STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Jason Cole Penniman,

Petitioner,

vs.

State of Minnesota,

Respondent.

STATE'S MEMORANDUM OF LAW IN SUPPORT OF ANSWER TO PETITION FOR POSTCONVICTION RELIEF

Court File No. 82-KX-05-3314
County Attorney File No. CR-2005-750

INTRODUCTION

Petitioner pleaded guilty to First-Degree Test Refusal in 2006. Petitioner now argues that later decisions of the Minnesota Supreme Court in *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson,* 886 N.W.2d 224 (Minn. 2016), apply retroactively to him. But those decisions do not apply retroactively. And regardless of retroactivity, Petitioner was on probation and subject to random testing at the time of the offense, allowing him to be convicted of test refusal regardless of *Thompson* and *Trahan*.

STATEMENT OF FACTS

Test refusal crime and disposition

On the evening of May 18, 2005, Officer Vandervort of the Cottage Grove Police Department saw a vehicle driving in both lanes of traffic on 80th Street in Cottage Grove. (Complaint at 1) .[1] The vehicle ran a red light. (*Id.*). Vandervort initiated a traffic stop, but the vehicle pulled to the right side of the road, then drifted across the street before finally stopping next to the concrete median on the left side of the road. (*Id.*).

[1] The facts concerning the traffic stop and Petitioner's later refusal to submit to chemical testing are taken from the complaint. Petitioner has not provided a transcript of any hearings in this matter.

Vandervort approached the vehicle and spoke with Petitioner, who was the driver. (*Id.*). When asked why he did not stop for the semaphore, Petitioner stated that there no semaphore. (*Id.*). Vandervort had Petitioner step out of the vehicle. (*Id.* at 1-2). Petitioner had slow movements and appeared lethargic and disoriented. (*Id.* at 2). Petitioner had slurred speech and "droopy" eyes. (*Id.*). Petitioner performed poorly on field sobriety tests. (*Id.*). On Petitioner's person, Vandervort found a glass pipe containing residue that field-tested positive for cocaine. (*Id.*). Various bottles of medication and a butane torch were later found in Petitioner's possession. (*Id.*). A preliminary breath test showed no alcohol in Petitioner's system. (*Id.*).

Vandervort placed Petitioner under arrest and transported him to the Cottage Grove Police Department. (*Id.*). A drug recognition expert evaluated Petitioner and advised Vandervort to invoke the implied consent advisory. (*Id.*). Vandervort read Petitioner the implied consent advisory and asked Petitioner if he would submit to a blood or urine test. (*Id.*). Petitioner stated he would not. (*Id.*). Vandervort reminded Petitioner that refusal to take a test is a crime. (*Id.*). When asked for his reason for refusing, Petitioner stated, "I already take two UAs two times per week." (*Id.*).

Based on the facts above and Petitioner's criminal history, Petitioner was charged with first-degree driving while impaired, first-degree test refusal, and fifth-degree controlled substance crime. (*Id.* at 2-3). The State later added a fourth count of Driving After Cancellation – Inimical to Public Safety. (*See* Amended Complaint).

On March 6, 2006, Petitioner pleaded guilty to the first-degree test refusal charge. The remaining counts were dismissed at sentencing. On July 17, 2006, the Court imposed but stayed a 72-month prison sentence.. After two probation violations, the Court executed Petitioner's sentence on August 15, 2008.

Petitioner's probation at the time of the offense

At the time of this offense, Petitioner was on probation in three different court files in Hennepin and Dakota counties. In all three of those files, Petitioner was ordered to not use alcohol or non-prescribed drugs and submit to chemical testing.

Court File 19-K0-00-3302

On February 12, 2001, Petitioner pleaded guilty to the felony offense of offering a forged check. (MNCIS Register of Actions at 1) (Ex. 2). Petitioner was sentenced on April 10, 2001. (*Id.*). Petitioner was placed on probation for up to five years. (Sent. Order) (Apr. 10, 2001) (Ex. 3). As conditions of probation, the court ordered "No use of alcohol or illegal drugs" and "Submit to random chemical/substance testing." (*Id.*). The court ordered that Petitioner be discharged from probation on May 31, 2007. (Recommendation of Supervising Agency and Order of the Court Discharging Probationer) (Ex. 4). There is no indication in the court file that Petitioner's conditions of probation were ever amended to remove the requirement of submission to random testing.

