**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-1526**

Eric Kenny Hagerman, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 1, 2020**
**Reversed**
**Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-CR-11-9339

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Lyndsey M. Olson, St. Paul City Attorney, Steven Heng, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Johnson, Judge; and Cochran, Judge.

**S Y L L A B U S**

The rule announced in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013)—that the dissipation of alcohol in the bloodstream is not a per se exigency justifying the warrantless search of a suspected impaired driver—applies retroactively when a petitioner challenges a final conviction for test refusal under the rule announced by the Supreme Court in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

## O P I N I O N

**SMITH, TRACY M.**, Judge

The United States Supreme Court's decision in *Birchfield*, together with the Minnesota Supreme Court's later decisions in *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), collectively make up what the Minnesota Supreme Court calls "the *Birchfield* rule." The *Birchfield* rule holds that states may not criminalize a suspected impaired driver's refusal to submit to a blood or urine test in the absence of a search warrant or a valid exception to the warrant requirement. *See Johnson v. State*, 916 N.W.2d 674, 678 n.2, 679 (Minn. 2018).

Appellant Eric Kenny Hagerman was convicted of test refusal in 2011 after refusing to provide a blood or urine sample following his arrest for driving while impaired (DWI). In 2017, he petitioned for postconviction relief, arguing that his conviction must be reversed under the *Birchfield* rule. Applying the *Birchfield* rule, the district court concluded that Hagerman's conviction was not unconstitutional because, at the time of Hagerman's test refusal, a per se exigent-circumstances exception to the warrant requirement applied. The district court refused to retroactively apply to Hagerman's case the Supreme Court's 2013 decision in *McNeely*, which invalidated the per se exigent-circumstances exception, reasoning that *McNeely* did not announce a substantive rule of law.

We conclude that the rule announced in *McNeely* is substantive in the context of test-refusal cases challenged under the *Birchfield* rule and therefore applies retroactively. And, because the state relied only on the per se exigent-circumstances exception

invalidated by *McNeely*, Hagerman's test-refusal conviction was unconstitutional. We therefore reverse.

## FACTS

In November 2011, St. Paul police officers arrested Hagerman on suspicion of drunk driving after Hagerman's vehicle struck the median, rolled over, and came to a stop, resting on its rooftop. The officers transported Hagerman, who was exhibiting signs of impairment, to a hospital. There, they read him the implied-consent advisory and asked him to submit to blood or urine testing. The police did not obtain a search warrant to take a blood or urine sample. Hagerman refused to submit to either test. The state charged Hagerman with third-degree test refusal in violation of Minn. Stat. § 169A.20, subd. 2 (2010), along with fourth-degree DWI in violation of Minn. Stat. § 169A.20, subd. 1(1) (2010). Hagerman pleaded guilty to third-degree test refusal, and the state dismissed the fourth-degree DWI charge.

In July 2017, Hagerman filed a petition for postconviction relief, seeking reversal of his test-refusal conviction. He argued that, under the *Birchfield* rule, his conviction violated the constitution because it was based on refusing to submit to a warrantless blood or urine test in the absence of an exception to the warrant requirement.

The district court denied Hagerman's petition, determining that the *Birchfield* rule did not apply retroactively to Hagerman's conviction. Hagerman appealed. In April 2018, we stayed Hagerman's appeal pending a decision by the Minnesota Supreme Court in *Johnson*, 916 N.W.2d 674. In *Johnson*, the supreme court held that *Birchfield* announced a substantive rule that applies retroactively to convictions that were final before the rule was announced. *Johnson*, 916 N.W.2d at 677. But, the supreme court explained, reversal

of a test-refusal conviction is not automatic under *Birchfield*, and it remanded the case to the district court to determine "whether a warrant or an exception to the warrant requirement existed at the time of the test refusal." *Id.* at 684. After reinstating Hagerman's appeal, this court remanded his case to the district court for further proceedings consistent with *Johnson*.

In July 2019, the district court denied Hagerman's petition for postconviction relief. It determined that, at the time of Hagerman's test refusal, a per se exigent-circumstances exception to the warrant requirement applied and that, although the Supreme Court later invalidated the per se exigent-circumstances exception in *McNeely*, 569 U.S. 141, 133 S. Ct. 1552, *McNeely* does not apply retroactively.

This appeal follows.

## ISSUE

Did the district court err by declining to retroactively apply the rule announced in *McNeely* to Hagerman's test-refusal conviction?

