IN THE SUPREME COURT

STATE OF NORTH DAKOTA

| | | |
|---|---|---|
| BRANDON MOREL, | ) | |
| | ) | |
| Petitioner/ Appellant. | ) | |
| | ) | |
| v. | ) | Supreme Court No. 20170380 |
| | ) | |
| STATE OF NORTH DAKOTA, | ) | |
| | ) | Burleigh County No. 08-2017-CV-01341 |
| Respondent/ Appellee. | ) | |

---

# BRIEF OF APPELLANT

---

Appeal from Judgment, dated October 16, 2017, and filed October 17, 2017

Entered following the District Court's Order Denying the

Application for Post-Conviction Relief

dated October 13, 2017, and filed on October 13, 2017

Burleigh County District Court

South Central Judicial District

The Honorable David Reich

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Brandon Morel

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

TABLE OF CONTENTS

[¶1] TABLE OF AUTHORITIES

## [¶2] STATEMENT OF THE ISSUES

I. *Birchfield v. North Dakota* stands for the proposition that a State may not criminalize the refusal of a warrantless blood test, while *Bernard v. Minnesota* declares that States may criminalize the refusal of a warrantless breath test.

II. Since a jury found Morel guilty of refusing a warrantless blood test, that conviction is now void because of the rule from *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). The rule from *Birchfield* is a new substantive rule of federal constitutional law, requiring retroactive effect.

III. Morel is entitled to a refund of the fees he paid related to the now void DUI-refusal conviction, pursuant to *Nelson v. Colorado*, 137 S.Ct. 1249 (2017).

## [¶3] STATEMENT OF THE CASE

[¶4] On May 8, 2017, Brandon Morel filed an Application for post-conviction relief, asking the district court to vacate a criminal conviction for refusal to submit to a blood test in Burleigh County Case No. 08-2014-CR-01125. (Appendix ("App.") at 2-4). The State filed an Answer asking the district court to deny Morel's request. (App. 5-9).

[¶5] On August 8, 2017, a hearing was held on Morel's Application for post-conviction relief. (App. 10). On October 12, 2017, the district court issued its Order Denying the Application for Post-Conviction Relief (filed October 13, 2017). (App. 11-15).

[¶6] On October 17, 2017, the Judgment (dated October 16, 2017) was filed. (App. 16). On October 26, 2017, Notice of Entry of Judgment was filed. (App. 17).

[¶7] On October 26, 2017, Morel filed a Notice of Appeal to this Court seeking relief. (App. 18-19). Morel also filed an Order for Transcript, requesting the transcript of the post-conviction hearing. (App. 20-21).

[¶8] Morel asks this court to reverse the decision of the district court and to vacate his conviction in Burleigh County Case No. 08-2014-CR-01125 for refusing to submit to a warrantless blood test.

## [¶9] STATEMENT OF THE FACTS

[¶10] On April 4, 2014, Brandon Morel was arrested and cited for driving under the influence of intoxicating liquor (App. 28), as well as refusal to submit to a warrantless blood test. (App. 29).

[¶11] On June 12, 2014, Morel filed a Motion to Dismiss the refusal charge, and requested that the refusal statute, which criminalizes a driver's refusal to submit to a warrantless blood test at the direction of a law enforcement officer, be struck down and held unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. (App. 30-40). Morel's constitutional challenge was exactly the same as the challenge in *State v. Birchfield*, 2015 ND 6, 858 N.W.2d 302.

[¶12] The State filed a reply brief opposing Morel's request and argued that a State may criminalize a driver's refusal to submit to a warrantless blood test. (App. 41-51). This is the same argument the State made in *Birchfield*.

[¶13] On September 29, 2014, the district court ruled that the refusal statute was not unconstitutional because a driver has no right to refuse a warrantless blood test. (App. 54-61). Like in *Birchfield*, the district court determined that the legislature could pass implied consent laws that supersede constitutional rights.

[¶14] Before going to trial, the State moved to dismiss Count One, the charge of driving under the influence of intoxicating liquor, and elected to proceed solely on the charge of refusing to submit to a warrantless blood test. (App. 52). The Court granted the State's motion and dismissed Count One. (App. 53). A jury found Morel guilty of refusing to submit to a warrantless blood test. (App. 62).

