); *Commonwealth v. Evans*, 153 A.3d 323, 330-31 (Pa. Super. 2016).

Commonwealth v. Kurtz, 172 A.3d 1153, 1157 (Pa. Super. 2017). *See also Commonwealth v. Giron*, 155 A.3d 635, 636 (Pa. Super. 2017) (vacating and remanding for resentencing after holding that "pursuant to [*Birchfield*] a defendant who refuses to provide a blood sample when requested by police is not subject to the enhanced penalties provided in 75 Pa.C.S. §§ 3803–3804.").

In the instant case, the certified record indicates that on December 21, 2015, the trial court imposed enhanced penalties for Appellant's refusal to consent to a blood draw. *See* N.T. Plea, 9/15/15, at 3, 6; N.T. Plea, 12/21/15, at 4-7; Pennsylvania Guideline Sentencing Form, filed 4/5/16, at 1; Sentencing Order, filed 12/23/15, at 1-3; Police Criminal Complaint, dated 4/20/15; Affidavit of Probable Cause, dated 4/27/15; Criminal Information, filed 8/18/15. Pursuant to *Birchfield*, a sentencing court today could not have sentenced Appellant to the mandatory minimum sentence under Section 3804(c)(3). However, Appellant's Judgment of Sentence became final on January 20, 2016, six months before the United States Supreme Court decided *Birchfield* on June 23, 2016. Although Appellant filed a timely PCRA Petition,

because his Judgment of Sentence became final before *Birchfield* was decided, pursuant to *Riggle*, we are unable to apply the mandates of *Birchfield*. *See Commonwealth v. Riggle*, 119 A.3d 1058 (Pa. Super. 2015) (declining to give *Alleyne* retroactive effect to cases on timely collateral review when the defendant's judgment of sentence had been finalized before *Alleyne* was decided).

Appellant summarily urges this Court to conclude, as a matter of first impression, that *Birchfield* is a new substantive rule that is fully retroactive on timely collateral review. *See* Appellant's Brief at 14-15. Appellant cites an unrelated unpublished memorandum for support, which is improper pursuant to this Court's Internal Operating Procedure § 65.37 ("Unpublished Memoranda Decisions"). *See Commonwealth v. Phinn*, 761 A.2d 176, 179 (Pa. Super. 2000) ("Unpublished memoranda of this court have no precedential value."). Moreover, that inapplicable case involved the direct appeal of a defendant's judgment of sentence that was not final when *Birchfield* was decided.

"[A] new rule of law does not automatically render final, pre-existing sentences illegal." *Commonwealth v. Washington*, 142 A.3d 810, 814 (Pa. 2016). "Under the *Teague*[8] framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Commonwealth v. Ross*, 140 A.3d 55, 59 (Pa. Super. 2016) (citations omitted).

"A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the

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[8] *Teague v. Lane*, 489 U.S. 288 (1989) (plurality).

rule is a 'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (citations omitted). "Substantive rules are those that decriminalize conduct or prohibit punishment against a class of persons." *Id.* (citation and quotation omitted). "[R]ules that regulate only the manner of determining the defendant's culpability are procedural." *Id.* (citations and quotation omitted).

Pennsylvania's implied consent statute reads, in relevant part, as follows:

> (a) General rule.--Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath or blood for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:
>
> > (1) in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock)[.]

75 Pa.C.S. § 1547(a)(1).

Relevant to the instant case, Section 3804 provides that an individual convicted of a third or subsequent

DUI (General Impairment) offense who refused to provide a blood sample faces a mandatory minimum of one year's imprisonment. 75 Pa.C.S. § 3804(c)(3)(i). Section 3804(c)(3)(i) effectively increases the punishment when a driver refuses to consent to a blood test. *Id*.

The new *Birchfield* rule, as it applies to Pennsylvania's DUI statutes providing for enhanced penalties, does not alter the range of conduct or the class of persons punished by the law: DUI remains a crime, and blood tests are permissible with a warrant or consent. Rather, the new rule precludes application of this mandatory minimum sentencing provision providing an enhanced penalty for Appellant's refusal to submit to blood testing. This change in the Pennsylvania sentencing enhancements applicable to DUI convictions is procedural because the new *Birchfield* rule regulates only the manner of determining the degree of defendant's culpability and punishment.

Based on the foregoing, we hold that *Birchfield* does not apply retroactively in Pennsylvania to cases pending on collateral review. Accordingly, Appellant's Judgment of Sentence is not illegal on account of *Birchfield* and he is not entitled to relief.