Court File 27-CR-01-29446

On October 12, 2001, Petitioner pleaded guilty to and was sentenced for the offense of attempted fifth-degree controlled substance crime. (MNCIS Register of Actions at 1) (Ex. 5). Petitioner was initially placed on probation for three years, but the length of his probation was later extended. (*Id.* at 2, 3, 6 (Sept. 20, 2004, entry), 7 (March 7, 2005, entry)). Petitioner was initially placed on administrative probation in Hennepin County but was ordered to follow the recommendations from the other counties in which he was on probation (i.e., Dakota County). (*Id.* at 2).

On April 6, 2005 – just over a month before the instant offense – Petitioner was ordered to submit to urine testing twice a week. (*Id.* at 3). On May 20, 2005, a probation violation report was filed

alleging that Appellant failed to remain law abiding in as a result of this charge and failed to submit to random testing. (Report of Adult Corrections Department and Order of the Court for Defendant's Arrest, Detention and Hearing at 1) (Ex. 6). Petitioner was discharged from probation on June 9, 2005. (Report of Probation Officer and Order Suspending Execution of Sentencing Permanently and Restoring Civil Rights) (Ex. 7).

Court File 27-CR-03-87195

On April 1, 2004, Petitioner pleaded guilty to and was sentenced for the offense of second-degree DWI. (MNCIS Register of Actions at 1) (Ex. 8). Petitioner was placed on probation for five years. (*Id.* at 2). The conditions of Petitioner's probation included no use of non-prescribed drugs. (*Id.* at 1).

On May 20, 2005, a probation violation report was filed alleging that Appellant failed to remain law abiding as a result of this charge and failed to submit to random testing. (*Id.* at 4). Petitioner was discharged from probation on January 5, 2006. (*Id.* at 4).

ARGUMENT

If the petition and record in the case show that a petitioner is not entitled to relief, the petitioner is not entitled to an evidentiary hearing. Minn. Stat. § 590.04, subd. 1. The Court should dismiss the petition without a hearing.

Petitioner waived any Fourth Amendment claims by failing to timely move to dismiss, and instead by pleading guilty. Petitioner's claim also fails on the merits. *Trahan* held "that the Fourth Amendment prohibits convicting [a person] for refusing the blood test requested of him absent the existence of a warrant or exigent circumstances," 886 N.W.2d at 221, and *Thompson* announced the same holding with respect to a urine test. 886 N.W.2d at 233. Because neither holding satisfies an exception to the general rule of non-retroactivity, neither applies retroactively to Petitioner's conviction.

Finally, Petitioner was on probation at the time of this offense and was required to submit to random chemical testing. Officer Vandervort could therefore lawfully demand a chemical test from Petitioner.

I. Petitioner Waived Any Fourth Amendment Arguments by Pleading Guilty.

Failure to raise an issue "that can be determined without trial on the merits must be made before trial" by an appropriate motion. Minn. R. Crim. P. 10.01, subd. 2. Failure to make such a motion "constitutes waiver." *Id.*

A defendant waives his right to challenge his conviction on Fourth Amendment grounds when he pleads guilty. *Hirt v. State*, 244 N.W.2d 162, 162-63 (1976) (holding defendant "waived his right to raise the Fourth Amendment issues when he pleaded guilty"); *State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986) (recognizing that a guilty plea operates as a waiver of all Fourth Amendment claims); *Larson v. State*, 801 N.W.2d 222, 228 (Minn. App. 2011) (explaining that a defendant can waive his right to challenge a conviction on constitutional grounds). *See also Trahan*, 886 N.W.2d at 221 n. 4 (noting that the State had not argued that Trahan waived his Fourth Amendment rights by pleading guilty); Minn. R. Crim. P. 26.01, subd. 4 (providing mechanism for stipulated facts trial without guilty plea to obtain appellate review of a dispositive pretrial ruling).

Petitioner pleaded guilty to first-degree test refusal on March 6, 2006. Petitioner was also charged with driving under the influence of alcohol, which carried the same possible felony penalty. But Petitioner chose to plead guilty to test refusal instead and never challenged the constitutionality of the test-refusal statute, either facially or as applied to him. As a result, he waived all claims that the statute to which he pleaded guilty was unconstitutional. The Court should deny the petition on this ground and need not reach the merits of the retroactivity claim.

