Mark Thomson:

This sounds like a great episode. Cannot wait to hear it. Welcome back to The ComMN Law, the best and only podcast about the Minnesota Supreme Court. My name is Mark Thomson. I work at Nichols Kaster in Minneapolis and I clerked for Justices Lillehaug and McKeig.

Alison Key:

And my name is Alison Key and I was a clerk for Justices Stras and Hudson.

Mark Thomson:

We've got a case today about retroactivity and exigency. Before we get to the main case, let's do some legal news.

Alison Key:

First up, we have an MPR news story for you from June 12th called "Court declines to exempt charters from school segregation case." So this is kind of just an update on the *Cruz-Guzman* litigation. We had talked about this case when the Minnesota Supreme Court opinion was published, and Justice Hudson wrote that opinion holding that the courts, the Minnesota judiciary, could intervene and hear the question of whether students were receiving an adequate education and that case went back to trial. So relevant to this current article then, the *Cruz-Guzman* litigation is essentially claiming that persistent school segregation effectively denies Minnesota children the adequate education guaranteed to them under the Minnesota Constitution. So several charter schools have sought to be exempted from whatever ruling might be made in this litigation. But a judge on June 10th decided not to exempt these charter schools. So Nekima Levy-Armstrong, who represents these charter schools in this case, said that her clients "are disappointed but not surprised by this judge's decision." So the article quotes her as saying this, "Our clients have done an incredible job providing culturally affirming environments for students and also outstanding educational opportunities. And we want to ensure that regardless of the outcome of this litigation, their rights will be protected, that their ability to educate students will be protected, and that the choices of parents, particularly parents of color, will also be protected." The article states that two of the charter schools that Levy-Armstrong represents say their student body is over 90% black, according to the court order that was filed on Monday the 10th. Levy-Armstrong said the concern would be that refusing to exempt these charter schools from whatever decision the court makes in this *Cruz-Guzman* litigation means that those charter schools may not be able to continue their work that they have been doing. She's quoted as saying, "One of the main that we are seeking to do is to ensure that we protect the rights of the charter school interveners, who are our clients, to be able to continue to deliver high-quality educational opportunities to their student populations. And particularly students of color." The article ends by noting the court hasn't made a final decision in the ultimate question of the *Cruz-Guzman* case and that the parties are actually still engaged in mediation.

Mark Thomson:

So a couple of interesting notes there. One, that this is a case about discrimination, racial discrimination, and one would assume that a substantial percentage of the students being discriminated against, allegedly according to the complaint, are African American students. And yet Ms. Levy-Armstrong is representing charter school at least some of whom are over 90% comprised of African American students. So just goes to show the complicated ways in which these cases can spin out. The other one on that last line, the parties are currently engaged in mediation, I think the kind of archetypal version of this litigation is something ending in a court order and then a court being required to monitor the terms that

the parties agreed to and keep watch over the case for years and years. I wonder if the case was decided via settlement rather than via a court order, whether the court would have less involvement or potentially no involvement. It seems like one of the themes in these cases is that if the plaintiffs are to receive any vindication, even if they formally win in court, they need a pretty active judge who's willing to come back again and again to ensure that the judgment is being adhered to. And I wonder what that would look like in the case of a mediated settlement.

Alison Key:

And we talked— when we talked about this opinion, we had mentioned that in oral argument, the justices were very concerned about becoming overinvolved in the management of a school district if they were to agree that segregation needs to be addressed before the constitutional requirements are fulfilled. And so it might be that they would certainly prefer that the parties come to an agreement on what that looks like so they do not have to.

Mark Thomson:

Next up a classic here on The ComMN Law, an update on Michelle MacDonald-related litigation. So this is from Minnesota Lawyer and we'll give you some context first before we get to the actual update. So Michelle MacDonald, who provides like 20% of the total content in this show and who we probably owe royalties to if we ever made any money from this, which we haven't and won't. So she sued Michael Brodkorb last year for defamation, claiming that Michael Brodkorb and his coauthor published a false image of her on their blog. Her complaint was dismissed by a Minnesota State district court, but she filed an appeal within the proper time period to do so. However, that's not the only deadline that has to meet to get a proper appeal. So within 10 days of filing an appeal, a party also has to file a request for transcripts from the District Court. MacDonald's attorney here did not do that on time. So when MacDonald's attorney did eventually request the transcripts from the court reporter, she actually backdated that request to a date that would have met the filing deadline. So off to a bad start. So there's— that's the deadline to request transcripts and there's also a deadline for the transcripts to actually be delivered to the court and that deadline is 60 days after the appeal is filed. So this all gets to the clerk of the Appellate Court and the clerk somehow decides to accept the backdated date of the request, but then rejects the transcript request in full because the transcript was due to be delivered after the 60 day delivery deadline. Now we're up to the present. Chief Judge Edward Cleary ruled on June 11th that MacDonald's failure to meet the delivery deadline does not merit throwing out the case. So the appeal will proceed. Judge Cleary said "Dismissal of an appeal for noncompliance with the appellate rules is an inappropriate sanction when the failure to follow the rules does not affect the appellate court's jurisdiction and neither prejudices the other party nor delays the appeal." Minnesota lawyer got a quote from Michael Brodkorb, the other party in this litigation, who said, "it's very frustrating, but this is what Michelle does. This is how she uses the system in an attempt to just bleed people dry," which does sound frustrating for him. Judge Cleary here, making what's probably the right decision. This is not some travesty of justice or something that affects materially what the case is about. So, it'll go on. I think he's clearly doing what seems fair and right to him. I think in the back of his mind, he might also be not upset that the decision he reached independently is one that will not bring Michelle MacDonald's ire on him. Nobody wants to be added to her enemies list.

