STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1943

Matthew William Edwards, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 21, 2020
Reversed and remanded
Bratvold, Judge

Sherburne County District Court
File No. 71-CR-11-724

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

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Bjorkman, Judge; and Bratvold, Judge.

S Y L L A B U S

A postconviction petition challenging the legality of a test-refusal conviction under the *Birchfield* rule is timely under the new-interpretation-of-law exception, Minn. Stat. § 590.01, subds. 4(b)(3), 4(c) (2018), if the petition is filed within two years of *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018), *cert. denied*, 139 S. Ct. 2745 (2019), which held that the *Birchfield* rule retroactively applies to final convictions on collateral review.

O P I N I O N

BRATVOLD, Judge

In 2018, the Minnesota Supreme Court announced the *Birchfield* rule in *Johnson*, following three decisions by the United States and Minnesota Supreme Courts,[1] and described the rule as providing that the "[s]tate may not criminalize refusal of a blood or a urine test absent a search warrant or a showing that a valid exception to the warrant requirement applies." *Johnson*, 916 N.W.2d at 679. *Johnson* also decided that the *Birchfield* rule changes substantive law and applies retroactively. *Id.* at 684. But *Johnson* held that reversal is "not automatic" and, on remand, the district courts in postconviction proceedings must make case-by-case determinations and "will need to apply the *Birchfield* rule and determine if the test-refusal statute was unconstitutional" as applied. *Id.*

Appellant Matthew William Edwards sought postconviction relief vacating his 2011 conviction for third-degree test refusal under Minn. Stat. § 169A.20, subd. 2 (2010). He appeals from an order denying all relief on his 2019 petition. Edwards argues the postconviction court erred when it determined that *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013), did not apply retroactively to his case. Edwards also contends that, in denying relief, the postconviction court "incorrectly placed the burden on the State and found it established [the] single-factor exigency" that *McNeely* disallowed.

[1] The three decisions are *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), *State v. Trahan*, 886 N.W.2d 216, 221-23 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224, 226, 229 (Minn. 2016).

Respondent State of Minnesota argues that Edwards's petition is untimely. The state also argues that the postconviction court did not err when it determined the *McNeely* rule is not retroactive. Edwards responds that his petition is timely because the two-year time limit for postconviction petitions includes a new-interpretation-of-law exception in Minn. Stat. § 590.01, subd. 4(b)(3).

We conclude that Edwards's petition is timely under the exception he raises because he filed his petition within two years of *Johnson*. Next, we conclude that *McNeely* applies retroactively to Edwards's case and precludes the state's reliance on single-factor exigency as an exception to the warrant requirement based on our decision in *Hagerman v. State*, 945 N.W.2d 872 (Minn. App. 2020), *review granted* (Minn. Aug. 25, 2020). Lastly, we conclude that the postconviction court failed to apply the heightened pleading standard and burden-shifting procedure articulated for *Birchfield/Johnson* postconviction proceedings in *Fagin v. State*, 933 N.W.2d 774 (Minn. 2019). Thus, we reverse and remand for further proceedings consistent with this opinion.

FACTS

On May 7, 2011, a police officer initiated a traffic stop after the officer observed Edwards's van roll through a stop sign and cross into the oncoming lane of traffic. While speaking with Edwards, the officer noticed a strong smell of alcohol and a faint smell of marijuana coming from the van. The officer observed Edwards was slurring his speech and had glassy eyes.

Edwards exited his van and dropped a marijuana pipe. He told the officer he had two-and-a-half beers about an hour before driving, smoked marijuana the previous day,

and had marijuana in the van. Edwards then failed a field sobriety test and took a preliminary breath test, which revealed an alcohol concentration of 0.05. The officer arrested Edwards, read the implied-consent advisory, and Edwards spoke with an attorney. A drug recognition expert performed tests and concluded that Edwards was under the influence of cannabis and unable to safely operate a motor vehicle. Police asked Edwards to take a blood or urine test, but he refused.

The state charged Edwards with third-degree test refusal under Minn. Stat. § 169A.20, subd. 2. On October 27, 2011, Edwards entered into an agreement with the state and pleaded guilty to the charge. On December 15, 2011, the district court convicted Edwards and sentenced him to 365 days with 335 days stayed for four years. Edwards was discharged from probation in 2014.