II. *Birchfield, Trahan*, and *Thompson*

The Supreme Court of the United States clarified the scope of the search-incident-to-arrest exception to the warrant requirement in *Birchfield v. North Dakota*. The Minnesota Supreme Court applied *Birchfield* to two pending cases in *Trahan* and *Thompson*, further clarifying the scope of that exception as it applied to the defendants in those cases.

A. *Birchfield v. North Dakota*

In *Birchfield v. North Dakota*, the Supreme Court of the United States decided three consolidated cases addressing various issues related to the criminalization of test refusal in DWI cases. 136 S.Ct. 2160, 2170-72 (2016). The Court held that if the warrantless collection of a breath or blood sample "comport[s] with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing." *Id.* at 2172.

The Court went on to consider whether the search-incident-to-arrest exception to the warrant requirement applied to breath and blood testing. *Id.* at 2174-85. The Court concluded that the search-incident-to-arrest exception to the warrant requirement applied to breath tests. *Id.* at 2184. But that exception to the warrant requirement does not justify the warrantless taking of a blood sample. *Id.* at 2185. The Court also rejected the argument that a motorist impliedly consents to a blood test "on pain of committing a criminal offense." *Id.* at 2186.

B. *State v. Trahan*

About fourth months after *Birchfield*, the Minnesota Supreme Court issued its opinions in the *Trahan* and *Thompson* cases. The issue in *Trahan* was whether the defendant could be prosecuted for refusing to submit to a blood test. 886 N.W.2d at 219.

In light of *Birchfield*, the State conceded that Trahan's test refusal conviction was not supported

by the theory that "criminalizing the refusal to take a warrantless blood test, even in the absence of exigent circumstances, is generally 'reasonable' under the Fourth Amendment." *Id.* at 221. The Minnesota Supreme Court agreed with that concession. *Id.* The court further held that the record did not show exigent circumstances that would justify a warrantless blood test. *Id.* There is no indication in *Trahan* that the State argued that any other exceptions to the warrant requirement would have justified requiring Trahan to submit to testing. The court concluded that the test-refusal statute was "unconstitutional as applied" to Trahan. *Id.* at 224.

C. *State v. Thompson*

At issue in *Thompson* was whether a warrantless search of a DWI suspect's urine would have been a valid search incident to arrest. 886 N.W.2d at 228. The State argued that a warrantless search of a DWI suspect's urine was a valid search incident to arrest. *Id.* The *Thompson* court considered the same factors analyzed by the *Birchfield* Court in evaluating the intrusion upon the arrestee's privacy. *Id.* at 229 (citing *Birchfield*, 136 S.Ct. at 2176-77). The *Thompson* court then evaluated the State's need to "obtain alcohol concentration readings through urine tests to prevent drunk driving." *Id.* at 232.

The *Thompson* court concluded that "a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver." *Id.* at 233. The court thus held that the test-refusal statute was unconstitutional as applied to Thompson. *Id.* at 234. The State did not argue that the urine test was justified under any other exception to the warrant requirement other than a search incident to arrest. *See id.* at 227.

III. General Principles of Non-Retroactivity

To determine whether Petitioner is entitled to the benefit of the rules announced in *Trahan* and *Thompson*, a court must first consider whether his convictions were final when those decisions were issued. *See Campos v. State*, 816 N.W.2d 480, 488 (Minn. 2012) (recognizing finality of conviction as threshold issue for retroactivity analysis). A conviction is final when "the availability of appeal has been exhausted, the time for a petition for certiorari has elapsed or a petition for certiorari with the United States Supreme Court has been filed and finally denied." *O'Meara v. State*, 679 N.W.2d 334, 335 (Minn. 2004), *overruled on other grounds by Danforth v. Minnesota*, 552 U.S. 264 (2008). A person convicted of a felony who wishes to challenge their conviction must file a notice of appeal within 90 days of sentencing. Minn. R. Crim. P. 28.02, subd. 4(3)(a).

Petitioner was convicted on July 17, 2006. He did not file a direct appeal, so his conviction became final on October 16, 2006. The Minnesota Supreme Court decided both *Trahan* and *Thompson* on October 12, 2016. Petitioner's conviction was thus final when *Trahan* and *Thompson* were decided.

Minnesota courts follow the retroactivity analysis set forth in *Teague v. Lane*, 489 U.S. 288 (1989), when considering whether a rule applies to a final conviction. *See Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009). Under *Teague*, a court first determines whether the rule is new. 489 U.S. at 310. If so, the rule does not apply to a final conviction unless it falls under an established exception to the general principle that new rules do not have retroactive effect. *Id.* at 310-12.

