No. 19-1070

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

DAVID T. LEAKE
Counsel of Record
LAW OFFICE OF DAVID T. LEAKE
130 West Main Street
Somerset, Pennsylvania 15501
David.Leake.Esq@gmail.com

AMIR H. ALI
MEGHA RAM*
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Fl.
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

**Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.*

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

1. The BIO concedes that four state courts of last resort are entrenched in a "split of authority" concerning the retroactivity of *Birchfield* on collateral review. BIO 11. It concedes that if Petitioner were convicted in one of the three states where "his position has been accepted," courts would have given effect to his constitutional right to refuse a warrantless blood test. *Id.*; *see also* Pet. 9-12 (recounting the acknowledged conflict).

2. The conflict here gives rise to disparity that offends perhaps the most fundamental notions of fairness and justice: Minnesota, New Mexico, and North Dakota undo final convictions obtained in violation of *Birchfield*, while Pennsylvania denies relief to similarly situated people. Pet. 19-20. Resolution of this issue is significant to defendants who were subject to elevated convictions, penalties, and lifelong collateral

consequences for exercising their constitutional prerogative. Pet. 19. Petitioner, for instance, is subject to a lifelong deprivation of his Second Amendment rights simply for asserting his Fourth Amendment right. Pet. 5, 19. And it is significant to states, some of which have started to invest resources in reviewing and rolling back these penalties. Pet. 20.

The BIO argues the Court should overlook this disparity for defendants and states because "[t]he claim may not reappear." BIO 4. It follows that with three unsubstantiated assertions.

First, it says without citation that Petitioner's sentence was "unusually high," while "DUI sentences are usually brief." BIO 5. Neither is true. The trial court sentenced Petitioner to 18 months imprisonment—six months above the mandatory minimum and within the "standard" guideline range set forth in Petitioner's PSR—with the remainder of his five-year term to be served on parole.[1] Pet. 4-5. DUI convictions in other states with refusal are just as long or substantially longer—indeed, in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018) itself, the total punishment was over nine years (51-month prison term followed by mandatory 5 years of conditional release). *Id*. at 678; *see also, e.g.*, LA. REV. STAT. ANN. § 14:98.4(B)(1) (2015) (mandatory minimum of ten years and maximum of thirty years for repeat DUI offender); 31 R.I. GEN. LAWS

[1] While the vast majority of state court pleadings and decisions are not available electronically, even a simple Westlaw search in Pennsylvania briefs yields hundreds of cases describing defendants who were sentenced to five-years for DUI, in addition to any other consecutive sentences imposed. For instance, the following search for Pennsylvania briefs yields over seven hundred results: dui /p sentenc! /s ("5 years" OR "60 months").

ANN. § 31-27-2.2(b)(1)(i), (b)(2) (West 1996) (range of five to fifteen years for a first violation and ten to twenty years for a second violation).[2]

In addition to being wrong, Respondent's suggestion that DUI sentences are brief is overly simplistic. The time served for conduct that results in a DUI is usually far longer than the DUI and blood-test refusal penalties alone because DUI defendants are frequently convicted and consecutively sentenced for additional crimes, including felonies, which result from the harm caused. *See Commonwealth v. Haines*, 168 A.3d 231, 232 (Pa. Super. Ct. 2017) (listing common additional charges for DUI offenses, including several felonies); *Commonwealth v. Kimmel*, 125 A.3d 1272, 1273 (Pa. Super. Ct. 2015).

Second, the BIO asserts without citation that collateral review "is generally restricted to offenders in custody." BIO 5. This is also untrue. In Pennsylvania, postconviction remedies are available not only while in custody, but for the full duration of subsequent probation or parole. 42 PA. CONS. STAT. ANN. § 9543(a)(1)(i) (West 2018). They are also available to anyone serving a consecutive sentence. *Id.*

---

[2] In addition, defendants often do not begin serving their time until long after they are sentenced. In Pennsylvania, a defendant's right to bail continues "until the full and final disposition of the case, including all avenues of direct appeal." Pa. R. Crim. P. 534. This right is commonly granted in misdemeanor cases; indeed, where, as here, the imprisonment component of a sentence is less than 2 years, a defendant who has been sentenced has "the same right to bail as before verdict." *Id.* 521(B); *see also Commonwealth v. Mackel*, No. 1341 WDA 2016, 2017 WL 3711075, at *1-2 (Pa. Super. Ct. Aug. 29, 2017) (noting the strong enforcement of bail pending appeal even in more serious DUI cases).