On July 26, 2019, Edwards petitioned for postconviction relief asking the court to vacate his conviction because the test-refusal statute was unconstitutional as applied to him based on the supreme court's decision that the *Birchfield* rule is retroactive, as stated in *Johnson*. Edwards argued that, because law enforcement did not have a warrant to search his blood or urine and no exception to the warrant requirement applied, his refusal to submit to a warrantless test could not be criminalized. Edwards also argued that *McNeely* is "expressly incorporated" into the *Birchfield* rule. Edwards asked the postconviction court, if it was "not inclined to summarily grant the petition," to grant him an evidentiary hearing "where the state would be required to carry its burden to show the presence of a warrant or warrant exception." Edwards relied on this court's opinion in *Fagin v. State*, No. A17-1705

(Minn. App. Nov. 19, 2018), which was under supreme court review when he filed his postconviction petition.[2]

The state argued that Edwards's petition is time-barred because he did not file it within two years of *Birchfield*, 136 S. Ct. 2160. The state also argued that Edwards's conviction was lawful because the *McNeely* rule is not retroactive. The state also noted that the supreme court had not yet decided *Fagin*, so "the question of which party bears the burden of proof is not yet before the Court." Edwards maintained that his petition is timely under the new-interpretation-of-law exception in Minn. Stat. § 590.01, subd. 4(b)(3), because he petitioned within two years of *Johnson*, which deemed the *Birchfield* rule retroactive.

The postconviction court implicitly determined that Edwards's petition is timely—citing the new-interpretation-of-law exception and addressing the merits of Edwards's petition—but denied all relief. The postconviction court also determined that "[the] case law is clear that *McNeely* is not to be applied retroactively." The postconviction court then concluded that the state had "shown that an exigent circumstance, as it was understood at the time, existed to justify the warrantless search" of Edwards, making his "refusal to submit to a chemical test a crime."

This appeal follows.

---

[2] This court held in *Fagin v. State* that the state has the burden to show the presence of a warrant or an exception to the warrant requirement. No. A17-1705 (Minn. App. Nov. 19, 2018), *rev'd*, 933 N.W.2d 774 (Minn. 2019) (holding petitioner in *Birchfield/Johnson* proceedings bears burden of refuting the state's justification for a warrantless search of blood or urine).

ISSUES

I. Did Edwards timely file his postconviction petition?

II. Did the postconviction court err by declining to apply the *McNeely* rule retroactively to Edwards's case?

III. Did the postconviction court err by requiring the state to show that exigent circumstances justified a warrantless search under *Birchfield/Johnson*?

ANALYSIS

We review a district court's denial of postconviction relief for an abuse of discretion. *Brown v. State*, 895 N.W.2d 612, 617 (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). Appellate courts review a postconviction court's legal determinations de novo. *Greer v. State*, 836 N.W.2d 520, 522 (Minn. 2013).

Before addressing the parties' arguments, we consider the legal context of the issues on appeal because applying the Fourth Amendment to warrantless urine and blood tests has evolved considerably since Edwards was convicted in 2011. 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. A warrantless search is unreasonable unless it falls into an exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 381-82, 134 S. Ct. 2473, 2482-83 (2014). "In the suspected-impaired-driving context, administering a chemical test of breath, blood, or urine is a search." *Hagerman*, 945 N.W.2d at 876.

Before 2013, courts had determined that police officers could conduct warrantless chemical tests to determine whether a driver was under the influence of alcohol because "the rapid, natural dissipation of alcohol in the blood create[d] single-factor exigent circumstances." *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009) (quotation omitted). Then, in 2013, the United States Supreme Court held that the natural dissipation of alcohol in the bloodstream is not a per se exigent circumstance. *McNeely*, 569 U.S. at 156, 133 S. Ct. at 1563. Instead, the Supreme Court held that exigent circumstances justifying a warrantless blood test "must be determined case by case based on the totality of the circumstances." *Id.*

A few years later, in 2016, the Supreme Court held that a warrantless blood test of a suspected intoxicated driver was *not* permitted under the search-incident-to-arrest exception to the warrant requirement. *Birchfield*, 136 S. Ct. at 2176, 2185-86. The Court also held, however, that warrantless breath tests are permitted incident to arrest. *Id.* The Minnesota Supreme Court applied *Birchfield* and held that a test-refusal conviction was unconstitutional because the warrantless blood test was not justified by an exception to the warrant requirement. *Trahan*, 886 N.W.2d at 221-23. The supreme court extended the *Birchfield* rule to warrantless searches of urine. *Thompson*, 886 N.W.2d at 224, 226, 229 (affirming reversal of test-refusal conviction based on warrantless urine test).