Petitioner asserts that *Trahan* and *Thompson* announced new rules of law. Petition for Postconviction Relief at p. 2 ¶ 11 ("The decisions in *Trahan* and *Thompson* announced new substantive rules."). Although the Minnesota Supreme Court did not definitively state that *Trahan* and *Thompson* announced new rules, Respondent agrees that they did.[2] Respondent does not agree, however, with the

[2] A case announces a new rule if the result "was not dictated by precedent existing at the time the defendant's conviction became final." *State v. Petschl*, 692 N.W.2d 463, 471 (Minn. App. 2004)

assertion that the new rules announced are substantive.

There are two recognized exceptions to the general rule of non-retroactivity: a new rule may apply retroactively to final convictions only if:

(1) The rule places an entire category of conduct beyond the reach of the criminal law (the "substantive" exception); or

(2) The rule is a watershed rule of criminal procedure that implicates the fundamental fairness of the criminal proceeding (the "watershed" exception).

Teague, 489 U.S. at 311; *Danforth*, 761 N.W.2d at 496-97. Petitioner relies exclusively on the assertion that the new rules announced in *Trahan* and *Thompson* are substantive, and thus apply retroactively to his conviction pursuant to the first exception. Petition for Postconviction Relief at p. 2, ¶¶ 11-12. Petitioner does not claim that the *Trahan* and *Thompson* decisions announced a watershed rule of criminal procedure, so this memorandum will not further address that exception.

IV. The New Rules Announced in *Trahan* and *Thompson* Are Not Substantive.

The first exception to Minnesota's general rule of non-retroactivity is adopted from federal law. *See Danforth*, 761 N.W.2d at 500 (adopting retroactivity principles of *Teague*). The U.S. Supreme Court has explained this exception by distinguishing between new substantive rules and new procedural rules. *See Schriro v. Summerlin*, 542 U.S. 348, 351-53 (2004). A new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or accords "constitutional protection to [a] primary activity" is deemed to be a new substantive rule. *Teague*, 489 U.S. at 311. By contrast, a new rule that "regulate[s] only the manner of

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(internal quotations and emphasis omitted). At the time of petitioner's conviction, a blood and urine test were among the chemical tests that a police officer could legally require a person to submit to if the officer suspected that person of driving while impaired. *Cf. O'Connell v. State*, 858 N.W.2d 161, 166 (Minn. App. 2015) (concluding that *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), announced a new rule that would generally not apply to final convictions on collateral review).

determining the defendant's culpability" is a new procedural rule. *Schriro*, 542 U.S. at 353 (emphasis omitted). The Minnesota Supreme Court has not deemed a new rule to be substantive since it began applying the *Teague* retroactivity principles in 2004.[3]

Although Minnesota appellate courts have not yet addressed the retroactivity of *Trahan* and *Thompson*, their decisions regarding the retroactivity of similar groundbreaking DWI cases are instructive. The Minnesota Court of Appeals held that the new rule announced in *Missouri v. McNeely* "is clearly procedural as it modified the process law enforcement must follow before administering a blood, breath or urine test." *O'Connell*, 858 N.W.2d at 166.

Following *O'Connell*, a defendant attempted to reframe the same issue in order to distinguish *O'Connell*. *See Cibulka v. State*, 2015 WL 5194617 at *3 (Minn. App. Sept. 8, 2015) (appellant arguing that, in a case involving a test-refusal conviction, "the new rule in *McNeely* has a substantive character . . . even though it had a procedural character in *O'Connell*") (unpublished)[4]. In *Cibulka*, the court of appeals again rejected the claim that the new rule in *McNeely* was substantive, and several reasons the court of appeals gave for doing so apply with equal force to the new rules in *Trahan* and *Thompson*.

The new rules in *Trahan* and *Thompson* are not substantive because a new rule is substantive only if it carries 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." *Cibulka*, 2015 WL 5194617, at *4 (quoting *Schriro*, 542 U.S. at 351-52). The new rules in *Trahan* and *Thompson* fail to satisfy this

[3] The Minnesota Supreme Court acknowledged in *Jackson v. State*, 883 N.W.2d 272, 277-78 (Minn. 2016), that the "*Miller* rule" (prohibiting mandatory life sentences without parole for juvenile offenders) applied retroactively because of the U.S. Supreme Court's determination that it did in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) (holding *Miller v. Alabama* announced a new substantive constitutional rule that was retroactive on state collateral review). Respondent is unaware of any other decision in which the Minnesota Supreme Court has acknowledged – much less concluded – that a new rule satisfied the substantive exception to the non-retroactivity principle.