Alison Key:

Right. He certainly wouldn't be the first judge that Michelle MacDonald has a beef with. We learn a lot about the legal system in Minnesota through Michelle MacDonald's various adventures through the Minnesota judiciary, through elections and disciplinary actions and defamation cases and various

procedural snafus, but we're certainly appreciative that Minnesota Lawyer is there chronicling literally every step of the way so we won't miss any opportunities to learn what Michelle MacDonald is up to.

Mark Thomson:

No. Minnesota Lawyer is a resource. And maybe if there were other— maybe like this is, Michelle MacDonald is the only like ethically questionable attorney in Minnesota. And like Florida Lawyer or like Arkansas Lawyer are full of like a thousand of these cases a month. And Minnesota Lawyer is just starved for material because this is the greatest state in the union.

Alison Key:

Both of us have worked for the justices in charge of disciplinary cases at the Minnesota Supreme Court. So we both know that that's not true. Moving on to then our final piece of legal news, a very significant and weighty piece of legal news that came out this week of our recording here. And I'll just read the AP news headline that I'm sure many ComMNers have already heard. The headline is Lillehaug says has Parkinson's, leaving Supreme Court.

TV Anchor:

Minnesota Supreme Court Justice David Lillehaug says that he has Parkinson's disease. He has decided to resign in July of next year. He's been on the Supreme Court since 2013. Justice Lillehaug said his Parkinson's disease is at an early stage, well managed, and he feels great. He said he wants a more flexible schedule to work part time and do more traveling.

Alison Key:

So from that AP news piece, the article states that Lillehaug, who is 65, said in a statement released by the court that he expects to resign effective July 31st, 2020. So for those not doing the math on that, he will remain on the court for one more term. The article does elaborate that under the state's constitution, the Democratic governor, Tim Walz, will appoint Lillehaug's successor who will then not have to stand for reelection until 2022. So we have talked about before that, had Lillehaug not announced this retirement, both he and Justice Thissen were to stand for election in Justice Thissen's case and re-election and Justice Lillehaug's case in 2020. But now only one justice, Justice Thissen, will be up in 2020. And Justice Lillehaug's successor, then, will have one bye election before having to stand for reelection in 2022.

Mark Thomson:

Justice Thissen and even more squarely within the sights of Michelle MacDonald for that 2020 election.

Alison Key:

Crossover between two pieces of legal news.

Mark Thomson:

So Justice Lillehaug still has another year plus on the bench to come. And as the court's press release explains, he's going to continue working in other capacities after that. I'm personally hoping he returns to advocacy as there are plenty of stories of how fearsome a lawyer he was as Minnesota's US attorney and as a private practitioner. So to be clear, Justice Lillehaug's impact on the law is far from over. However, being an ex clerk of Justice Lillehaug, I wanted to offer one thought, which is, if you listen to

the show, you know that Alison and I sometimes have a rather jaded view toward how the law operates. We're not always confident that there's a level playing field or that the rules are being fairly applied. And I stand by that. But it's not the only way to approach the law. When I clerked for Justice Lillehaug, he approached the law as something to be respected and something to be marveled at. Not in the sense of automatically deferring to tradition or power, but rather in the sense of honoring the fundamental principles that govern the law. Things like the court's place in our democracy and the importance of discretion and fair mindedness in judging cases. In a job that affords him extreme discretion and power, he instead operates with unfailing discipline, demanding of himself that his legal analysis be rigorous and his opinions be fair, concise, and lucid. When I was in law school, I read a lot of high minded odes to the majesty of the law and the higher aims of the legal profession. And at the time I had some trouble squaring that with the legal profession as I observed it. It actually wasn't until I clerked for Justice Lillehaug that I saw how those virtues work in practice, as exemplified by him every day. So there's a lot about Justice Lillehaug that's admirable as both a person and a judge, but his seriousness of purpose and his reverence for the ideals of the law will be extremely difficult to replace when he leaves the court. We look forward to many more opinions from him, before that time. And in fact, he is the author of the opinion in the resulted case that we're looking at today, which is *Central Housing Associates v. Olson*, a case that we discussed on this show back in November of last year.