The Minnesota Supreme Court later referred to this series of cases—*Birchfield*, *Trahan*, and *Thompson*—as the *Birchfield* rule. *Johnson*, 916 N.W.2d at 679. Following the *Birchfield* rule, "states can make it a crime for suspected [intoxicated] drivers to refuse breath[] 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." *Hagerman*, 945 N.W.2d at 876. Accordingly, the legislature revised Minnesota law, which today criminalizes a driver's refusal to submit to a *warrantless* breath test as well as a *warranted* blood or urine test. Minn. Stat. § 169A.20, subd. 2(1)-(2) (2018).

Persons with prior test-refusal convictions have sought to obtain the benefit of the new rules of law announced in *McNeely*, *Birchfield*, *Trahan*, and *Thompson*. "Although a new rule of law generally does not apply retroactively to final convictions, . . .[a] new rule may be applied retroactively if it: (1) is substantive, as compared to procedural, or (2) is a new 'watershed' rule of criminal procedure." *Johnson*, 916 N.W.2d at 681 (citing *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 1076 (1989)). In *Johnson*, the Minnesota Supreme Court held that the *Birchfield* rule is substantive and therefore applies retroactively. *Id.* at 683. The supreme court remanded Johnson's case to the district court for application of the *Birchfield* rule and expressed "no opinion" on whether *McNeely* applies "to any exigent-circumstances determination." *Id.* at 684, n.8.

With this background in mind, we consider the issues raised by Edwards's appeal.

I. Edwards timely filed his postconviction petition.

The timeliness of Edwards's postconviction petition turns on our interpretation of the statutory requirements for postconviction petitions under chapter 590, as well as existing precedent interpreting those requirements. We review "the interpretation and application of a statute of limitations" de novo. *Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231, 232 (Minn. 2016). We interpret unambiguous statutory language according to its plain

meaning. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). The supreme court determined that the language setting out the timing requirements in Minn. Stat. § 590.01, subd. 4 (2008), is "clear and free from all ambiguity." *Gassler v. State*, 787 N.W.2d 575, 584 (Minn. 2010), *abrogated on other grounds by Henderson v. State*, 906 N.W.2d 501, 507 (Minn. 2018), *cert. denied*, 139 S. Ct. 271 (2018).

Minnesota Statutes section 590.01, subdivision 4(a) (2018), provides that an individual must file a postconviction petition within two years of either "the entry of judgment of conviction or sentence if no direct appeal is filed," or "an appellate court's disposition of petitioner's direct appeal," whichever is later. A postconviction court, however, may consider a petition filed beyond the two-year time limit if the petitioner establishes any one of five exceptions set out in subdivision 4(b). Minn. Stat. § 590.01, subd. 4(b)(1)-(5).

Subdivision 4(c) provides, "Any petition invoking an exception provided in paragraph (b) must be filed *within two years of the date the claim arises*." Minn. Stat. § 590.01, subd. 4(c) (emphasis added). The two-year time limit set out in subdivision 4(c) applies to each exception in subdivision 4(b). *Sanchez v. State*, 816 N.W.2d 550, 552, 556 (Minn. 2012). Thus, we must determine whether Edwards's petition, which relies on an exception in subdivision 4(b), was filed "within two years of the date" his claim arose, as provided in subdivision 4(c).

Precedent guides our analysis of the relevant statutory terms in subdivision 4(c). A "claim" under subdivision 4(c) means "an event that supports a right to relief under the asserted exception." *Bee Yang v. State*, 805 N.W.2d 921, 925 (Minn. App. 2011), *review*

denied (Minn. Aug. 7, 2012). And, "for purposes of calculating the 2 year time limit," a claim "arises" under section 590.01 "when the claimant knew or should have known that the claim existed." *Sanchez*, 816 N.W.2d at 552 (construing Minn. Stat. § 590.01, subd. 4(c)). *Sanchez* underscored that we determine when "the date the claim arises" by an objective "knew or should have known" standard. *Id*. at 558-60.

We now apply the timing requirements in subdivision 4 to the facts before us. Edwards petitioned for postconviction relief on July 26, 2019. Edwards did not petition within two years of either "the entry of judgment of conviction," or "an appellate court's disposition of [his] direct appeal." Minn. Stat. § 590.01, subd. 4(a). Thus, Edwards did not timely file his petition *unless* he establishes an exception under subdivision 4(b). *See Rickert v. State*, 795 N.W.2d 236, 240-41 (Minn. 2011).