[4] Pursuant to Minn. Stat. § 480A.08, subd. 3, a copy of *Cibulka* is attached as Exhibit 9.

requirement because they do not categorically prohibit all warrantless blood and urine tests, nor do they completely bar prosecution of an individual for refusing such a test when police suspect that individual has driven while impaired.

After *Trahan* and *Thompson*, a person may still be constitutionally prosecuted for refusing a warrantless breath test. *Birchfield*, 136 S.Ct. at 2184. And a person may still be constitutionally prosecuting for refusing warrantless blood and urine test, if requiring a test would comport with the Fourth Amendment. *See Birchfield*, 136 S.Ct. at 2172; *Trahan*, 886 N.W.2d at 221; *Thompson*, 886 N.W.2d at 233; *State v. Stavish*, 868 N.W.2d 670, 677-78 (Minn. 2015) (holding that exigent circumstances justified a warrantless blood draw).[5]

Because the new rules in *Trahan* and *Thompson* necessarily require case-by-case application, Petitioner cannot establish – as he has the burden to do in this proceeding – that the new rules "place[] an entire category of primary conduct beyond the reach of the criminal law" or that they "prohibit[] the imposition of a certain type of punishment for a class of defendants because of their status or offense." *See Danforth*, 761 N.W.2d at 496-97 (quotation omitted).

Trahan and *Thompson* modified the processes that law enforcement must follow before requesting or administering a blood or urine test in order to comply with the Fourth Amendment. *See*

[5] Even if this Court concludes the new rules in *Trahan* and *Thompson* apply retroactively, they still do not apply to petitioner's conduct. As discussed in Section V, *infra*, Petitioner was on probation at the time of the offense and was required to submit to random chemical testing. Additionally, exigent circumstances may have justified dispensing with the warrant requirement in this case. If the Court orders an evidentiary hearing, the State may present evidence to show exigent circumstances. Because the defense never raised any claim that he could not lawfully be convicted of test refusal, the State had no reason to develop the record with regard to potential exigency. Now, nearly 12 years later, the State might have to try to show that exigency existed on a particular night in 2005. This underscores the importance that such issues be raised during the pendency of a case and is a stark example of why the courts find waiver or forfeiture when issues are not timely raised.

Schriro, 542 U.S. at 353 (defining procedural rules as those that regulate only the manner of determining guilt). Prior to *Trahan* and *Thompson*, law enforcement in Minnesota had been given the discretion to request and administer a "blood, breath *or* urine" test of a suspected drunk driver. Minn. Stat. § 169A.51, subd. 3 (emphasis added); *see also* Minn. Stat. § 169A.20, subd. 2 (criminalizing the refusal of any of these tests). *Trahan* and *Thompson* (along with *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *aff'd sub nom. Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016)), announced that the Fourth Amendment limits law enforcement's use of blood and urine tests (but not breath tests) to situations in which a warrant or an exception to the warrant requirement is present.

This series of decisions, at its core, impacts the chemical tests available to law enforcement as it handles DWI investigations. Despite petitioner's attempt to characterize these rules as substantive, "it is more appropriate to determine a new rule's retroactive application based on what the opinion announcing the new rule states, not based on how the new rule is sought to be used by parties in subsequent cases." *Cibulka*, 2015 WL 5194617, at *4.

Trahan and *Thompson* changed the methods by which police can attempt to gather evidence in DWI cases – but only sometimes. When police obtain a search warrant, or when an exception to the warrant requirement justifies asking for blood or urine without a warrant, *Trahan* and *Thompson* change nothing. This is why *Trahan* and *Thompson* are procedural, not substantive. The Minnesota Supreme Court did not hold that the State cannot criminally punish refusal to submit to blood and urine testing. Instead, the Minnesota Supreme Court held that the State *can* criminally punish such a refusal if police obtain a search warrant or the circumstances constitute an exception to the warrant requirement. The rules announced in *Trahan* and *Thompson* are procedural and thus do not fall under the first exception to the non-retroactivity rule.