Alison Key:

So to recap the facts quickly of *Central Housing Associates v. Olson*, this was the case about a tenant, Olson, who had complained to his landlord about various concerns with his rental property, including some maintenance complaints as well as an allegation of harassment of Olson's daughter by someone who worked for the landlord, Central Housing Associates. So then after receiving these complaints from Olson, the landlord, Central Housing Associates, notified Olson of what the landlord considered material lease violations that Olson was committing and set a termination date on that lease, on Olson's lease. So Olson didn't vacate the property at the termination date and then the landlord brought an eviction action. Olson then alleged that the landlord had retaliated against him for his complaining about the maintenance issues and the harassment of his daughter. So during that eviction action, the landlord asserted that he had a right to evict Olson under the statute allowing evictions for material breaches of leases. That statute also contains a retaliation defense as part of that statute, which Olson asserted. So listeners of that episode will remember that we talked a lot about the question in oral argument was whether the statute's language that triggers the retaliation defense, which was "complaint of a violation," applied to Olson's complaining his landlord or whether the word "complaint" required, something more official, a complaint to file a lawsuit, etc. So that brings us then to the questions that were dealt with in the opinion released by the court.

Mark Thomson:

So writing for a five-member majority, Justice Lillehaug determined that Olson was not able to assert the retaliation defense under the relevant eviction statute. So the court first concluded that the language was ambiguous. He wrote, "based on the words of section 504B.441, read in light of the tenant remedies statutes, we conclude that the section 504B.441's use of 'complaint of a violation' is subject to more than one reasonable interpretation and is therefore ambiguous. CHA's interpretation that limits the phrase to pleading in court is reasonable. But so is Olson's interpretation that includes a tenant's expression of dissatisfaction in a court filing or to a government entity or landlord." So now that we're in the realm of ambiguity, the court walked through all of the possible reasonable explanations. Again, this is from the opinion, "although both CHA's and Olson's interpretations of 'complaint of a violation' are reasonable. We discern yet a third reasonable interpretation, not advanced by either party. The third

interpretation is in the nature of a middle ground between the parties competing interpretations. The legislature could have intended that a 'complaint of violation' means either a tenant's complaint, commencing a lawsuit or a tenant's complaint to a government entity, but not a tenant's complaint to a landlord. In other words, the phrase could refer to an expression of dissatisfaction that has an official character to it. We conclude that this third interpretation is also reasonable." So the court then uses the canons of statutory construction to conclude that the third interpretation is the most reasonable, which also means that Olson is not eligible to assert it because he did not officially file any type of complaint. He just complained in the normal sense, by talking to his landlord.

Alison Key:

So I thought this was a good example of kind of walking through statutory interpretation step by step. And I know we've mentioned before that we kind of wish the court was more explicit in stepping through exactly every step of statutory interpretation they were doing. And I thought this was an excellent example of that kind of thorough analysis that's pretty easy to follow. So it's a good one to check out if you're looking for a roadmap to statutory interpretation. So Olson isn't eligible to assert the retaliation defense in the statute. So the landlord is probably pretty— feeling pretty good about this opinion so far. But what's remarkable about this opinion is the next section, which goes on to announce a new common law retaliation defense. So Justice Lillehaug starts by saying the court is at liberty to expand the common law as it would like. He writes, "there is nothing in Minnesota Statutes chapter 504B whereby the legislature constrained the judiciary from exercising our responsibility to develop the common law of landlord-tenant relationships. To the contrary, the legislature clearly let us know that the tenant remedies statutes are intended only to supplement the common law. In that spirit, we exercise our responsibility to develop the common law." He also writes that this new common law retaliation defense that is announced in this opinion is necessary to "fill a gap that the legislature left open, perhaps inadvertently." So then the court determined that this new common law retaliation defense applied to Olson's situation and reinstated the district court's judgment for the tenant Olson. So listeners of our November episode will remember that this common law section here, the announcement of a new common law retaliation defense was certainly a surprise to us here. So we kind of talked about how in oral argument we assumed that there might be a tenant win, but the justices would try to expand the meeting of the word "complaint" in the statute to permit Olson to claim a statutory retaliation defense. But the justices did not seem to be willing to dig into this common law of retaliation doctrine. I think the direct quote from me for the transcript was, "I think the easier question is we're not getting common law retaliation."

Mark Thomson:

It definitely was.

Alison Key:

But that's what we get for underestimating Justice Lillehaug. So a new opinion and new law from the Minnesota Supreme Court this month.