Edwards argues that the exception in subdivision 4(b)(3) applies; it provides that a court may hear an untimely postconviction relief petition when "the petitioner *asserts* a *new interpretation of federal or state constitutional or statutory law* by either the United States Supreme Court or a Minnesota appellate court *and* the petitioner *establishes* that this interpretation is *retroactively applicable* to the petitioner's case." Minn. Stat. § 590.01, subd. 4(b)(3) (emphasis added). The commonly understood meaning of "asserts" is "to state positively" and the relevant meaning of "establishes" is "to prove." *Black's Law Dictionary* 143, 688 (11th ed. 2019).

Edwards argues that his petition *asserts* a new interpretation of the law by relying on the application of *McNeely* through the *Birchfield* rule. Edwards also argues that his petition *establishes* that this interpretation applies retroactively to his case by relying on

Johnson, which was announced in 2018. Therefore, Edwards argues, he satisfies the new-interpretation-of-law exception and timely filed his petition within two years of *Johnson*. The state contends that Edwards did not satisfy this exception because he filed his petition more than two years after the date his claim arose under subdivision 4(c). The state contends that Edwards claim arose when *McNeely* and *Birchfield* were issued, either in 2013 or 2016.

We conclude that Edwards timely filed his postconviction petition. Edwards's claim arose based on the "event that supports a right to relief under the asserted exception." *See Bee Yang*, 805 N.W.2d at 925. In Edwards's case, the event that supports his right to relief is the new and retroactive interpretation of law that occurred in two steps: (1) the *Birchfield* rule announced a new interpretation of law, and (2) *Johnson* determined that the *Birchfield* rule applies retroactively. *See Johnson*, 916 N.W.2d at 683. Put slightly differently, Edwards seeks relief under *McNeely* through the *Birchfield* rule, which satisfies the timing exception as a new interpretation of law. But under the timing exception in subdivision 4(b)(3), Edwards also must "establish" or prove that the *Birchfield* rule applies retroactively to his case. Edwards could not establish the second step of the event that supports relief until 2018, when the supreme court held that the *Birchfield* rule is retroactive, as stated in *Johnson*. Thus, Edwards timely filed his postconviction petition seeking to vacate his test-refusal conviction under the *Birchfield* rule within two years of the supreme court's decision in *Johnson*.

The state advances three arguments in support of its position that the "only reasonable interpretation" of when Edwards's "claim arises," for purposes of subdivision

4(c) and subdivision 4(b)(3), is on the date that a new interpretation of law is announced: here, *McNeely* or *Birchfield*. We consider each argument in turn.

First, the state argues that Edwards should have asserted retroactivity of the *Birchfield* rule as soon as the new interpretation of law was announced, either in 2013 or 2016, relying on *McNeely* and *Birchfield*. We are not persuaded. As explained in *Hagerman*, it is "*McNeely*, as applied through the *Birchfield* rule" that is the relevant new rule of law. 945 N.W.2d at 874. And the supreme court established retroactivity of the *Birchfield* rule when it issued *Johnson*. Indeed, this court considered retroactivity of the *Birchfield* rule before the supreme court did. In *Johnson v. State*, we held that the *Birchfield* rule is not retroactive because it is a procedural, rather than a substantive, rule. *Johnson v. State*, 906 N.W.2d 861 (Minn. App. 2018), *rev'd*, 916 N.W.2d 674 (Minn. 2018).

The supreme court granted review and reversed our decision, describing *Birchfield-Trahan-Thompson* as the *Birchfield* rule for the first time and determining the rule to be retroactive. *Johnson*, 916 N.W.2d at 677. It is not reasonable to expect that a petitioner knew or should have known that the *Birchfield* rule applies retroactively when this court had determined otherwise. *See Sanchez*, 816 N.W.2d at 552 (applying objective standard to postconviction timing exception). It is, therefore, not reasonable to determine that Edwards knew or should have known that he would have a viable postconviction claim until the supreme court held the *Birchfield* rule is retroactive in 2018. *See Johnson*, 916 N.W.2d at 683.