In his third claim, Appellant argues that this Court should reinstate his appellate rights *nunc pro tunc* based on "equitable principles." Appellant's Brief at 15-17. Appellant does not cite any pertinent authority to support his argument. Moreover, the PCRA does not grant such unrestrained authority to this or any other post-conviction court. *See* 42 Pa.C.S. § 9543 ("Eligibility for relief"). Thus, Appellant is not entitled to relief based on "equitable principles of

fairness" that are not otherwise delineated in the PCRA.

Order affirmed.

President Judge Emeritus Stevens joins the Opinion.

Judge Olson concurs in the result.

Judgment Entered.

s/ Joseph D. Seletyn, Esq.
Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/14/2018

APPENDIX C

IN THE COURT OF COMMON PLEAS OF SOMERSET COUNTY, PENNSYLVANIA

[filed on December 23, 2016]

COMMONWEALTH v. JEFFREY ALAN OLSON, Defendant	No. 544 CRIMINAL 2015

For Commonwealth: Hannah Myers, Esq., A.D.A.

For the Defendant: David T. Leake, Esq.

Hearing: October 24, 2016

MEMORANDUM

This matter is before us on Defendant's Petition For Relief Under the Post Conviction Relief Act. For the reasons which follow, his request must be denied. The record reflects that Defendant entered a negotiated plea of guilty to one count of Driving Under the Influence, a third offense under 75 Pa. C. S. A.§ 3802 (a)(l) with a refusal to undergo blood alcohol testing, graded as a misdemeanor of the first degree. On December 21, 20 15, he was sentenced to serve not less than 18 months nor more than 5 years in a State Correctional Institution, to be served consecutively to any sentence he was then serving. In addition, because this was Defendant's third offense, his

sentence included a mandatory minimum sentence of one year incarceration pursuant to 75 Pa. C. S. A. § 3803(b)(2). No post sentence motions or appeal was filed.

Defendant's *prose* Petition was docketed in this Court on August 17, 2016. Counsel was appointed to represent Defendant by Order dated August 19, 2016. Following the hearing, we took the matter under advisement to address Defendant's now counseled claim, that he is entitled to relief based on the recent decision of the U. S. Supreme Court in *Birchfield v. North Dakota*, __ U.S. __, 136 S.Ct. 2160, 84 USLW 4493 (June 23, 2016).

We will address his claim that he is somehow entitled to relief under the decision of the U.S. Supreme Court in *Birchfield v. North Dakota*, __ U.S. __, 136 S.Ct. 2160, 84 USLW 4493 (June 23, 2016). That decision provides that a blood test may not be administered as a search incident to a lawful arrest for drunk driving. In his Brief, Defense Counsel argued that the decision "held unconstitutional the practice of criminalizing the failure to consent to blood testing upon being suspected of a DUI." Brief, p. 1. While we do not read *Birchfield* to apply that broadly, we find that this issue was not properly preserved for collateral review.

> Simply stated, a new rule of law to which we give full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue

> was properly preserved there, or . . . is non-waivable.
>
> *Commonwealth v. Gillespie,* 512 Pa. 349,355, 516 A.2d 1180, I 183 (1986)

The record reflects that while the *Birchfield* decision was issued on June 23, 2016, because the issue presently before us was not raised by Defendant on direct appeal, the only other avenue which would allow it to be applied in this collateral matter would require us to find that the issue is non-waivable. Because this issue could have been raised by Defendant on direct appeal but was not, it is considered waived for PCRA purposes.

> We note that the PCRA's definition of waiver speaks only of claims that **could** have been raised, but were not. *See* 42 Pa.C.S.A. § 9544(b). It does not specifically address claims that **were** raised, but raised improperly. Nonetheless, we see no reason the definition would not apply to both types of waiver; thus, we assume it applies to all claims not preserved, whether by omission or imprecision.
>
> *Commonwealth v. Jones,* 2007 PA Super 255, ¶ 11, 932 A.2d 179, 182 (Pa. Super. Ct. 2007) (emphasis in original).

Therefore, the Motion for Post conviction Relief must be denied.

IN THE COURT OF COMMON PLEAS OF SOMERSET COUNTY, PENNSYLVANIA

COMMONWEALTH v. JEFFREY ALAN OLSON, Defendant	No. 544 CRIMINAL 2015

ORDER

AND NOW, this 22nd day of December, 2016, consistent with the foregoing Memorandum, Defendant's request for post-conviction relief is denied.

BY THE COURT

s/ John M. Cascio
John M. Cascio, J.