No. _____

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Respondent,

v.

MARY ANN GERMAN,
Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a decision of this Court makes a state statute unconstitutional under the Fourth Amendment, do the police get a grace period after this Court's decision under the *Davis* good faith exception?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mary Ann German respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at State v. Mary Ann German, 439 S.E.2d 912 (2023). App. 1.

JURISDICTION

The Supreme Court of South Carolina issued its opinion on April 5, 2023. The court issued an amended opinion on April 19, 2023. Petitioner timely filed a petition for rehearing which was denied on June 28, 2023. App. A46. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (a), petitioner having asserted below and herein the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Amendment IV, United States Constitution.

"[N]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . ." Amendment XIV, United States Constitution.

INTRODUCTION

Petitioner's case presents this Court with the opportunity to define the scope of the phrase "binding appellate precedent" as used in *United States v. Davis*, 564 U.S. 229 (2011). Justice Sotomayor's concurrence in *Davis* specifically invited a similar question. In *Davis*, Justice Sotomayor stated:

> [W]hether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled. The Court's answer to the former question in this case does not resolve the latter one.

Id. at 2436.

The "latter" question referenced by Justice Sotomayor was answered by the South Carolina Supreme Court in a contrived and unusual way. The state supreme court held the police violated petitioner Mary Ann German's Fourth Amendment rights when they ordered her blood drawn without her consent. *State v. German*, 887 S.E.2d 912, 922-23 (2023). But the court held the admission of German's blood alcohol level was proper under *Davis* because of the officer's "reasonable reliance" on South Carolina's implied consent statute and "its uncertain validity at the time." *Id.* at 925. The state court reached this conclusion even though the police took German's blood over three years after this Court's decision in *Missouri v. McNeely*, 569 U.S. 141 (2013) and three weeks after *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016).

STATEMENT OF THE CASE

The Altercations at the Bar

In the wee morning of July 10, 2016, petitioner Mary Ann German and her husband, Roger, sped out of a bar's parking lot fleeing threats of racial violence and ran headfirst into an oncoming car, causing a terrible crash in which the other driver died.[1] At the hospital, a police officer ordered Mary's blood drawn over her vehement objections. The police officer who ordered the blood draw testified at the suppression hearing that even though seeking a warrant from a magistrate who was on call "24/7" was possible, he did not need one when he suspected a felony DUI because he "was trained that way" when he began his law enforcement career.

On the day leading up to the fatal crash in rural Beaufort County, the couple set off from their home intent on visiting two state parks to get stamps in their Ultimate Outsider book. R. 409. The Germans, who had been married for twenty-six years, were avid campers. R. 406, 412. A bad wreck on the only highway out of the first state park delayed their departure for the second park by over five hours. R. 413-14. The July evening had already become dark when they headed out for the second park, Hunting Island, near Beaufort, South Carolina. R. 414-15. Mary drove and the rural road was empty that night. R. 415-16.

The first place they saw with its lights on was a small bar. R. 415-16, 461-62. Figuring Hunting Island park would be closed, the Germans pulled into the bar's empty parking lot to get a drink and decide where to stay for the night. R. 415-17.

[1] The South Carolina Supreme Court's Opinion failed to include any mention of the threats against the Germans or her defense of necessity.

R. 461-62. Roger thought it looked like a safe place to stop and have a beer. R. 417-18. The bar was almost empty when the Germans arrived at approximately 10:30 PM. R. 418-19.

Not much of a beer drinker, Mary decided to get a mixed drink. R. 419. A lady sitting at the corner of the bar offered the Germans "the opportunity to purchase an all you can drink bracelet for $10." R. 419. The Germans bought bracelets and went around a corner where someone was "free pouring" liquor. R. 419-20.