Second, the state argues that Edwards's petition is untimely relying on *Prentis Jackson v. State*, 929 N.W.2d 903 (Minn. 2019), and *Tyree Jackson v. State*, 927 N.W.2d

308 (Minn. 2019). But both cases are distinguishable. In *Prentis Jackson*, appellant sought postconviction relief based on a new interpretation of law announced in *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376 (2012). 929 N.W.2d at 906. The supreme court first assumed that *Lafler* "announced a new rule that applied retroactively" to appellant, and then determined that appellant's petition was untimely because it was filed more than two years after *Lafler*. *Id.* Similarly, in *Tyree Jackson*, the supreme court determined that appellant's postconviction petition was untimely because *Lafler* was decided more than two years before appellant petitioned for relief. 927 N.W.2d at 312-13.

These cases do not help us analyze the timeliness of Edwards's petition. *Tyree Jackson* did not discuss or analyze the new-interpretation-of-law exception, although the reference to *Lafler* suggests that appellant asserted that exception. *Prentis Jackson* did not discuss or analyze the retroactivity requirement in its timeliness analysis. Neither case involved existing precedent that had determined a new interpretation of law is *not* retroactive. Because Edwards had legal precedent that rejected retroactivity of the *Birchfield* rule in this court's opinion in *Johnson*, we conclude that the state's preferred authorities do not guide us.

Lastly, the state relies on the timing requirements for the federal habeas statute and argues that Minnesota's postconviction statute is structured similarly and should be interpreted similarly. The state's argument is unavailing because the federal statute is *unlike* Minnesota's postconviction statute. The federal statute has a one-year time limit and does not have any exceptions, such as those found in the Minnesota scheme. *Compare* 28 U.S.C. § 2255(f) (2008), *with* Minn. Stat. § 590.01, subd. 4(b). Instead, the federal

statute provides that the one-year period "shall run from the latest of" and provides four different accrual dates. 28 U.S.C. § 2255(f). Unlike Minnesota's postconviction timing exception for new interpretations of law, the federal statute's accrual for "newly recognized rights" is specifically tied to "the date on which the right asserted was initially recognized by the Supreme Court." *Id.* (f)(3). Because the federal statute expressly focuses on "the date" as the point of accrual for "newly recognized rights," it is unlike Minnesota's timing language, which has an exception tied to a new interpretation of law *and* retroactivity of that new interpretation. Minn. Stat. § 590.01, subd. 4(b)(3).[3]

In summary, the supreme court has held that "the date the claim arises" for an exception to the two-year filing period for postconviction petitions should be determined by an objective "knew or should have known" standard. *Sanchez*, 816 N.W.2d at 559-60. Edwards's petition challenges the legality of his test-refusal conviction under *McNeely* through the *Birchfield* rule. Under the objective standard, Edwards timely filed his petition because he asserted a new interpretation of law *and* established that the new interpretation applies retroactively to his case within the two-year period after the supreme court decided *Johnson*. See Minn. Stat. § 590.01, subd. 4(b)(3). Because we have determined that Edwards's petition is timely, we proceed to the merits of his appeal.

[3] To be clear, the limitations period for federal habeas petitions also mentions retroactivity, but does so as a precondition to the accrual period. The one-year limitation period "shall run from the latest of," in relevant part, "the date on which the right asserted was initially recognized by the Supreme Court, *if* that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 (f)(3). The use and placement of "if" suggests that retroactivity is a *precondition* and not *part of* the timing analysis.

II. The postconviction court erred when it declined to apply *McNeely* retroactively to Edwards's case.

"Whether 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.

We recently considered *McNeely*'s retroactivity in *Hagerman*. 945 N.W.2d 872. In 2011, Hagerman was arrested for driving while impaired and refused to submit to a warrantless blood and urine test. *Id.* at 874-75. Hagerman was charged with and convicted of third-degree test refusal. *Id.* at 875. Hagerman petitioned for postconviction relief in 2017, arguing that his conviction must be reversed under the *Birchfield* rule. *Id.* The district court declined to apply *Birchfield* retroactively and denied Hagerman's petition; Hagerman appealed. *Id.* We reversed Hagerman's conviction, holding that "*McNeely*, as applied through the *Birchfield* rule, is substantive and retroactive." *Id.* at 881.[4]

Hagerman controls the resolution of this issue because it determined that *McNeely* applies retroactively to cases in which "a petitioner challenges a final conviction for test refusal under the rule announced by the Supreme Court in *Birchfield*." 945 N.W.2d at 873. Because Edwards challenges his test-refusal conviction under the *Birchfield* rule, *McNeely* applies retroactively to his case.