Mark Thomson:

Onto our featured case. This is called Fagin v. State of Minnesota. And to start with the facts, we'll go with a case that we featured on season one of The ComMN Law called *Johnson v. State*. So in that case, we talked about a new principle announced in a trio of cases, which are called *Birchfield*, *Trahan*, and *Thompson*. In *Birchfield*, the United States Supreme Court stated that it violates the US Constitution

when, after stopping a driver on suspicion of driving under the influence, law enforcement takes blood without a warrant. The Minnesota Supreme Court later took this principle and applied it to its own constitution in *Trahan* and *Thompson*, and added that it also violates the Minnesota Constitution to take urine samples without a warrant. However, all courts still agree that breath tests are still permissible without a warrant. So after *Birchfield*, *Trahan*, and *Thompson*, we knew that blood and urine was impermissible without a warrant. But breath tests were fine. The problem with that for our *Johnson* case was that we had people who had been convicted for test refusal pre-*Birchfield*, *Trahan*, and *Thompson* on the basis of blood and urine tests that were now rendered unconstitutional by those cases. So in its opinion in *Johnson*, the court made *Birchfield*, *Trahan*, and *Thompson* retroactive. Meaning, now we open up all these convictions for test refusal for blood and urine. One wrinkle in these legal principles is that even though our general mantra is that blood and urine without a warrant are unconstitutional, but breath is fine, both the United States and Minnesota constitutions have exceptions to warrant requirements. So the relevant exception here is for exigent circumstances. So the law stands now that *Birchfield*, *Trahan*, and *Thompson* prohibit and retroactively invalidate blood and urine tests without a warrant. But breath tests and any test under exigent circumstances are fine.

Alison Key:

So that background brings us then to this case. The facts of this case are that in 2012 which was pre-*Birchfield*, *Trahan*, and *Thompson*, Jason Fagin was arrested on suspicion of driving while impaired. The deputies brought Fagin to the sheriff's department and asked him to submit to a blood or a urine test. Fagin refused. So he was then charged with and later pleaded guilty to first-degree test refusal. So then in our timeline, *Birchfield* comes down in 2016, followed closely by *Trahan* and *Thompson*. Then in 2017, Fagin filed a petition for postconviction relief, arguing that *Birchfield*, *Trahan*, and *Thompson* now entitle him to relief. So while his case was percolating, *Johnson* comes down in 2018 and making those cases retroactive, which is relevant only here because it strengthens his case that it should apply retroactively. So Fagin is now arguing that the test-refusal statute was unconstitutional as applied to him because he refused a warrantless blood and urine test, which is now unconstitutional and the rulings, we now know, apply retroactively. And, importantly here, that the deputies did not demonstrate that exigent circumstances existed to fall into a warrant exception. So the district court hearing this postconviction case summarily denied the postconviction petition, holding that it was Fagin's burden to prove the lack of exigent circumstances and that he didn't meet that burden.

State Attorney:

The postconviction court finding that the petitioner below and respondent in this court, Mr. Fagin, failed to meet his burden to show that there were no exigent circumstances in this case.

Alison Key:

The court of appeals reversed in an unpublished opinion determining that "The postconviction court erred by placing the burden of proof with respect to exigent circumstances on Fagin instead of on the state. Therefore we reverse and remand for further proceedings." So the state appealed this question then of who has the burden of proving lack or existence of exigent circumstances when we're relitigating all of these convictions for test refusal.

State Attorney:

Whether a postconviction petitioner who was making— by this court's own decisions, a collateral attack on a conviction that carries a presumption of regularity— whether they have the burden of or not.

Alison Key:

And so at the Supreme Court, the main issue presented is which party bears the burden of proof with respect to exigent circumstances when a defendant challenges a final test-refusal conviction based on the retroactive application of the *Birchfield* rule.

Mark Thomson:

So the appellant, the State of Minnesota's attorney at oral argument was Nicholas Hydukovich from the Washington County Attorney's Office.

State Attorney:

Good morning, Your Honors. May it please the court. My name is Nick Hydukovich. I'm an Assistant Washington County Attorney. I represent the appellant, the State of Minnesota.

Mark Thomson:

The state's entire argument relies on the procedural posture of this case. So, we're at postconviction here. And the state's argument is simple. The postconviction relief statute unambiguously places the burden on the petitioner, that's Fagin here, to prove by a preponderance of evidence that he or she is entitled to the relief sought. And that the court's prior decisions demonstrate that this burden is on the petitioner.

State Attorney:

By statute and by decades of this court's jurisprudence, the burden lies on the other side to show that— they have to prove, essentially, that they are entitled to relief under the statute.

Mark Thomson:

The argument continues, because petitioners have the burden for all elements to prove that they're entitled to the relief sought, that includes the element in this case of, not only that law enforcement didn't have a search warrant, but also that no valid exception to the warrant requirement existed.

State Attorney:

The burden lies on the other side to show that— a search would not have been constitutional in this circumstance.

Mark Thomson:

So the State's essentially arguing here that nothing in *Birchfield*, *Trahan*, or *Thompson* suggests that this burden should shift or be any different than what we understand it to be.

State Attorney:

So what I'm asking this court to do is to simply follow the text of the postconviction statute as well as this court's decades of jurisprudence on the issue and hold as a rule of law that a person who challenges their final conviction under the *Birchfield* rule bears the same burden as essentially any other postconviction petitioner does. And place the burden of proof on them to show by a preponderance of the evidence facts which would support their claim.