## ANALYSIS

We generally review a district court's denial of postconviction relief for an abuse of discretion. *Dikken v. State*, 896 N.W.2d 873, 876 (Minn. 2017). "A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation omitted). Legal issues are reviewed de novo. *Id.* Specifically, "[w]hether a rule of federal constitutional

law applies retroactively to convictions that were final when the rule was announced is a legal question that [appellate courts] review de novo." *Johnson*, 916 N.W.2d at 681.

Hagerman argues that the district court abused its discretion because the state failed to establish that an exception to the warrant requirement existed at the time that he refused blood or urine testing. The state acknowledges that it must show that a valid exception existed and contends it has done so because, at the time of Hagerman's conviction, Minnesota law recognized that the natural dissipation of alcohol in the bloodstream creates a per se exigent circumstance justifying a warrantless search. *See State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009). Hagerman counters that the Supreme Court's decision in *McNeely*, rejecting such a per se exigency, applies retroactively and that the state therefore failed to prove an exception to the warrant requirement in his case.

**A. Legal background**

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. In the suspected-impaired-driving context, administering a chemical test of breath, blood, or urine is a search. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989) (breath test); *Schmerber v. California*, 384 U.S. 757, 767-68, 86 S. Ct. 1826, 1834 (1966) (blood test); *Thompson*, 886 N.W.2d 224 (urine test).

Before the Supreme Court's 2013 decision in *McNeely*, the Minnesota Supreme Court categorically upheld warrantless chemical tests in the DWI context under the exigent-circumstances doctrine, holding that "the 'rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances.'" *Netland*, 762 N.W.2d at 212

(quoting *State v. Shriner*, 751 N.W.2d 538, 549-50 (Minn. 2008)). In *McNeely*, the state of Missouri similarly urged a rule that, "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because [alcohol-concentration] evidence is inherently evanescent." 569 U.S. at 151, 133 S. Ct. at 1560. The Supreme Court rejected a per se exigency approach, holding instead that the exigency "must be determined case by case based on the totality of the circumstances." *Id.* at 156, 133 S. Ct. at 1563.

In 2016, the Supreme Court in *Birchfield* addressed another exception to the warrant requirement—the search-incident-to-arrest exception. 136 S. Ct. at 2174. *Birchfield* involved three consolidated cases, one of which was from Minnesota, that all concerned whether state laws criminalizing test-refusal violate the Fourth Amendment protection against unreasonable searches. *Id.* at 2170-72. The Court noted that *McNeely* addressed the exigent-circumstances exception but did not address any other warrant exceptions. *Id.* at 2174. The Court then evaluated the search-incident-to-arrest exception as it applies to breath and blood tests, examining "the degree to which they intrude upon an individual's privacy and the degree to which they are needed for the promotion of legitimate governmental interests." *Id.* at 2176 (quotation omitted). It held that, while a breath test is a permissible search incident to a lawful arrest, a blood test is not. *Id.* at 2185. As a result, states can make it a crime for suspected drunk drivers to refuse breaths tests but cannot criminalize refusal to submit to a blood test unless the police obtained a search warrant or the test request was supported by another exception to the warrant requirement. *Id.* at 2185-86.

Following the Supreme Court's decision in *Birchfield*, the Minnesota Supreme Court decided *Trahan*, 886 N.W.2d 216, and *Thompson*, 886 N.W.2d 224. In *Trahan*, the supreme court applied *Birchfield* and held that Trahan's conviction for test refusal was unconstitutional because a warrantless search of his blood was not justified by an exception to the warrant requirement. 886 N.W.2d at 221-23. In *Thompson*, the supreme court decided that urine tests, too, were not justified by the search-incident-to-arrest exception and held that Thompson's conviction for test refusal was likewise unconstitutional. 886 N.W.2d at 226, 229.

After these cases, the Minnesota Supreme Court in *Johnson* addressed whether the *Birchfield* rule announced a substantive, rather than a procedural, rule of constitutional law that applies retroactively to final convictions on collateral review. *Johnson*, 916 N.W.2d at 677. The *Johnson* court applied the standard from *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and decided that the *Birchfield* rule is indeed a new, substantive rule of law that applies retroactively. *Id.* at 684. The rule is substantive, the supreme court concluded, because it "defin[es] who can and who cannot be culpable for refusing to submit to a chemical test." *Id.* at 683.

With this background, we turn to the issue presented in this case.