[4] After the parties submitted their appellate briefs, this court issued *Hagerman*. Edwards submitted *Hagerman* as a significant supplemental legal authority before oral argument, *see* Minn. R. Civ. App. P. 128.05, and the attorneys discussed the applicability of *Hagerman* to Edwards's petition during oral argument.

Hagerman held that "[i]n order to commit the crime of test refusal, the driver must refuse a constitutionally *permissible* test." *Id.* at 880 (citing *Birchfield*, 136 S. Ct. at 2172 (emphasis added)). Here, the state relies on the natural dissipation of alcohol or drugs in Edwards's bloodstream to justify the warrantless search that Edwards refused. Under *McNeely*, the natural dissipation of alcohol cannot be used as a per se single-factor exigency to justify a warrantless search. 569 U.S. at 155-56, 133 S. Ct. at 1562-63. Thus, Edwards's conviction stemmed from his refusal to submit to a constitutionally *impermissible* test. And as a result, Edwards's conviction remains valid only if, under the totality of the circumstances, exigent circumstances justified a warrantless search. *See id.* at 156, 133 S. Ct. at 1563 (stating "a finding of exigency" must be determined "case by case based on the totality of the circumstances").

Because the postconviction court's decision—that *McNeely* is not retroactive and not applicable to Edwards's case—followed caselaw that has been overruled, the postconviction court abused its discretion. *Pearson*, 891 N.W.2d at 596 (stating a ruling based on an erroneous view of the law is an abuse of discretion).Thus, we reverse.

III. The postconviction court erred when it placed the burden solely on the state to show the presence of exigent circumstances justifying a warrantless search under *Birchfield/Johnson*.

If this court reverses, Edwards asks us to remand because the postconviction court "incorrectly placed the burden on the [s]tate and found it established [the] single-factor exigency" of dissipation of alcohol and drugs in the bloodstream. The state did not brief this issue on appeal. We agree with Edwards that the postconviction court erroneously placed the burden of proof solely on the state. Edwards argues that, under *Fagin*, this court

should remand because Edwards is entitled to "supplement the postconviction record and meet his burden of showing that the totality-of-the-circumstances did not create an exigency justifying" a warrantless search of his blood or urine. The supreme court issued *Fagin*, 933 N.W.2d 774, after the parties had submitted memoranda to the postconviction court, and just five days before the postconviction court issued its order.

In *Fagin*, the supreme court articulated a "heightened pleading requirement for *Birchfield*/*Johnson* postconviction proceedings." 933 N.W.2d at 780. *Fagin* required that a postconviction petitioner must "affirmatively allege that no search warrant was issued and that (at least upon information or belief) no warrant exception was applicable." *Id.* The burden then shifts to the state to respond by motion or with an answer to "admit or deny" the existence of a warrant, and if there was no warrant, concede a lack of an exception or "state specifically the exception relied on and the grounds for the State's reliance." *Id.* "The exception and its grounds must be pleaded in sufficient detail to give the petitioner adequate notice of the State's position." *Id.* The burden of proof then shifts back to the petitioner, who must supplement the record with facts showing there was "no warrant and no exception" to the warrant requirement. *Id.* The supreme court remanded to allow supplemental pleadings and reconsideration of Fagin's request for postconviction relief. *Id.* at 781.

We agree with Edwards that remand is appropriate under *Fagin*. Here, the postconviction court placed the burden solely on the state to prove no search warrant was obtained and that no exception to the warrant requirement existed. Because the postconviction court issued its decision just five days after the supreme court issued *Fagin*,

it is understandable that it did not follow the burden-shifting procedure outlined in *Fagin*; still, the postconviction court's error is clear. As the supreme court explained in *Fagin*, "we conclude that a remand to the district court is required to allow the parties to comply with the new heightened standard." *Id.* at 781. Similarly, we remand because neither Edwards nor the state has had the opportunity to follow the procedure outlined in *Fagin*.

D E C I S I O N

We conclude that Edwards timely filed his petition for postconviction relief from his 2011 test-refusal conviction because he relies on the *Birchfield* rule and filed his petition within two years of the supreme court's decision in *Johnson*. We also conclude that *McNeely* applies retroactively to Edwards's test-refusal conviction. Finally, we conclude that the postconviction court erred when it failed to follow the heightened pleading requirement and burden-shifting procedure set out in *Fagin*. We therefore reverse the postconviction court's order denying relief and remand for further proceedings consistent with this opinion.

Reversed and remanded.