No. _____

In the Supreme Court of the United States

MARY ANN GERMAN, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

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

APPENDIX

DAVID ALEXANDER
Attorney at Law

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
dalexander@sccid.sc.gov
(803) 734-1330

ATTORNEY FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Mary Ann German, Appellant.

Appellate Case No. 2018-002090

Appeal from Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 28149
Heard September 21, 2021 – Filed April 5, 2023
Re-Filed April 19, 2023

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia; Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

CHIEF JUSTICE BEATTY: Appellant was convicted of felony driving under the influence ("DUI") resulting in death and sentenced to eleven years'

incarceration. Before trial, Appellant moved to suppress evidence of her blood alcohol content ("BAC") obtained through a warrantless blood draw, which was taken pursuant to section 56-5-2946 of the South Carolina Code[1] while she was hospitalized after an automobile accident. Finding that section 56-5-2946 was constitutional as applied and unchanged by the holdings of *McNeely*[2] and *Birchfield*,[3] the trial court denied the motion to suppress. The court concluded that

[1] Section 56-5-2946 provides in relevant part:

> (A) Notwithstanding any other provision of law, a person *must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945 [felony DUI].
>
> (B) The tests must be administered at the discretion of a law enforcement officer. The administration of one test does not preclude the administration of other tests. The resistance, obstruction, or opposition to testing pursuant to this section is evidence admissible at the trial of the offense which precipitated the requirement for testing. A person who is tested or gives samples for testing may have a qualified person of his choice conduct additional tests at his expense and must be notified of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial.

S.C. Code Ann. § 56-5-2946(A)–(B) (2018) (emphasis added).

[2] *Missouri v. McNeely*, 569 U.S. 141 (2013) (holding the natural metabolization of BAC does not create a per se exigency as an exception to the Fourth Amendment's warrant requirement).

[3] *Birchfield v. North Dakota*, 579 U.S. 438 (2016) (holding warrantless breath tests, but not blood tests, are permitted as searches incident to arrest under the Fourth Amendment).

law enforcement had probable cause to suspect Appellant of felony DUI and properly obtained the blood draw pursuant to section 56-5-2946.

Appellant appealed her conviction based on the denial of her motion, and the court of appeals requested certification pursuant to Rule 204(b), SCACR. We agreed to consider whether the warrantless blood draw based on section 56-5-2946 violated Appellant's Fourth Amendment rights or her rights under the South Carolina Constitution and, in effect, whether section 56-5-2946 is constitutional.

We conclude section 56-5-2946 is facially constitutional but unconstitutional as applied in Appellant's case. However, we find the trial court did not err in denying Appellant's motion to suppress because law enforcement acted in good faith based on existing precedent at the time of the blood draw. We affirm Appellant's conviction.

I. FACTS

On July 9, 2016, Appellant and her husband were diverted from their vacation camping plans due to traffic and decided to pull off Highway 21 in Beaufort County. The couple decided to rest for the evening and have a few drinks at a bar, known locally as "Archie's." There, patrons offered the couple an all-you-can-drink bracelet for ten dollars as part of an event being held that night. The bar served "free pouring" liquor, and Appellant consumed a beer and four to six vodka drinks.

Around 12:30 a.m., Appellant drove their truck off the property. Upon leaving the parking lot, Appellant entered the road, ran the stop sign before Highway 21, and drove into the wrong side of the divided highway. Her truck collided with a sedan head-on, and, tragically, the other driver did not survive the collision.

Paramedics, firefighters, and police officers all responded to the collision. First responders extracted Appellant and her husband from the vehicle, and a responding officer noted an alcoholic odor emanating from each of them. The responding paramedics placed Appellant into an ambulance and noted an ethanol smell from Appellant. In response to paramedics' questions, Appellant heavily slurred her speech. One paramedic testified Appellant was intoxicated.

In the early morning hours of July 10, 2016, Appellant arrived at Beaufort Memorial Hospital by EMS on a backboard, and medical professionals expressed concern she had a serious head injury. However, Appellant's only ultimate injury was a laceration on the bottom of her foot. Later, Appellant became belligerent and

agitated. The emergency room physician testified that, based on her medical opinion, Appellant was intoxicated.