Unknown to the Germans, they had unintentionally become guests at "Isa and Muck's Grown and Sexy Bash." R. 420-21. The bar where they stopped was known locally as "Archie's" and was a night club. R. 156. Isa Grant and Mahogany Fields were the hostesses of the Grown and Sexy Bash and promoted the event with a flyer that said "Security strictly enforced." R. 165-66. The trial judge sustained the state's objection when defense counsel attempted to cross-examine the eponymous Archie about shootings, attempted murders, and other times the police had been called to the club. R. 216-25. The court allowed defense counsel to ask Archie in front of the jury whether people had "a habit of bringing guns and weapons" to the bar and Archie said, "That's right." R. 225-26.

Archie's started filling with people. R. 469. The Germans are white and the crowd at Archie's was Black. As it became "packed," the crowd became hostile to the Germans. R. 422-24. Somebody called Roger "a white bitch." R. 423. Several other people in the bar asked Roger "what the fuck was my white ass doing there." R. 423. Someone "shouldered" Roger. R. 423. Mary dropped a beer bottle and when she lifted

her head from picking up the broken pieces, one woman loudly said, "Who the fuck is this white bitch." R. 471-72. Roger told Mary, "It's time to go." R. 472.

"Things went from bad to worse" when the Germans got to the parking lot. R. 425. The Germans had considered spending the night in their truck when it was the only car parked in the rural parking lot, but that was no longer possible. R. 425-26. People followed them out of the bar. R. 426. The parking lot had as many people as inside the bar. R. 426. The Germans' truck was blocked by cars in the now-full lot. R. 426-28. Mary got in the truck and Roger tried to find somebody to move cars so they could leave. R. 428.

People gathered around the truck and then surrounded Roger, making more racially charged comments. R. 428-29. Roger fell to the ground dodging a punch. R. 429. As he stood up, another man pulled a gun and pointed it at Roger. R. 429. Roger put his hands in the air. R. 429.

Mary saw the man pointing the gun at Roger and "was terrified." R. 473-76. Mary quit "being careful about getting out of the parking spot," pulled up next to Roger, and told him to get in the truck. R. 479. They "took off" screaming at people to "move, move, move." R. 479. Mary said, "There was no way I was gonna watch my husband get shot." R. 481. She testified calling 911 or a cab were impossible and that, "There were no options. I couldn't go back in the club. I couldn't run away. I couldn't leave my husband there to be shot. I did the only thing that I knew to do." R. 484-86.

The Accident and the Blood Draw

Neither Mary nor Roger could remember the accident. R. 434, 489-90. The state's accident reconstruction expert said the Germans' truck pulled out of the parking lot and across a four-lane highway divided by a grassy median. R. 296-310. The truck began travelling the wrong way at 22 mph. R. 296-310. Tragically, a sedan driven by Shermain Palmer was travelling at 62 mph and collided head-on with the Germans' truck, killing him. R. 296-310.

An ambulance took Mary to the hospital where she encountered State Trooper Jeff Shumaker. R. 22-23. Trooper Shumaker read Mary the wrong implied consent rights because he "grabbed the wrong form." R. 22-23. Mary refused to cooperate with any testing. R. 36. She refused to sign the trooper's form. R. 20. She became upset. R. 36.

Trooper Shumaker nevertheless told Mary he was getting the blood. R. 43, l. 20 – 44, l. 12. He admitted it was "[p]ossible" that he told Mary that "like it or not, we are getting a blood draw." R. 44. When Mary's blood was taken at 2:00 AM, she was restrained to a bed in the emergency room. R. 8, 59. Testing revealed a blood alcohol level of 0.275. R. 393-94.

Trooper Shumaker candidly admitted the reason why he did not get a warrant: "In a case, normally, of—if there's a felony DUI involving death, we do not need permission." R. 41-42. The officer "was trained that way when I came into law enforcement." R. 42. Trooper Shumaker agreed that magistrates were on call "24/7," that he had contact information for a magistrate, that getting a warrant "could have

been possible," but nevertheless made no attempt to get a warrant for the blood draw. R. 40-41.