§ 9543(a)(1)(iii). Minnesota, New Mexico, and North Dakota also have no custody requirement and even allow postconviction claims after a defendant has served all components of his sentence. *See* N.M. R. Crim. P. Dist. Ct. 5-803(A) (permitting post-conviction relief even if petitioner is no longer "in custody or under restraint"); *Sampson v. State*, 506 N.W.2d 722, 724 n.1 (N.D. 1993) (noting that its post-conviction scheme "does not include an express 'in custody' requirement"), *disapproved of on other grounds by Whiteman v. State*, 643 N.W.2d 704 (N.D. 2002); MINN. STAT. ANN. §§ 590.01-590.11 (containing no custody requirement).[3]

Third, the BIO asserts without citation that the Court can just assume defendants have waived all of these claims and that Petitioner's preservation of the issue resulted "from a peculiarity of Pennsylvania law holding that sentencing illegality claims cannot be waived." BIO 5. This is not true. Virtually all states, if not all, provide for nonwaivability of "an illegal sentence," including Minnesota, New Mexico, and North Dakota. *State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007); *State v. Trujillo*, 157 P.3d 16, 18 (N.M. 2007); *State v. Thomas*, 938 N.W.2d 897, 901 (N.D. 2020). Indeed, this Court has recognized the centuries-long understanding that even a guilty plea does not waive the challenge to a conviction for conduct

---

[3] Respondent does not and has never contested that Petitioner himself would be eligible for postconviction relief. Any such argument was waived below, *see Commonwealth v. Fields*, 197 A.3d 1217, 1222-23 (Pa. Super. Ct. 2018) (holding that arguments going to eligibility for postconviction relief are nonjurisdictional and waivable), and then further waived by failure to assert it in the BIO, *see* Sup. Ct. Rule 15.2.

"which the State may not constitutionally prosecute." *Class v. United States*, 138 S. Ct. 798, 803-04 (2018); *see also Bousley v. United States*, 523 U.S. 614, 623 (1998) (although the petitioner had pled guilty and not argued at trial or on appeal that "use" meant active use, his default would be excused if he could show that the error in his case had "probably resulted in the conviction of one who is actually innocent.").

Accordingly, just last year when the State of Minnesota urged this Court to grant review even in the absence of a split, it was forthright that retroactivity would affect "thousands of test-refusal and driving-while-impaired convictions" and "every one of these defendants who was convicted for refusing a blood [test]" would be entitled to show they are eligible for relief from their unconstitutional conviction. Pet. for Writ of Cert., *Minnesota v. Johnson*, 139 S. Ct. 2745 (Feb. 19, 2019) (No. 18-1084), 2019 WL 852261 at *6, *12. And accordingly, Minnesota courts have continued to resolve *Birchfield* retroactivity claims and work out the relevant procedures, such as "the burden of proof in a *Birchfield/Johnson* postconviction proceeding" and the "pleading[s] requirement for *Birchfield/Johnson* postconviction proceedings." *Fagin v. State*, 933 N.W.2d 774, 776, 780-81 (Minn. 2019).

Nothing about the disparate treatment of similarly situated people, the elevated offense and lifelong consequences Petitioner will face for asserting his constitutional right, or the ongoing litigation in other states is "academic." BIO 5. When a conflict on retroactivity arises, it has been this Court's practice to resolve it expeditiously, not to let the problems amass. *See, e.g.*, *Welch v. United States*, 136 S. Ct. 1257 (2016) (resolving conflict as to a rule announced the prior term);

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (granted in OT 2015 to resolve conflict in OT 2011); *Bousley v. United States*, 523 U.S. 614 (1998) (granted in OT 1997 to resolve conflict as to a rule announced in OT 1995); *Schriro v. Summerlin*, 542 U.S. 348 (2004) (granted in OT 2003 to resolve conflict as to a rule announced in OT 2001). The acknowledged split on *Birchfield*'s retroactivity should similarly be resolved before the disparate consequences for defendants and states become untenable.

3. The BIO spends all but two pages of its argument addressing the merits. That is telling; the Court should permit the parties to proceed to full briefing on these issues.

The substance of the BIO's merits argument merely echoes the decision below without meaningfully responding to the petition.