[¶15] Morel appealed his refusal conviction to this Court and argued, like in *Birchfield*, that the refusal statute was unconstitutional because it criminalized Morel's refusal conduct, which was beyond the power of the State to proscribe. On August 11, 2015, this Court denied relief for Morel, citing this Court's decision in *Birchfield* as being directly applicable. (App. 63-64).

[¶16] On May 8, 2017, Morel filed an Application for post-conviction relief, asking the district court to vacate this criminal conviction for refusal to submit to a blood test based upon the holding in *Birchfield v. North Dakota*, 579 U. S. ___ , 136 S.Ct. 2160 (2016), that a driver may not be criminally prosecuted for refusing a warrantless blood test. (App. 2-4). The State opposed the application. (App. 5-9).

[¶17] At the August 8, 2017, post-conviction hearing in this matter, Morel argued:

> "[I]t's our belief that based upon *Montgomery v. Louisiana* cited in the petition at 136 S.Ct. 718 (2016) that the *Birchfield* rule is a substantive rule of constitutional law ... since the *Birchfield* rule, we know that an individual cannot be charged with a crime of refusing a warrantless blood test. And because of the *Birchfield* rule, we know that that conduct is now [proscribed]. *Montgomery v. Louisiana* indicates that ... the new substantive rule must be applied retroactively on state collateral review matters, which this certainly is."

(August 8, 2017, post-conviction hearing transcript ("Tr.") at 3, lines ("L.") 8-21).

> "The *Birchfield* rule actually immunizes an individual from prosecution. If the *Birchfield* rule had been decided before Mr. Morel's case, the State could not have charged him with refusing a warrantless blood test because that would have been barred. So we know that it's a substantive rule."

(Tr. at 4, L. 1-5).

[¶18] The State argued that the *Birchfield* decision spoke nothing to whether a State may criminalize the refusal of a chemical test and that *Birchfield* did not say "this cannot be a crime and that this isn't a crime." (Tr. at 7, L. 1-11). The State continued:

> "[I]f we actually look to the text of the *Birchfield* decision, it doesn't go into the North Dakota statute in prescribing what the State can and cannot do."

(Tr. at 7, L. 2-4). This is a particularly odd argument, especially considering that the argument in *Birchfield* throughout was whether a State may criminalize the refusal of a chemical test.

[¶19] After taking the matter under advisement, the district court issued its decision denying post-conviction relief. (App. 11-15). The district court remarked that "a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." (App. 13). This is consistent with a new substantive constitutional rule that places, for example, the primary conduct of refusing a warrantless blood test beyond the power of the State to proscribe - the *Birchfield* rule.

[¶20] Then, after explaining why the *Birchfield* rule is a substantive rule, the district court inexplicably veered to the assertion that "the *Birchfield* decision stated a federal rule of criminal procedure, and not a new substantive rule of constitutional law." (App. 14). The district court made no mention of the fact that Morel was convicted of

refusing a warrantless blood test under an unconstitutional statute, a charge that is constitutionally barred because of *Birchfield*.

## [¶21] STANDARD OF REVIEW

[¶22] "The standard of review on an alleged denial of a constitutional right ... is de novo." *See State v. Murchison*, 2004 ND 193, ¶9, 687 N.W.2d 725; *see also Beylund v. Levi*, 2015 ND 18, ¶8, 859 N.W.2d 403 ("The standard of review for a claimed violation of a constitutional right is de novo"). "Questions of law are fully reviewable on appeal of a post-conviction proceeding." *See Baatz v. State*, 2014 ND 151, ¶8, 849 N.W.2d 225.

## [¶23] LAW AND ARGUMENT

I. *Birchfield v. North Dakota* stands for the proposition that a State may not criminalize the refusal of a warrantless blood test, while *Bernard v. Minnesota* declares that States may criminalize the refusal of a warrantless breath test.