V. Petitioner's Probation Required Him to Submit to Chemical Testing.

Even if the Court disagrees with Respondent and finds that *Trahan* and *Thompson* should be applied retroactively to Petitioner, Petitioner is still not entitled to relief. In this case, Petitioner had no right to refuse testing. The conditions of his probation for three separate crimes required him to submit to such testing.

"Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." *United States v. Knights*, 534 U.S. 112, 119 (2001) (internal quotations and citations omitted). "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *Id.* at 121. A police officer conducting a search of a probationer subject to a search condition does not need a search warrant. *Id.* at 121-22. The Minnesota Constitution does not afford additional constitutional protection to probationers subject to searches. *State v. Anderson*, 733 N.W.2d 128, 140 (Minn. 2007).

At the time of this felony DWI, Petitioner was on probation for three crimes: felony check forgery, felony attempted drug possession, and gross-misdemeanor DWI. In all three files, he was required not to use alcohol or illegal drugs and to submit to random testing. Petitioner has not claimed these conditions were unlawful or unreasonable, and nor could he – two of his crimes directly involved the unlawful use or possession of chemicals.

Birchfield, *Trahan*, and *Thompson* hold that a person cannot be charged with refusing to take blood and urine tests if law enforcement does not either have a warrant *or* a basis to conduct the chemical test without a warrant. *Knights*, *Anderson*, and many other cases make clear that probationers are subject to searches as a condition of probation based on reasonable suspicion. Thus, Officer Vandervort had a lawful basis to demand a chemical test of Petitioner if there was reasonable suspicion that Petitioner had been using alcohol or illegal drugs.

And Officer Vandervort indisputably had more than reasonable suspicion to believe Petitioner was using alcohol or drugs. In order for a defendant to be convicted of test refusal, a peace officer must have "'probable cause to believe the person was driving, operating, or in physical control of a motor vehicle' while impaired." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) (quoting Minn. Stat. § 169A.51, subd. 1(b)). Petitioner has made no claim that his guilty plea was supported by an insufficient factual basis. Indeed, it is too late for Petitioner to do so, as any such claim would be time-barred. *See* Minn. Stat. § 590.01, subd. 4 (imposing two-year statute of limitations on petitions for postconviction relief); *Lussier v. State*, 821 N.W.2d 581, 586 n. 2 (Minn. 2012) (holding that motion to withdraw guilty plea post-sentencing is subject to two-year statute of limitations).

Officer Vandervort had probable cause – not just reasonable suspicion – to believe Petitioner was using drugs. Vandervort saw Petitioner go through a semaphore, but Petitioner apparently did not even see the semaphore. Petitioner was lethargic and disoriented. Petitioner's speech was slurred and his eyes were "droopy." Petitioner performed poorly on field-sobriety tests. And Vandervort found a glass pipe with cocaine residue, bottles of medication, and a butane torch on Petitioner.

When Petitioner refused to submit to either blood or urine testing, he refused to submit to a search that Vandervort lawfully requested. Vandervort had more than the reasonable suspicion necessary to require Petitioner to submit to a test. Because Vandervort had a lawful basis to require Petitioner to submit to the test, Petitioner could lawfully be convicted of test refusal. Even if the Court finds that *Trahan* and *Thompson* are retroactive, they do not change the fact that Vandervort had a lawful basis to require Petitioner to submit to testing because the search would "comport with the Fourth Amendment" as required by *Birchfield*. 136 S.Ct. at 2172

CONCLUSION

The Court need not reach the merits of Petitioner's claims. Petitioner pleaded guilty without

raising any constitutional issues – much less the constitutionality of the test-refusal statute as applied to him. If the Court reaches the retroactivity of *Trahan* and *Thompson*, the Court should find that the two decisions do not apply retroactively. They are not substantive decisions because they do not prohibit the criminalization of test refusal; instead, they require a case-by-case analysis to determine whether a test was properly required. *Trahan* and *Thompson* regulate the process by which police conduct chemical tests in DWI cases – they are procedural decisions. As a result, the petition is time-barred. Finally, even if *Trahan* and *Thompson* apply retroactively, they do not bar a test-refusal conviction in this case. Officer Vandervort could lawfully require Petitioner to submit to testing because Petitioner was required by his probation in other cases to submit to testing. The Court should deny the Petition.

Dated: February 9, 2017

Respectfully submitted,

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/s/

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