**B. Application to this case**

In response to Hagerman's petition for postconviction relief, the state advanced one warrant exception: the pre-*McNeely* per se exigency exception based on the dissipation of alcohol. Hagerman contends that the per se exigency theory is invalid and that the exigent-circumstances exception requires a totality-of-the-circumstances analysis. He makes two

somewhat different arguments. The first is that the *Birchfield* rule, which is substantive and applies retroactively, should be interpreted as rejecting any and all categorical warrant exceptions—under either the exigent-circumstances doctrine or the search-incident-to-arrest doctrine. The second is that, even though *McNeely* issued a procedural rule, its ruling is substantive as applied to Hagerman and therefore must be retroactively applied. We address each argument in turn.

**1. The *Birchfield* rule and a per se exigency exception**

Hagerman argues that "the *Birchfield* rule holds that no categorical warrant exception may justify a DWI-test refusal conviction based on a blood or urine test." He contends that *Birchfield* required case-by-case determinations and thus "necessarily rejected" both the per se exigent-circumstances exception and the search-incident-to-arrest exception.

The state responds that Hagerman's argument erroneously conflates *McNeely* and *Birchfield*. Each decision, the state asserts, stands on its own and examines a separate exception to the warrant requirement—the exigent-circumstances exception in *McNeely* and the search-incident-to-arrest exception in *Birchfield*. In fact, the state observes, *Birchfield* explicitly identifies differences between the exigency exception and the search-incident-to-arrest exception. 136 S. Ct. at 2180. Thus, the state argues, *Birchfield* does not prohibit consideration of a per se exigency exception. The state also references the Minnesota Supreme Court's footnote in *Johnson* in which the court leaves open the question about the application of *McNeely*:

> Under the *Birchfield* rule, the State cannot criminalize a driver's refusal of a blood or urine test absent a warrant or a showing of a valid exception to the warrant requirement. One exception to the warrant requirement for blood and urine tests that could apply is exigent circumstances. We express no opinion on whether *Missouri v. McNeely* applies to any exigent-circumstances determination for either of Johnson's test-refusal convictions.

*Johnson*, 916 N.W.2d at 684 n.8 (citations omitted).

*Birchfield* holds that states cannot criminalize refusal to submit to a blood test unless the test request is supported by a search warrant or an exception to the warrant requirement applies. 136 S. Ct. at 2185-86. The opinion makes clear that it addresses only the search-incident-to-arrest exception to the warrant requirement. *Id.* at 2174 ("In the three cases now before us, the drivers were searched or told that they were required to submit to a search after being placed under arrest for drunk driving. We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests.") When applying its newly announced rule to Birchfield himself, who had been convicted based on refusal to submit to a blood test, the Supreme Court concluded that his conviction was invalid because there was no warrant, the search-incident-to-arrest exception did not apply, and "North Dakota ha[d] not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search." *Id.* at 2186. But Birchfield's offense occurred after *McNeely*, so a per se exigency argument was unavailable to the state, regardless of whether the law at the time of Birchfield's conviction or the law at the time of the Supreme Court's *Birchfield* decision controlled. *Id.* at 2170 (stating that Birchfield's refusal to test occurred October 10, 2013). And no other statement

in *Birchfield* suggests to us that the decision requires district courts, when evaluating whether a particular petitioner's test-refusal conviction was justified by a warrant exception, to apply a case-by-case analysis, rather than a per se analysis, to all cases, including pre-*McNeely* cases.

Nor does Minnesota law lend any support to Hagerman's argument. In *Johnson*, the driver was convicted of two test-refusal offenses, one of which occurred in 2009 (pre-*McNeely*) and the other in 2014 (post-*McNeely*). 916 N.W.2d at 677-78. The supreme court remanded the case to the district court, explaining, "Even though the *Birchfield* rule applies to Johnson's convictions, reversal of those convictions is not automatic. On remand, the district courts will need to apply the *Birchfield* rule and determine if the test-refusal statute was unconstitutional as applied to Johnson." *Id.* at 684. The supreme court then expressly declined, in the footnote that the state cites, to offer an opinion as to whether *Missouri v. McNeely* applied to either of Johnson's convictions. *Id.* at 684, n.8 (citation omitted).

We conclude that neither United States Supreme Court nor Minnesota precedent holds that, if the state seeks to defend a test-refusal conviction based on the exigent-circumstances exception, *Birchfield* itself requires that it do so based on the totality of the circumstances, regardless of whether the underlying offense occurred before or after *McNeely*.