[¶24] In *State v. Birchfield*, Mr. Birchfield challenged the statute that criminalized the refusal of a warrantless blood test, and argued that it was unconstitutional. *See State v. Birchfield*, 2015 ND 6, ¶4, 858 N.W.2d 302. This Court rejected Birchfield's argument that the statute was unconstitutional.

[¶25] The United States Supreme Court reversed this Court, finding that a driver has a constitutional right to refuse a blood test. The Court arrived at this determination by "conclud[ing] that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *See Birchfield v. North Dakota*, 136 S.Ct.

2160, 2185, 195 L.Ed.2d 560 (2016). The Court then applied its "legal conclusions to the three cases before" it, held that Birchfield could not be "criminally prosecuted for refusing a warrantless blood draw," and accordingly reversed his conviction. *See id*. at 2186. *Birchfield* placed a bar on these sorts of prosecutions.

[¶26] In a consolidated case, *Bernard v. Minnesota,* the high court held that Mr. Bernard could be criminally prosecuted for refusing a warrantless breath test, because unlike Birchfield, "Bernard had no right to refuse it" (warrantless breath test). *See id*.

[¶27] In *Beylund,* the other case consolidated with *Birchfield* and *Bernard,* the Court was looking at the issue of coerced consent. *See Beylund v. Levi*, 136 S.Ct. 2160, 2186, 195 L.Ed.2d 560 (2016) ("we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense"). There is a vast difference between the issue of whether consent was coerced and the issue of whether a state may criminalize a refusal. This appeal does <u>not</u> deal with the retroactivity of the *Beylund* rule or whether that rule is substantive or procedural.

II. Since a jury found Morel guilty of refusing a warrantless blood test, that conviction is now void because of the rule from *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). The rule from *Birchfield* is a new substantive rule of federal constitutional law, requiring retroactive effect

[¶28] Generally, new constitutional rules do not apply "to convictions that were final when the new rule was announced." *See Montgomery v. Louisiana*, 577 U.S. ___ , 136 S.Ct. 718, 728 (2016). This general retroactivity bar exists so that convictions that have become final are not disturbed by new constitutional rules that do not undermine the soundness of the final conviction.

[¶29] However, the United State Supreme Court "has recognized that substantive rules are ... not subject to the [retroactivity] bar." *See Montgomery*, 136 S.Ct. at 728. Therefore, "courts must give retroactive effect to new substantive rules of constitutional law." *See id.*

[¶30] "Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *See id* (emphasis added). As to the latter, a new constitutional rule proscribing the death penalty category of punishment for those of juvenile status is a substantive rule that must be applied retroactively, even to defendants whose convictions have become final before the new rule was announced.

[¶31] As to the former, a new constitutional rule that forbids criminal punishment of certain primary conduct, this substantive rule category controls the outcome of our case. Under this category, "[s]ubstantive rules ... set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *See Montgomery*, 136 S.Ct. at 729. Under the holding in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), the high court set forth a categorical Fourth Amendment guarantee that a State may not criminalize the refusal of a warrantless blood test and placed any criminal punishment for such refusal beyond the State's power to impose. Therefore, the *Birchfield* rule is a substantive rule of federal constitutional law.

[¶32] Under the *Birchfield* rule, the Fourth Amendment of "the Constitution itself deprives the State of the power to impose a certain penalty" for refusing a warrantless blood test and that refusal conduct is now immune from criminal punishment.

*See Montgomery*, 136 S.Ct. at 729. "[N]o circumstances call more for the invocation of a rule of complete retroactivity than when the conduct being penalized is constitutionally immune from punishment." *See id*. at 731.

[¶33] In a situation like *Birchfield*, where the defendant was "convicted under [an] unconstitutional statute[ ]," that "conviction under an unconstitutional law is not merely erroneous, but is illegal and void." *See Montgomery*, 136 S.Ct. at 730. In our case, exactly like *Birchfield*, Morel was convicted of refusing a warrantless blood test. Like *Birchfield*, Morel's conviction under this unconstitutional law is not merely erroneous, but it is "illegal and void." *See id*.

[¶34] "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *See Montgomery*, 136 S.Ct. at 731. "[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *See id* (emphasis added).