Mark Thomson:

Justice Chutich wasn't fully convinced. And she noted one reason why the presumption might be different, which is that the law changed.

J. Chutich:

Does this case carry a presumption of regularity when we're in a retroactive context where we've said, "hey, this was wrong?" Because what strikes me as unfair is in that particular context, there shouldn't be different burdens of proof on the defendants. Like if you, if you brought, if you were stopped and you refused to take the test after our decision in *Johnson*, you know, the state is going to prove that at the hearings. But it doesn't seem to me when we've said, "hey, this was wrong all along," it doesn't seem fair to have somebody who just happened to be arrested and refuse before, we made that clarifying ruling.

Mark Thomson:

Justice Hudson was giving off similar vibes, noting just as a matter of fairness that perhaps things should be different here.

J. Hudson:

Because that just seems like the fair thing to do. We're saying that because this was a— this was a substantive rule and this rule is retroactive. These are the parties responsibilities going back and going forward.

Alison Key:

So these questions almost remind me of kind of an equal-protection-type challenge. So what Justice Chutich seem to be kind of getting at is that, is it really rational to treat people convicted pre-2016 differently? That is to say— with a different burden of proof than the people convicted post-2016. She seems like she's thinking, no, that's not rational to treat those two people differently. Justice Hudson seems to agree. In the State's response to this— the attorney kind of interestingly flips the premise on this inconsistency question and says, well then we're creating an inconsistency in postconviction cases where sometimes the petitioner has the burden and sometimes in other postconviction cases the petitioner doesn't have the burden. Which would be, in the state's argument, the very first time the court hasn't followed this blanket rule that the postconviction burden is on the petitioner.

State Attorney:

It's very different to then say that the State has the burden in a context in which, as far as I know, this court has never felt held that the State has the burden at any other context that's similar.

Alison Key:

So it seems like the State kind of has a good response to this inconsistency question posed by Justices Chutich and Hudson until Justice Lillehaug gets in there. So Justice Lillehaug ends up finding that changing the burden off the petitioner has actually happened in the case law in another context. So this is obviously a maneuver that's every attorney's worst nightmare, which is the court finds a case you didn't find that undermines your argument, and brings it up at oral argument. And even further, because Justice Lillehaug is Justice Lillehaug, kind of pre-walked the attorney into a trap before mentioning it. So we'll play kind of that exchange here.

J. Lillehaug:

Counsel, I agree with you that this is a case of first impression, with regards to the, the test-refusal statute. But we looked for some analogies, and I'm wondering if maybe confessions and interrogation might be an analogy. Where, at the pretrial stage, the defendant can allege "I was in custody, I didn't get a Miranda warning," and then the burden shifts to the state to show that the confession was voluntary. Would that be a fair analogy?

State Attorney:

In some sense, I think it is. But if that were raised in a postconviction petition, the burden does shift, by the language of the statute, to the petitioner.

J. Lillehaug:

Well I was wondering about that. We came across the case from 1975 that suggests exactly to the contrary. It's called Doan, have you come across that case?

State Attorney:

I unfortunately did not come across that case.

J. Lillehaug:

Okay. In any event, we said that once the defendant establishes essentially a prima facie case that the confession was not voluntary, then in postconviction, the burden shifts to the state to show that it was voluntary. That that might be a pretty good analogy, wouldn't it?

Alison Key:

So obviously the State then has to back down on the case law argument, obviously, that there's no case law where the petitioner doesn't have the burden in a postconviction context. But the State kind of tries to salvage, you know, the remaining shambles of his argument by contending that this would then be inconsistent with the text of the postconviction statute and then therefore should just not be followed.

State Attorney:

If that's the case then it's certainly possible the court could make that the rule of law here, but I'm not advocating for it obviously because I do think it's inconsistent with the text of the postconviction statute.

Alison Key:

So the State acknowledges, while the court's case law seems to state repeatedly that the burdens for postconviction is on the petitioner—obviously with exceptions noted by Justice Lillehaug—there's no case law directly on point with respect to warrant exceptions, which is what Justice Anderson kind of nailed the State's attorney down for.

J. Anderson:

What case law can you point to that makes exigency in this context something that the petitioner must prove?

State Attorney:

With regard to exigency specifically, I'm not aware of any cases where this specific issue has come up in this manner. So I don't know that there are any decisions in either direction on it.

Alison Key:

So the State is forced here to acknowledge it's drawing from nonexigency cases for this principle.

State Attorney:

I think that by the text of the statute as well as this court's prior cases where the court has held over and over again that a person challenging via postconviction relief has the burden of showing the facts demonstrating that they are entitled to relief. This is really no different.

Mark Thomson:

The justices also got into some of the practical realities at play here, which play a large role in Fagin's argument, but don't get much attention from the State. So if the petitioner bears the burden of proving the warrant exception, how does the petitioner know what to address?

J. Lillehaug:

Counsel, I know what your position is on who has the ultimate burden on the exception. Does the State have the burden to assert an exception to the warrant requirement?