**2. The *McNeely* rule as a substantive new rule of constitutional law**

Hagerman alternatively contends that it is nevertheless error to apply the per se exigency exception to his case because *McNeely*, as applied through the *Birchfield* rule, is substantive and therefore retroactive in this context.

To determine whether a rule of federal constitutional law has retroactive effect, we apply the standard set forth by the Supreme Court in *Teague*. *See Johnson*, 916 N.W.2d at 681 (applying *Teague*, 489 U.S. 288, 109 S. Ct. 1060); *see also Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (same). Under *Teague*, the first inquiry is whether the rule at issue is a new rule or an old rule. *Johnson*, 916 N.W.2d at 681. "[A] new rule of law generally does not apply retroactively to final convictions," but there are exceptions. *Id.* The parties agree, as do we, that *McNeely* announced a new rule and that Hagerman's conviction was final when the rule was announced, so we move to the potential exceptions. *Teague* identifies two. A new rule may be applied retroactively if the rule: "(1) is substantive, as compared to procedural, or (2) is a new 'watershed' rule of criminal procedure." *Id.* Hagerman asserts only the first exception.

A substantive rule is one that "alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004). A rule that "narrows the scope of a criminal statute," along with "a constitutional determination that places particular conduct or persons covered by the statute beyond the State's power to punish[,] is substantive for purposes of the retroactivity analysis." *Johnson*, 916 N.W.2d at 682 (quotation omitted). Substantive rules are applied retroactively "because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352, 124 S. Ct. at 2522-23 (quoting *Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 1610 (1998)).

Procedural rules, on the other hand, regulate "only the manner of determining the defendant's culpability." *Johnson*, 916 N.W.2d at 682 (quotation omitted). They do not apply retroactively because they raise only "the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise" and thus have a "more speculative connection to innocence." *Schriro*, 542 U.S. at 352, 124 S. Ct. at 2523.

In *Johnson*, the Minnesota Supreme Court addressed the applicability of the substantive-rule exception to the new *Birchfield* rule. 916 N.W.2d at 681. In *Johnson*, the state argued that the *Birchfield* rule was procedural because it "control[ed] only police conduct, redefine[ed] the scope of searches permissible under the Fourth Amendment, and le[ft] no private conduct categorically beyond the scope of the test-refusal statute." *Id.* Johnson contended that the rule was substantive because it changed the elements of the crime of test refusal and narrowed the scope of persons who may be convicted of that crime, creating a class of people immune from punishment. *Id.*

The Minnesota Supreme Court concluded that the *Birchfield* rule was substantive. *Id.* at 684. It stated that determining whether a rule is substantive or procedural requires looking to "the nature of the rule." *Id.* at 681. The *Birchfield* rule, the supreme court concluded, "changes who can be prosecuted for test refusal" and "has placed a category of conduct outside the state's power to punish." *Id.* at 682, 683. The supreme court explained:

> [F]or anyone convicted of test refusal for refusing a blood or urine test when the police did not have a warrant or a warrant exception did not apply, no procedure, even the use of impeccable fact finding procedures could now validate a conviction for test refusal because that crime no longer exists.

*Id.* at 683 (quotations omitted).

The same reasoning applies to Hagerman's conviction with respect to *McNeely*. Hagerman's test-refusal conviction is invalid unless the blood or urine test in his case was requested pursuant to either a warrant or a valid warrant exception. *Birchfield*, 136 S. Ct. at 2185-86; *Johnson*, 916 N.W.2d at 684. This is so because, in order to commit the crime of test refusal, the driver must refuse a constitutionally permissible test. *Birchfield*, 136 S. Ct. at 2172. In *McNeely*, the Supreme Court rejected the proposition that a warrantless blood test is categorically permissible simply because the natural metabolization of alcohol in the bloodstream presents a per se exigency justifying an exception to the Fourth Amendment's search warrant requirement. 569 U.S. at 145, 13 S. Ct. at 1553. Instead, the *McNeely* Court held, an exigency in the context of blood testing in suspected impaired-driving cases must be determined case-by-case based on the totality of the circumstances. *Id.* If the totality of the circumstances does not establish an exigency justifying a warrantless search of a driver's blood or urine, the driver's refusal is in "a category of conduct outside the State's power to punish." *Johnson*, 916 N.W.2d at 683. Thus, consistent with *Johnson*, the crime of test refusal "no longer exists" where a person refuses a warrantless blood or urine test for which no valid exigency applies. *Id.*