After arriving on the scene of the collision, a state trooper went to the hospital to obtain a blood draw from Appellant, who was the driver of the truck involved in the accident. Based on hearing information from other law enforcement officers, being at the scene himself, and observing Appellant at the hospital, the trooper suspected Appellant of felony DUI. He placed Appellant under arrest at the hospital around 2:00 a.m.

The trooper read Appellant her rights pursuant to the implied consent statute. However, instead of reading the felony DUI advisement of rights form, he read Appellant the advisement of rights form for misdemeanor DUI because he inadvertently "grabbed the wrong form." Regardless, Appellant resisted cooperation and refused to sign the paperwork detailing her rights. The emergency room physician declined to release Appellant for a breath test within the two-hour window to take Appellant to a police station for a breath test as required by law.[4] Because the trooper could not administer a breath test in the hospital, he ordered a blood draw while Appellant was in a hospital bed.[5] Appellant's BAC registered 0.275%.

[4] *See* S.C. Code Ann. § 56-5-2950(A) (2018) ("At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, *or for any other reason considered acceptable by the licensed medical personnel*, the arresting officer may request a blood sample to be taken . . . . A breath sample taken for testing must be collected *within two hours of the arrest*. Any additional test to collect other samples must be collected within three hours of the arrest." (emphasis added)).

[5] Pursuant to section 56-5-2946, if there is probable cause to believe an individual violated the felony DUI statute or is under arrest for felony DUI, he or she "*must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs." S.C. Code Ann. § 56-5-2946(A) (2018) (emphasis added); *see also State v. Long*, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005) (holding in a felony DUI case, an officer need not offer a breath test as the first testing option, nor

The trooper was the only officer at the hospital, and neither he nor any other responding officer sought a warrant to collect the sample of Appellant's blood. He conceded on cross examination that his office had provided him with a number to reach a magistrate late at night and he had used the number before. He also admitted it was "[p]ossible" to obtain a warrant; however, he explained that he did not seek a warrant because he "was trained . . . when [he] came into law enforcement" that "if there's a felony DUI involving death, [he] [did] not need permission." He told Appellant, "like it or not, we are getting a blood draw."

Three months before trial, the court heard arguments on Appellant's motion to suppress evidence of the blood draw and its results. Appellant focused her argument on an as-applied challenge rather than a facial challenge to the constitutionality of the statute. Specifically, she believed there is a way to read the statute such that a person, who is suspected upon probable cause of committing felony DUI, must consent. However, Appellant maintained that, under the facts in this case, a search warrant was necessary and only a neutral and detached magistrate could determine probable cause for a search warrant. Conversely, the State argued that, under section 56-5-2946, the probable cause to arrest Appellant for felony DUI is sufficient to eliminate the need to obtain a warrant. The State waived its argument that the officer relied on the exceptions for a search incident to an arrest or exigent circumstances and, instead, relied solely on the felony DUI statute.

The court, finding the statute constitutional as applied, ultimately adopted the State's arguments and denied the motion to suppress. Appellant renewed the motion throughout trial, and this appeal followed.

II. STANDARD OF REVIEW

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

must the officer obtain a medical opinion that such a test is not feasible before ordering a blood test or urine sample).

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id.* at 570, 549 S.E.2d at 597.

III. DISCUSSION

Appellant contends the trial court erred in denying her motion to suppress the BAC results because the warrantless blood draw violated the Fourth Amendment's prohibition against unreasonable searches and seizures. Appellant further argues the warrantless blood draw violated her right against unreasonable invasions of privacy in South Carolina's Constitution. Additionally, Appellant avers the State waived any reliance on the exceptions for exigent circumstances and a search incident to an arrest. Even if preserved, Appellant maintains the State failed to prove an applicable exception that would justify the warrantless blood draw. Finally, Appellant contends any error in admitting the BAC results cannot be harmless.

In response, the State claims the trial court correctly denied Appellant's motion to suppress the BAC results. The State argues the warrantless search was reasonable because exigent circumstances existed and the search was a permissible search incident to a lawful arrest. The State further maintains the good-faith exception applies and, if the trial court erred, the error was harmless.