State Attorney:

I think the court could certainly say that in terms of putting some sort of burden of pleading or production or something on the State. But I don't think that by the terms of the statute that that exists. And—.

J. Lillehaug:

So is it the burden of the postconviction petitioner to imagine each and every possible exception to the warrant requirement and then to refute each and every one?

Mark Thomson:

The State seemed only somewhat willing to bow to those practical realities.

State Attorney:

I think depending on how you categorize them around seven to eight exceptions to the warrant requirement, it depends on if you combined some under the same umbrella or look at them separately. But if you look at how these cases work in terms of what possible exceptions could apply, there are probably at most two exceptions that I can possibly imagine that could apply in any given case involving refusal of blood and urine testing. There's a relatively finite number to begin with, and then we narrow that to what is actually plausible in a case like this.

Mark Thomson:

So you can see that clearly the Justices are weighing these practical factors more heavily than they featured in the State's priniciple arguments. And we'll have to see how that impacts the final opinion.

Alison Key:

So moving to the respondent's attorney then, Fagin's attorney at oral argument is Amy Lawler from the Minnesota Public Defender's office.

Fagin Attorney:

Good morning, Your Honors. May it please the court. My name is Amy Lawler. I'm an assistant state public defender and I represent respondent Jason Fagin.

Alison Key:

So Fagin's attorney starts by agreeing with a good chunk of the state's legal argument. Fagin's attorney states that petitioners do bear the burden of proof in postconviction proceedings to establish their right to the relief sought by a preponderance of evidence. But where Fagin's analysis then diverges from the State's is that Fagin's attorney argues that Fagin has met this burden. And specifically has met this burden because (1) he demonstrated that the police lacked a warrant at the time he refused a search of his blood and urine, and (2) he *asserted* lack of exigent circumstances.

Fagin Attorney:

Well I think that the rule of law is simply that the postconviction statute means what it says, it requires a petitioner to prove that they're entitled to relief. Here they meet that burden by showing that there was a warrantless search and that they are asserting there are no exigent circumstances. They meet that prima facie burden. And that doesn't mean that the State cannot then come back with any sort of response. But that initial burden is met by the petitioner making that claim that it was a warrantless search and that there were no exigent circumstances.

Alison Key:

So this distinction between demonstrating the lack of a warrant and asserting a lack of exigency is rightly confusing to the court and Fagin's attorney doesn't seem to have it all sorted out as it relates to who has the burden and why there's a different burden for these two elements. Justice Thissen and Justice Lillehaug have a few back and forth sessions with the attorney about this.

J. Thissen:

Because I mean you can assert it, but once you get to that, once you get to an actual hearing, what happens then? It seems that you're arguing pleading stuff, which I think is what Justice Lilhehaug was getting at, but at some point, how do you make that case to begin with?

Fagin Attorney:

Well, I think this goes to the heart of our assertion that the State is the one that has to make the case that once we make the assertion in...

J. Thissen:

So this is, but this is my question because we're talking about— you're talking about kind of pleading burdens and I guess the way I was thinking about the case is what's the actual burden of proof? So you're saying there actually is a burden of proof of the State if you were going to get to an evidentiary hearing.

Fagin Attorney:

Our argument is that the defendant does meet his burden when he makes these assertions, that he falls under that *Birchfield* class that it was warrantless and there were no exigent circumstances and then the ball's in the State's court.

J. Lillehaug:

Let me follow up on Justice Thissen's question though, let's say you actually had a hearing in this case and then it's your client's burden to put on a case, right? Okay, so your client would have to put in evidence that there was no warrant.

Fagin Attorney:

I'm not even sure if it would need to be evident. Well, I think that it's enough that in this case . . .

J. Lillehaug:

You need to show you're in the *Birchfield* class.

Fagin Attorney:

Yes, we would need to do that. I think it could be . . .

J. Lillehaug:

So you would have to show there wasn't a warrant.

Fagin Attorney:

Yes. I think we could do that with just the complaint or even an agreement between the parties. I don't think there's any dispute.

J. Lillehaug:

Probably could do that. Then, you allege in the petition there were no exigent circumstances. Would you then put on a case that there weren't? I mean, would your client say, "gee, as far as I know, there was nothing unusual about this case?"

Fagin Attorney:

Well that's, I think that's the question of where you draw the line. I don't think that the defendant has to do anything beyond assert that there were no exigent circumstances because then you delve into the realm of trying to attempt to prove a negative.

Alison Key:

And Fagin and the Justices seem to be tracking on the logic, until then, the attorney reverts to simply requiring only asserting exigency, but still the petitioner has the burden to prove other aspects of the petition.

Fagin Attorney:

It's true that it has to either be either a warrant or the state had to prove exigent circumstances, and so I think that that . . .

Chief Justice:

So you have to prove that there wasn't a warrant, then why don't you have to prove that there wasn't exigency under the plain language of the statute?