How the Federal Issue was Raised Below and the State Court Decisions

Mary moved to suppress the results of the blood draw arguing that a warrantless blood draw pursuant to South Carolina's implied consent statute violated the Fourth Amendment, citing *McNeely* and *Birchfield*. R. 62-89. At the suppression hearing, the state expressly waived any argument that the exigent circumstances exception to the warrant requirement applied. R. 71. The trial court ruled that *McNeely* and *Birchfield* did not make the implied consent statute unconstitutional and refused to suppress the BAC results. R. 573. The jury convicted Mary of felony DUI, death resulting, and the trial judge sentenced her to eleven years' imprisonment. R. 566.

The South Carolina Supreme Court held that application of the implied consent statute violated the Fourth Amendment. *German*, 887 S.E.2d at 920-23. After analyzing *McNeely*, *Birchfield*, and *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), the state court reasoned that "implied consent cannot justify a categorical exception to the warrant requirement. *German*, 887 S.E.2d at 922.

But the court refused to apply the exclusionary rule under the *Davis* good faith exception. *Id.* at 925-26. Even though it recognized that *McNeely* and *Birchfield* were decided before the blood draw in this case, it said that South Carolina's implied consent statute "had not been directly called into question" until a state court decision three years after the blood draw. *Id.* The court said the state trooper "reasonably

relied on [the implied consent statute] and did not violate Appellant's rights deliberately, recklessly, or with gross negligence." *Id.* The court then cited the trooper's reliance on his training (when he began his law enforcement career) that he did not need a warrant as evidence of good faith. *Id.* The trooper's reliance on the statute was reasonable because of its "uncertain validity at the time." *Id.* Mary's petition for rehearing was summarily denied. App. A46.

REASONS FOR GRANTING THE WRIT

Each time this Court issues a decision that modifies existing Fourth Amendment law or addresses a new technological development, lower courts grapple with how to apply the *Davis* good faith exception to the exclusionary rule. The lower courts apply *Davis* in different ways. Some courts apply *Davis* strictly and require "binding appellate precedent" that specifically authorizes law enforcement's action. Other courts hold that when the law is unsettled, law enforcement receives the benefit of the doubt and *Davis* applies. In the context of *McNeely* and *Birchfield*, courts routinely use the date of the offense to judge the state of the existing law at the time.

South Carolina's approach is in line with those states that give the police the benefit of the doubt when the law is unsettled and also indicates that the police may wait on the state appellate court to interpret this Court's decisions. South Carolina is a distinct outlier by not using the date of *Birchfield* to assess the state of the law. The court reasoned that *Birchfield* was "only released three weeks before the blood draw," effectively giving the police a grace period during which this Court's decisions do not apply to South Carolinians. This Court has not addressed *Davis* in a meaningful way

since it was issued in 2011, making this question ripe for certiorari and German's case presents the question cleanly.

The Strict Approach – Requiring Express Authorization for Police Conduct

The Seventh Circuit applied *Davis* strictly in a dog sniff case in the wake of *Florida v. Jardines*, 569 U.S. 1 (2013). *See United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016). This Court issued *Jardines* on March 26, 2013. On January 7, 2014, the police took a drug sniffing dog into the common area of an apartment building to detect drugs. *Whitaker*, 820 F.3d at 851. The police used the dog's indication that drugs were present at an apartment to obtain a search warrant. *Id.* at 851-52. The district court refused to suppress the drugs. *Id.*

Relying on *Jardines* and *Kyllo v. United States*, 533 U.S. 27 (2001), the Seventh Circuit had little trouble concluding that the police's actions violated the Fourth Amendment. *Id.* at 852-54. When the court turned to the *Davis* good faith exception, it noted, "At the time of this search, there was no recognized expectation of privacy in the common areas of a multi-unit apartment building." *Id.* at 854. But the court then said, "However, no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant. Therefore, the officer could not reasonably rely on binding appellate precedent, and the good-faith exception does not apply." *Id.* at 854-55. The court further reasoned that the police should have known better based on *Kyllo*. *Id.* at 855. *Whitaker*'s strict interpretation of *Davis* puts the burden on the state and the police to tie their action to a case that specifically allowed

the conduct.

