

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.)	

REPLY 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

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[¶1] TABLE OF AUTHORITIES

North Dakota statutes

N.D.C.C. § 39-08-01(1)(e)(2) ¶6, fn.1

North Dakota cases

Parshall v. State, 2018 ND 69, ___ N.W.2d ___, 2018 WL 1190819 ¶10

United States Supreme Court cases

Beylund v. Levi, 579 U. S. ___, 136 S.Ct. 2160 (2016) ¶¶7-8

Birchfield v. North Dakota, 579 U. S. ___, 136 S.Ct. 2160 (2016) ¶¶3-6, 10-11

Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718 (2016) ¶¶8-9, 11

Schiro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519 (2004) ¶¶6, 10

[¶2] LAW AND ARGUMENT

[¶3] The parties agree that *Birchfield v. North Dakota*, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) announced a new constitutional rule. The dispute is whether that rule is procedural or substantive. Certain new procedural rules are given retroactive effect. Generally, new substantive rules are applied retroactively.

[¶4] Morel brought the exact same challenge that Birchfield did. Like Birchfield, Morel argued that a State may not criminalize the refusal of a warrantless blood test. The *Birchfield* court held that Birchfield could not be "criminally prosecuted for refusing a warrantless blood draw," and accordingly reversed his conviction. *See Birchfield*, 136 S.Ct. 2160, at 2186. *Birchfield* placed a bar on these sorts of prosecutions.

[¶5] Substantive rules place a bar on prosecution for certain conduct. This is what the *Birchfield* case did. Because of *Birchfield*, the State has no power, today, to charge a driver with refusing a warrantless blood test. The *Birchfield* rule proscribes that. In fact, the State acknowledges that "[s]ubstantive rules include decisions that narrow the scope of a criminal statute" by placing "particular conduct ... beyond the State's power to punish." *See* Brief of Appellee at p.4, ¶5. To that same end, the *Birchfield* rule narrowed the scope of the criminal refusal statute by placing the particular conduct of refusing a warrantless blood test beyond the State's power to punish.

[¶6] The State also argues that "[t]he essential elements of the crime of refusal to submit to a blood test have not changed since the Birchfield decision." *See* Brief of Appellee at p.7, ¶17. This is a remarkably untrue statement. Even though the text of

N.D.C.C. § 39-08-01(1)(e)(2)¹ still criminalizes refusal of a warrantless blood (and urine) test, *see* <<http://www.legis.nd.gov/cencode/t39c08.pdf>>, refusing a warrantless blood test is no longer criminal. *Birchfield* not only changed the essential elements of refusing a warrantless blood test, it obliterated those elements. "A decision that modifies the elements of an offense is normally substantive rather than procedural." *See Schriro v. Summerlin*, 542 U.S. 348, 354, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

[¶7] If our situation was different, and the State was arguing that the *Beylund* rule on 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"), could not be applied to convictions retroactively on post-conviction review because the *Beylund* rule is procedural, the analysis would be different and the result might be different too.

[¶8] It could be argued that the *Beylund* rule is procedural because "[p]rocedural rules ... are designed to enhance the accuracy of a conviction or sentence by regulating "the *manner of determining* the defendant's culpability." *See Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 730 (2016) (emphasis in original). Because (the argument might proceed) a new constitutional rule on the issue of coerced consent only regulates the manner of determining the defendant's culpability, by regulating the admissibility of chemical test evidence, that rule is procedural in nature. However, whether *Beylund* announced a new procedural rule, watershed or otherwise, is not before this Court.

¹ Section 39-08-01(1)(e)(2), N.D.C.C., does not contemplate or include the existence of a search warrant.

[¶9] There is a vast difference between the issue of whether consent was coerced and the issue of whether a State may criminalize a refusal. The former looks at the propriety of steps taken leading up to the conviction. The latter looks at the soundness of the conviction - for example, whether the conviction was procured under a statute that has since been declared unconstitutional. Under the latter, we are not looking at the procedural steps taken to get to the conviction, but rather we are concerned with whether conduct amounts to a substantive crime that is not forbidden by the Constitution, or whether the conduct we are punishing is substantively beyond the power of the State to impose. *See Montgomery*, 136 S.Ct. at 729. When a conviction is based upon primary conduct that is no longer illegal, and never was, that conviction is void, and substantively, always has been.

[¶10] "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *See Schriro*, 542 U.S. at 353. Here, the *Birchfield* rule did both. By removing criminality from the conduct of refusing a warrantless blood test, the *Birchfield* rule altered the range of conduct punishable under the statute. The *Birchfield* rule also altered the class of persons that the law punishes:

"Before *Birchfield*, an individual could be prosecuted for the refusal of a warrantless blood test. After *Birchfield*, an individual may not be criminally punished for that same conduct. This alters the class of persons the law punishes."

See Parshall v. State, 2018 ND 69, ¶27, ___ N.W.2d ___, 2018 WL 1190819 (Jensen, J., concurring and dissenting). If the new *Birchfield* rule is not substantive, it's hard to imagine what would qualify as a new substantive rule.

[¶11] Morel was convicted of refusing a warrantless blood test under an unconstitutional statute, a charge that is constitutionally barred because of *Birchfield*. 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 new substantive *Birchfield* rule, Morel's conviction is void and it must be vacated.

[¶12] CONCLUSION

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

Respectfully submitted
this 24th day of April, 2018.

/s/ *Dan Herbel*

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[¶14] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 24, 2018, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was 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 24th day of April, 2018.

/s/ Dan Herbel

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