Fagin Attorney:

Because I think that it's enough for the petitioner to go in under the statute and establish the facts by a fair preponderance of the evidence that he was convicted of refusing a chemical test and then to assert this test was not supported by a warrant, it was not supported by exigent circumstances. I think that's enough to say that the facts alleged in the petition meet that burden.

Alison Key:

Which continues to remain unclear to me. And obviously the Justices who tried to continue to track with her as well.

J. Lillehaug:

Well you've got one you said you have to prove something, that's with evidence, and then you have to assert something that's apparently without evidence. Is that right? And how do you distinguish between proving and asserting those two subelements of the new crime?

Alison Key:

But good thing Fagin has a few other arguments to help draw this distinction between the petitioner's burden on those two elements including jurisdiction, practicality, and precedent as we'll get to in a second. But the distinction in burdens between these two elements still remains largely unexplained.

Mark Thomson:

So Fagin's next argument is that the State bears the burden of proving an exception to the warrant requirement because of the nature of how the lack of a warrant changes this case in relation to all the other postconviction cases. So Fagin's arguing that his is a different type of case than the decades of cases that the State cites in it's case law where the petitioner bears the postconviction burden.

Fagin Attorney:

You know, and I think that the problem with relying on any of the cases that deal with, you know, the burden on the State, a lot of what the State is resting on is cases that involve suppression of searches that did already happen or that rely very specifically on Fourth Amendment jurisprudence. This is a different type of case.

Mark Thomson:

Fagin's argument is this case implicates quasi-jurisdictional issues. It's no longer within the state's jurisdiction to bring charges on this issue.

State Attorney:

I think it's more that the State has to assert jurisdiction and that really goes back to *Johnson*, which is the argument that "I was convicted of something that is not a crime." The State always has the obligation to prove jurisdiction, to prove subject matter jurisdiction, specifically to the district court. What *Birchfield* and *Trahan* and then most specifically recently *Johnson* established is that when you

convict someone of something that is no longer presumptively a crime, that really is a question of jurisdiction. It's not a Fourth Amendment search question. It's a jurisdiction question. And here, we've made that showing then, that under *Birchfield* and *Trahan* and now *Johnson*, there is a jurisdiction problem. There's a problem that he was convicted of something that's not a crime in this state. Then didn't come back and say "why, yes, we do have jurisdiction. There was a warrant or there were exigent circumstances. Let us show you."

Mark Thomson:

The argument is the State always has the burden of proving jurisdiction, just as it always has the burden of proving an exception which would render jurisdiction available in this case.

Fagin Attorney:

The State previously had the ability to punish and removing it from that realm. Now that behavior is no longer punishable. And so, when you look at all of the line of case law about the State having the obligation to prove jurisdiction at any level and then looking on further to the all of the plethora of case law that establishes that is the State that must establish an exception to the warrant requirement. That law is clear.

Mark Thomson:

Fagin also argues that both *Johnson* and *Trahan* actually address the issue because the issue of burdens on warrant exceptions and exigency was at issue in those cases and in those cases the burden was placed on the State.

Fagin Attorney:

The legal question I believe has been squarely answered both in *Johnson* and in *Trahan* where this court did assign on remand the burden to the State or say that the State had failed to meet its burden. And this is supported by sound analysis. It's supported by decades of case law both by this court and by the United States Supreme Court indicating that the burden rests with the State to prove an exception to the warrant requirement and to prove exigent circumstances. That was the analysis that the court of appeals correctly applied here in Fagin.

Mark Thomson:

The state's response to this is again pretty simple and goes back to its principle argument, which is the procedure of this case. The State's argument is those were not postconviction cases. This is.

State Attorney:

Counsel argues that this court has essentially already decided this issue and I think that needs to be addressed. Because what I want to make clear is that although *Trahan* has, I think, a very complicated and confusing procedural history, *Trahan* was indisputably entitled to the application of the *Birchfield* rule to his case because it was on direct appeal. So the language and *Trahan* in which this court talks about the burden being on the State to show exigency is really black letter law. Because that is the State's burden in a challenge made on direct appeal or prior to trial, if the challenge were made the burden is of course on the State to show exigent circumstances and no one is disputing that here today. But the case also doesn't answer the question posed in this case.

Alison Key:

So back to Fagin's principle argument, which otherwise does seem to resonate with the Justices in terms of what they consider fairness and consistency with pre- and post-2016 convictions, and which types of defendants have that burden to prove exigency. The problem with that argument that consistency and justice and fairness should prevail is it just doesn't jive with the actual language of the postconviction statute, as the chief kept pointing out.

Chief Justice:

I just want to have you take us through the statute, the statutory arguments. So in 590.04, subdivision 3, the statute provides "unless ordered by the court, the burden of proof of the facts alleged in the petition shall be upon the petitioner to establish" etc. So, so what exactly is your argument here?

Alison Key:

So whether you like it or not, you kind of have to at least address the language of the statute.