For instance, the BIO does not contest that *Birchfield* prohibits a state 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, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016), and therefore placed that "particular conduct . . . beyond the State's power to punish." *Welch*, 136 S. Ct. at 1266-67; Pet. 14. Instead, the BIO merely repeats that because a state could validly impose punishment if it had a warrant or exigency—an argument that goes to eligibility, not retroactivity, *see* Pet. 16-17—*Birchfield* "does not categorically bar the prosecution of any 'primary, private individual conduct.'" BIO 8. Respondent never addresses the fact that none of *Bousley*, *Welch*, or *Montgomery* categorically barred any primary conduct, expressly rejected

that argument, and, indeed, the latter two cases specifically recognized that Congress remained free to criminalize the very conduct at issue. Pet. 15-17.

Moreover, Respondent's argument remains premised on the most strained conception of "private individual conduct." On Respondent's view, (1) an individual who decides to refuse a blood draw in the absence of a warrant and (2) an individual who decides to refuse a blood draw in the presence of a warrant have engaged in the exact same "primary, private individual conduct." The difference, Respondent says, rests solely on "conduct by the state." BIO 10. This is hogwash. Accepting Respondent's logic means accepting that each of these scenarios involve the same "private, individual conduct":

(1) Police show up at a corporation's headquarters and demand to seize their business records without any warrant. The business declines.	(2) Police show up at a corporation's headquarters with a court order requiring the business to turn over its records. The business declines.
(1) Police knock on your door and say they want to enter without a warrant. You say no.	(2) Police knock on your door and present a warrant authorizing them to search your home. You say no.

(1) Police go to a business or place of worship and tell it to shut down. The business or place of worship continues to operate.	(2) Police go to a business or place of worship with a court order requiring it to cease operations. The business or place of worship continues to operate.

This Court has never endorsed such a paternalistic view of the law and of individual autonomy. *See Johnson*, 916 N.W.2d at 682 (recognizing that *Birchfield* fundamentally "change[d] who can be prosecuted for test refusal").[4]

The Court's cases have adopted a coherent definition of a "procedural" rule, and it is one that concerns the "permissible methods *a court* might use to determine" a defendant's guilt or sentence. *Welch*, 136 S. Ct. at 1265 (emphasis added). Respondent never explains how the absolute prohibition on punishment for refusing a warrantless, non-exigent blood draw affects only "the accuracy of a conviction or sentence," *Montgomery*, 136 S. Ct. at 730, and "merely raise[s] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Welch*, 136 S. Ct. at 1265. The only case cites in support of its position, *Alleyne v. United States*, 133 S. Ct. 2151 (2013), concerned a rule requiring a jury, not

---

[4] Respondent curiously claims that "[n]o state has specifically criminalized 'blood test refusal in the absence of a warrant or warrant exception' rather than 'blood test refusal." BIO 10. But that is exactly what Pennsylvania did after *Birchfield*. *Compare* 75 PA. CONS. STAT. ANN. § 3803(b)(2), (4) (West 2014) (punishing "refused testing of blood"), *with id.* (West 2018) (punishing "refused . . . chemical testing pursuant to a valid search warrant").

judge, to make particular findings—a "prototypical procedural rule[]." *Schriro*, 542 U.S. at 353; *see also Welch*, 136 S. Ct. at 1265 (using this as an illustration of a procedural rule that goes to "the range of permissible methods a court might use").

The petition further explained that *Birchfield* is plainly substantive because it "narrow[ed] the scope of a criminal statute by interpreting its terms." *Welch*, 136 S. Ct. at 1265. Multiple state supreme courts have endorsed that rationale. *See Johnson*, 916 N.W.2d at 681-82 (holding that *Birchfield* was "a decision that 'narrow[s] the scope of a criminal statute'"); *Morel v. State*, 912 N.W.2d 299, 304 (N.D. 2018) (holding that *Burchfield* "changed the substantive reach" of a criminal statute). Yet Respondent has nothing to say about it, beyond a curious representation in a footnote that "*Birchfield* . . . did not discuss, or even mention, the terms of any statute." BIO 7 n.4. Huh? The very question in *Birchfield* was whether state implied consent laws could constitutionally reach warrantless blood draws, and the Court granted relief to Mr. 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. 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)).

4. The BIO does not contest that the question presented was the sole issue decided below and is thus squarely presented. Pet. 20. Indeed, the BIO concedes this case presents that unadorned question: "Is *Birchfield* . . . 'substantive' under *Teague*"? BIO i.

CONCLUSION

For these reasons and those in the petition, certiorari should be granted.

Respectfully submitted,

DAVID T. LEAKE
Counsel of Record
LAW OFFICE OF DAVID T. LEAKE
130 West Main Street
Somerset, Pennsylvania 15501
David.Leake.Esq@gmail.com

AMIR H. ALI
MEGHA RAM*
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Fl.
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

**Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.*

May 2020