Maine applied the good faith exception for the first time in the wake of *Birchfield*. *State v. Weddle*, 224 A.3d 1035, 1045-47 (Me. 2020). Despite the blood draw in *Weddle* taking place months before *Birchfield*, the Maine court engaged in a strict analysis and identified its own "binding appellate precedent." *Id.* at 1038. The court first examined *Illinois v. Krull*, 480 U.S. 340 (1987) for the reach of the exclusionary rule when dealing with an unconstitutional statute. *Id.* The court noted that officers cannot be expected to question a legislature's judgment, but also stated that an officer cannot "'be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.'" *Id. quoting Krull* at 355. The Maine court reluctantly applied the good faith exception because it had "blessed" the statute "as constitutional as recently as 2007." *Id.*

The Loose Approach

Arizona's approach at first blush appears to give defendants the benefit of the doubt when the law is unsettled. *State v. Weakland*, 434 P.3d 578 (Ariz. 2019). Arizona looked at the status of its own jurisprudence to "determine whether the law regarding a DUI admonition was 'unsettled' at the time of Weakland's arrest, meaning law enforcement officers could not rely on precedent to authorize the illegal search." *Id.* at 580-81. But the court backed away from a strict reading of *Davis* and endorsed a forgiving analysis for the police on whether the law was unsettled. *Id.* "We see no reason to limit the good-faith exception to police practices that appellate precedent specifically authorizes when the rationale for the exception applies with equal force

where binding appellate precedent otherwise supports the practice." *Id.* "It is the exclusionary rule, not the good-faith exception to it, that we turn to as a 'last resort.'" *Id.* at 584.

Ohio used a loose approach to good faith in *State v. Eads*, 154 N.E.3d 538 (Ohio Ct. App. 2020). The blood draw in *Eads* was post-*Birchfield*. *Eads*, 154 N.E.3d at 541-42. Instead of using a forced blood draw under an implied consent statute, the police obtained the defendant's blood from the hospital months later in reliance on a different statute allowing the police to get drug and alcohol results from a health care provider. *Id.*

The Ohio court analyzed both *Birchfield* and *Carpenter v. United States*, 138 S.Ct. 2206 (2018) and determined that the police needed a warrant to get the defendant's blood from the hospital. *Id.* at 543-49. Despite the illegal search, the court concluded the good faith exception applied. *Id.* at 549-50. Some Ohio appellate courts "had already held" that statutes did not authorize such warrantless searches. *Id.* But neither the Ohio Supreme Court nor the specific court of appeal in *Eads* had decided the issue. *Id.* The court also looked to other jurisdictions and the Sixth Circuit and found the law to be uncertain. *Id.*

The Lack of Grace Periods in Jurisdictions Other than South Carolina

South Carolina's approach in *German* gives a grace period to the police. The court reasoned that *Birchfield* was "only released three weeks before the blood draw," and applied the *Davis* good faith exception. *German*, 887 S.E.2d at 925. This approach will introduce an element of subjectivity into the good-faith inquiry. Defense lawyers

will need to discover training methods and find out what an officer knew or should have known about this Court's decisions.

Contrast South Carolina's grace period with the objective standard applied by Florida. *See Campbell v. State*, 288 So.3d 739 (Fla. Dist. Ct. App. 2019). In *Campbell*, the defendant was arrested and had his blood drawn the day after this Court issued *Birchfield*. *Id.* at 741. The trial judge applied the good faith exception finding that it was unreasonable to expect an officer to know about *Birchfield* so soon. *Id.* The Florida appellate court rejected this reasoning, stating, "Although it is understandable that a police officer might be unaware of the holding of a controlling court opinion within a day or two of its issuance, we conclude that the good faith exception cannot be applied where the police officer's acts occur subsequent to a binding appellate court decision which determines that such acts are violative of the Fourth Amendment." *Id.*