Chief Justice:

But the statute puts the burden to prove the facts on the petitioner. And the fact, it seems to me, is whether or not there was an exception to the warrant requirement.

Alison Key:

Fagin's attorney doesn't have a great way for the court to navigate that language with any real flexibility. The attorney kind of just continues to assert that it's a matter of jurisdiction and the burden is met after asserting no exigent circumstances exist.

Fagin Attorney:

A petitioner meets that burden when they assert that they were convicted of the statute that was dealt with under *Johnson* and *Trahan*, that they are convicted of something that is now presumptively no longer a crime, and that they refused a test in which the state had no warrant and there were no exigent circumstances.

Alison Key:

Fagin's attorney at one point even seems to kind of walk away from a decent textual argument advanced by the Chief, which is that the postconviction statute actually states that the petitioner bears the burden of proof "unless otherwise directed by the court," which could potentially open up an avenue for the burden here to be different in certain cases.

Chief Justice:

So your argument is not that— you're not relying on the first clause "unless otherwise directed by the court." You're not relying on that. You're saying we had a burden, we met it.

Fagin Attorney:

Right.

Mark Thomson:

And Fagin again harkens back to the issue of the practical reality of how a defendant would prove the absence of exigent circumstances if the burden was placed on the defendant.

Fagin Attorney:

This is a case that raises both legal and practical questions, the legal question of what the burden is and how it should be assigned based on case law, but also the very pressing practical questions of how a petitioner is supposed to prove a negative in the context that the State here seeks. The State rested on the fact that we could not prove the negative, that we could not prove that there was no universe in which any exigent circumstances existed.

Mark Thomson:

Alison, who's going to win this case?

Alison Key:

So that's an interesting question. It didn't sound like this was going to be a close case until about 40 minutes into oral argument. So Justice Anderson stated pretty explicitly that he thinks the burden rests with the State.

J. Anderson:

We have here a petitioner who proved that there was a warrantless arrest. Exigency is very clearly something that the State would normally prove. We're asking the defendant to prove that exception, and he's in real trouble if he forgets to prove one of those exceptions don't apply. That doesn't seem to make any sense to me. It seems to me that burden rests with the State.

Alison Key:

Justice Chutich said she can see how it'd be unfair to treat people convicted in different years separately. Just Lillehaug was trying to tease out similarities to analogies and burden shifting in other contexts. Justice Hudson pretty explicitly stated, *Johnson* says that the burden was on the State. Justice Thissen kept pressing on the burden that the State has now or would have had if it knew about how *Birchfield* was going to come down, suggesting a possible willingness to place the burden on the State. Justice McKeig right out of the gate noted that the state would have the burden to get the warrant.

J. McKeig:

Counsel, do you agree with me that it is the State's obligation and burden when requesting a warrant?

State Attorney:

I suppose in the sense that it has to demonstrate probable cause to the judge. Yes.

J. McKeig:

Tell me why that— what impact that has on your argument here.

Alison Key:

So at first it was only the Chief knd of hitting hard in oral argument with the statutory language, but then about 40 minutes in a Fagin's attorney kind of just muddied the waters and got everyone a little confused about how it makes sense to have the two elements of the crime with two distinct burdens for the petitioner, without providing real reason for that distinction. And it seemed like everyone after that point kind of got a little confused about how that would logically work. So it's hard to stay. I still think given how strongly a lot of the statements were worded about fairness and consistency from so many of

the justices, I would probably predict a win for Fagin here. Just how they can get around the logical inconsistencies will be the question.

Mark Thomson:

Yeah, that seems right to me. It's like Alison said, so many of the justices expressed concerns or attitudes that seem to favor Fagin, not settling really on one consistent line of argument. It seems like people had a divergence of lots of issues and concerns, but I bet they can cobble together four votes.

Alison Key:

So Mark, what did we learn from the case today?

Mark Thomson:

Well we'll never know what we learned from the case today because the last ten minutes or so of the oral argument video were cut out. The website says, due to technical difficulties—usually means some clerk screwed up. We see you, it happens. But I can only assume that it was ten of the finest minutes of oral argument in Minnesota Supreme Court history and we are forever deprived it.

Alison Key:

That must be where the fancy sidestepping of the statutory language and resolving all the conflicts and inconsistencies happened.

Mark Thomson:

Yeah, it's like a crescendo.

Alison Key:

We assume it was ten minutes. Could have been longer.

Mark Thomson:

Yeah.

Alison Key:

We'll never know.

Mark Thomson:

Thanks as always to our communications directors, Chloe and Joy, to the state law librarians who are endlessly helpful in getting the show off the ground, to our sponsor, the Michael Schultz Law Firm. Thanks again for listening. It's been a delight.

Alison Key:

I'm pretty sure all these facts are true, but I made up everything from memory about *Johnson*. So if it's not true, I'm sorry.

Mark Thomson:

That's hilarious. Okay.

Alison Key:
Could be true. Could be made up.

Mark Thomson:
We'll ask Kate!

Alison Key:
We'll ask Kate!