[¶35] In our case, neither the State nor the district court provided sufficient analysis as to why the *Birchfield* rule is not substantive. Indeed, the *Birchfield* rule is substantive.

[¶36] The State argued that the new *Birchfield* rule is like that in *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). (App. 8) However, *McNeely* did not announce a new constitutional rule that barred criminal prosecution for certain primary conduct; *Birchfield* did. So, *McNeely* and *Birchfield* are not the same simply because they both involve the Fourth Amendment. Just because a rule involves the Fourth Amendment does not mean that it is not a substantive rule. "Rules relating to

the Fourth Amendment always affect police conduct, but the fact that police conduct changes with the law does not render a rule procedural." *See Parshall v. State*, 2018 ND 69, ¶28, ___ N.W.2d ___ , 2018 WL 1190819 (Jensen, J., concurring and dissenting).

[¶37] Even assuming Morel's conviction became final before the *Birchfield* rule was announced, "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction ... became final before" the *Birchfield* ruling. *See Montgomery*, 136 S.Ct. at 731. Therefore, assuming Morel's conviction became final before the *Birchfield* ruling, that final conviction is contrary to law and is now void.

[¶38] "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *See Montgomery*, 136 S.Ct. at 729. This "constitutional command is, like all federal law, binding on state courts." *See id*. "There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *See id*. at 731.

[¶39] The *Birchfield* rule controls the outcome in Morel's case, because the new substantive rule of constitutional law has rendered void Morel's test-refusal conviction under the Fourth Amendment. The "Constitution requires state collateral review courts to give retroactive effect" to the *Birchfield* rule. *See Montgomery*, 136 S.Ct. at 729. Because it does not matter whether Morel's conviction became final before the announcement of the *Birchfield* rule, Morel's conviction is void and it must be vacated.

III. Morel is entitled to a refund of the fees he paid related to the now void DUI-refusal conviction, pursuant to *Nelson v. Colorado*, 137 S.Ct. 1249 (2017).

[¶40] Should this Court vacate Morel's test-refusal conviction, he then is entitled to a return of the fees he paid from the voided conviction. "[O]nce those convictions were erased, the presumption of [his] innocence was restored." *See Nelson v. Colorado*, 137 S.Ct. 1249, 1255 (2017). A state "may not retain funds taken from [defendants] solely because of their now invalidated convictions," for the state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *See id*. at 1256.

[¶41] With his test-refusal conviction voided, Morel is "entitled to be presumed innocent." *See Nelson*, 137 S.Ct. at 1256. Morel is also entitled to due process and a return of the funds he turned over to the State through an unlawful conviction. Due process does not require a defendant to prove actual innocence in order to receive his rightful refund. *See id*. at 1255.

[¶42] "When a criminal conviction is invalidated by a reviewing court and no retrial will occur," the State is "obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction." *See Nelson*, 137 S.Ct. at 1252. North Dakota "has no interest in withholding from [Morel] money to which the State currently has zero claim of right." *See id*. at 1257.

[¶43] Here, Morel's test-refusal conviction must be voided. With the refusal charge voided and the standard DUI charge now well beyond the statute of limitations, there is no chance of retrial. *Nelson v. Colorado* requires a refund.

[¶44] Morel has sole interest in the $250.00 in court fees[1] he paid as punishment for the unlawful conviction in this case. Morel asks that those funds be returned to him.

[¶45] CONCLUSION

[¶46] For the foregoing reasons, Brandon Morel respectfully requests relief from this Court.

Respectfully submitted
this 12th day of March, 2018.

/s/ *Dan Herbel*

Dan Herbel
Attorney for Appellant Brandon Morel
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

[1] Morel paid a court administration fee in the amount of $125.00, a court facility fee in the amount of $100.00, and a $25.00 victim witness fee. It appears the Court did not levy a fine on Morel.

[¶47] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 12, 2018, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Derek K. Steiner, Assistant Burleigh County State's Attorney, at the following:

Electronic filing to: "Derek K. Steiner" < bc08@nd.gov >

Dated this 12th day of March, 2018.

/s/ *Dan Herbel*

_____

Dan Herbel
Attorney for Appellant Brandon Morel
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com