The Florida court's rationale uses the objective measure of the date of police conduct versus the date of the decision from this Court. Keeping the good faith exception simple and easy to apply eliminates the need for any subjective inquiry into training or what the officer actually knew. This rationale is also in keeping with this Court's jurisprudence favoring objective tests instead of subjective approaches in the Fourth Amendment context. *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Nebraska applied the same objective analysis in *State v. Nielsen*, 917 N.W.2d 159, 162-63 (Neb. 2018). The court compared the date of the police action with the date

Birchfield was issued. *Id.* Because the officer's conduct occurred before *Birchfield*, the Nebraska court concluded that the good faith exception applied. *Id. See also State v. Miller*, 295 So.3d 443, 459-460 (La. Ct. App. 2020) (comparing date of conduct with date of *Birchfield* and concluding good faith exception applied); *Commonwealth v. Updike*, 172 A.3d 621, 627 (Pa. Super. Ct. 2017) (comparing date of conduct with date of *Birchfield* and concluding good faith exception applied).

The Importance of this Question as the Pace of Technological Change Accelerates

Law enforcement's use of technology will continue to make the good faith issue important. In the last ten years, this Court decided *Riley v. California*, 573 U.S. 373 (2014) and *Carpenter*, both dealing with cell phones and the Fourth Amendment. Facial recognition, license plate readers with mass storage, drones, stingrays, and other technologies will be employed by the police in creative ways. Each time the police use a new technological device, the reach of *Davis* will come into play. Advocates of a strict approach to *Davis* will want the police to assume they cannot use a new technology without a warrant. Advocates of a loose approach will argue that *Davis* means that if an appellate court has not prohibited a new technology's use, the police do not need a warrant and relief will be denied to that defendant (and subsequent defendants) based on the good faith exception.

The Issue is Ripe and German's Case Presents a Clean Question for this Court's Review

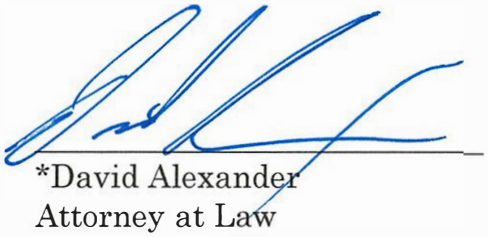
This Court has not examined the scope of *Davis* since it was issued, citing it briefly nine times. *United States v. Gonzalez*, 564 U.S. 1032 (2011) (GVR of Ninth Circuit decision); *Colorado v. Key*, 564 U.S. 1033 (2011) (GVR of Colorado decision);

Kentucky v. Velasquez, 564 U.S. 1032 (2011) (GVR of Kentucky decision); *Heien v. North Carolina*, 574 U.S. 54 (2014) (holding reasonable mistake of law by an officer can give rise to reasonable suspicion, citing *Davis* with no discussion); *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (quoting *Davis* in a non-Fourth Amendment case); *Utah v. Strieff*, 579 U.S. 232 (2016) (citing *Davis* briefly for the proposition that "The exclusionary rule exists to deter police misconduct."); *Collins v. Virginia*, 138 S.Ct. 1663 (2018) (citing *Davis* in Justice Thomas's concurrence concerning application of the exclusionary rule); *California v. Texas*, 141 S.Ct. 2104 (2021) (citing *Davis* in dissent about standing in a non-Fourth Amendment case); *Lange v. California*, 141 S.Ct. 2011 (2021) (citing *Davis* in Justice Thomas's concurrence concerning application of the exclusionary rule). The good faith issue arises both with new technologies and, as is the case here, with old technology. The issue is ripe for this Court's attention.

German's case presents the issue cleanly. Her arrest was after *Birchfield*. No serious dispute exists that the blood draw violated her Fourth Amendment rights. The *Davis* good faith exception is the only constitutional issue at play. Granting certiorari in German's case will allow this Court to address the question Justice Sotomayor correctly predicted would arise after *Davis*.

CONCLUSION

By reason of the foregoing arguments, this Court should grant a writ of certiorari and allow full briefing on this issue.



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