The state urges a different result based on our 2015 decision in *O'Connell v. State*, 858 N.W.2d 161 (Minn. App. 2015), *review denied* (Minn. Oct. 20, 2015). In *O'Connell*—a case that preceded both *Birchfield* and *Johnson*—the petitioner brought a postconviction challenge to his conviction for DWI, arguing that his guilty plea was not voluntary because the district court refused to suppress urine-test results obtained without a warrant. *O'Connell*, 858 N.W.2d at 164. The issue before this court was whether the district court

erred by declining to retroactively apply the new rule announced in *McNeely* to O'Connell's conviction. *Id.* We held that it did not err. *Id.* We stated that "[t]he rule announced by *McNeely* is clearly procedural as it modified the process law enforcement must follow before administering a blood, breath, or urine test." *Id.* at 166. We further reasoned that "[t]he requirement that law enforcement secure a warrant, or establish an exception to the warrant requirement, before administering a breath, blood, or urine test has little bearing on the accuracy of the underlying determination of guilt" for DWI. *Id.*

In the test-refusal context, in contrast, the requirement that law enforcement secure a warrant or establish an exception to the warrant requirement has a critical "bearing on the accuracy of the underlying determination of guilt." *Id.* Without constitutional justification for the blood or urine test, the driver cannot be convicted of test refusal. *Birchfield*, 136 S. Ct. at 2172. *O'Connell* dealt with the admissibility of test results tending to prove that the defendant was driving while impaired—conduct that the state has the power to punish. *O'Connell* did not address conduct that, without a constitutional justification for requesting a blood or urine test, was outside of the state's power to punish. Thus, *O'Connell* does not control this case.

For the foregoing reasons, we hold that *McNeely*, as applied through the *Birchfield* rule to test-refusal convictions, is substantive and therefore retroactive.[1]

[1] We recognize that we reached the opposite conclusion in an unpublished decision, *Cibulka v. State*, No. A14-1631, 2015 WL 5194617 (Minn. App. Sept. 8, 2015), *review denied* (Minn. Nov. 25, 2015). But unpublished opinions are not precedential, *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993), and further, *Cibulka* predated the United States Supreme Court's decision in *Birchfield*, 136 S. Ct. 2160, and the

Our remaining task is to apply this holding to Hagerman's case. Hagerman argues that his conviction must be vacated if the pre-*McNeely* per se exigent-circumstances warrant exception does not apply, particularly in light of the "heightened pleading standard" outlined in *Fagin v. State* for collateral attacks on test-refusal convictions brought under the *Birchfield* rule. 933 N.W.2d 774, 780-81 (Minn. 2019). In *Fagin*, the supreme court directed that, after a petitioner pleads that there was no warrant and no exception, the "obligation to plead" shifts to the state to plead with specificity any warrant exception relied on and the grounds for the state's reliance. *Id.* at 780. Ultimately, "the burden of proof in a *Birchfield*/*Johnson* postconviction proceeding is on the petitioner, . . . [and] the petitioner must prove two negatives: no warrant and no exception." *Id.*

When Hagerman filed his original petition for postconviction relief, he asserted that his conviction must be vacated because the officers had no warrant and no exigent circumstances justified the lack of a warrant. After Hagerman's case was remanded by this court for proceedings consistent with *Johnson*, the state acknowledged that there was no warrant but asserted that the per se exigency exception to the warrant requirement applies. The state asserted no other grounds for an exception to the warrant requirement. Because we conclude that a per se exigency exception does not apply to Hagerman's case, the district court erred by concluding that an exception to the warrant requirement applies.[2]

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Minnesota Supreme Court's decision in *Johnson*, 916 N.W.2d 674, which largely control our analysis here.

[2] We note that the state did not ask us, in the event that we rejected the per se exigency exception, to remand the case to give it the opportunity to prove an exigent-circumstances exception on other grounds. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2537-39 (2019)

## D E C I S I O N

Because *McNeely*, as applied through the *Birchfield* rule, is substantive and retroactive as applied to Hagerman's conviction for test refusal, and because the state's asserted per se exigency exception to the warrant requirement therefore does not apply, we conclude that Hagerman's conviction was unconstitutional and we reverse.

**Reversed.**

(evaluating exigent-circumstances exception in the context of a driver hospitalized because of "unconsciousness or stupor"); *McNeely*, 569 U.S. at 156, 133 S. Ct. at 1563 (discussing totality-of-the-circumstances analysis of exigent circumstances). We therefore do not address whether remand would be available here.