Initially, we note that our appellate courts have said that an operator of a motor vehicle in South Carolina is not required to submit to alcohol or drug testing. *Sanders v. S.C. Dep't of Motor Vehicles*, 431 S.C. 374, 383, 848 S.E.2d 768, 773 (2020) (citing *S.C. Dep't of Motor Vehicles v. Nelson,* 364 S.C. 514, 522, 613 S.E.2d 544, 548 (Ct. App. 2005)). Both *Sanders* and *Nelson* involved suspended driver's licenses due to refusal to submit to an alcohol breath test. However, these cases are distinguishable from the case now before this Court because they involved civil penalties, not criminal convictions; they did not address the constitutionality of the statutes; and the decisions appear to be founded on statutory interpretation. Nonetheless, it is arguable that our appellate courts have spoken on the issue of mandatory alcohol and blood testing, even if some may view it as dicta. In any case, clarity of the law is needed.

A. Constitutionality under the Fourth Amendment to the U.S. Constitution

This Court has recognized that a blood draw is a search and seizure under the Fourth Amendment in a triad of cases dealing with our implied consent statutes. *See State v. Key*, 431 S.C. 336, 344, 848 S.E.2d 315, 318 (2020) (remanding the case for a determination of exigent circumstances which the State has the burden to establish); *State v. McCall*, 429 S.C. 404, 410, 839 S.E.2d 91, 93 (2020) (holding exigent circumstances justified the warrantless blood draw); *Hamrick v. State*, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019) (declining to address exigent circumstances where the good-faith exception justified the warrantless blood draw). Further, the United States Supreme Court has held a blood draw is a search under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

Under the Fourth Amendment, people are free from unreasonable searches and seizures by their government. *McCall*, 429 S.C. at 409, 839 S.E.2d at 93. A warrantless search is unreasonable per se, unless it falls within a recognized exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 382 (2014); *see also State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) (noting a warrantless search is *per se* unreasonable). The recognized exceptions to the warrant requirement are search incident to a lawful arrest, hot pursuit, stop and frisk, the automobile exception, the plain view doctrine, consent, and abandonment. *State v. Counts*, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015). Three exceptions to the warrant requirement are considered here: search incident to a lawful arrest, consent, and exigent circumstances.

During the pretrial suppression hearing, the State argued that the blood draw was taken solely pursuant to section 56-5-2946 and expressly waived any reliance on the search incident to a lawful arrest and exigent circumstances exceptions. Accordingly, we decline to address these exceptions to the warrant requirement. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). In our analysis, we depend solely on the consent exception to the warrant requirement; however, we briefly discuss the other exceptions as they have developed.

South Carolina's implied consent statute provides in relevant part:

> [A] person *must submit* to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if

there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945 [felony DUI].

S.C. Code Ann. § 56-5-2946(A) (2018) (emphasis added). Although our jurisprudence already has considered our implied consent statutes, we have not yet directly addressed their constitutionality. In *McCall*, we reserved that question for a future case: "While we leave this question for another day, we do note numerous courts have cast doubt on the constitutionality of similar implied consent statutes." 429 S.C. at 413 n.3, 839 S.E.2d at 95 n.3. We address that question today.

Over the years, we have seen a jurisprudential movement, in both this Court and the United States Supreme Court, calling into question the constitutionality of implied consent statutes. In *Schmerber*, the United States Supreme Court recognized that, despite the usual need for a warrant, an officer might have reasonably believed there was an emergency and a blood draw was an appropriate search incident to an arrest. 384 U.S. at 770–71 (holding the case specific facts allowed a warrantless blood draw because the officer might have reasonably believed there was an emergency). However, years later, the United States Supreme Court held the dissipation of alcohol in the blood alone does not categorically create an exigent circumstance. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (holding the warrantless blood draw of a suspected drunk driver as an exigent circumstance requires a "case-by-case analysis under the totality of the circumstances"). In *McNeely*, the United States Supreme Court justified the previous holding in *Schmerber* with its specific facts. *Id.* at 152, 156.

More recently, in *Birchfield v. North Dakota*, the United States Supreme Court held a warrantless blood draw cannot be taken as a search incident to an arrest.[6] 579 U.S. 438, 476 (2016). The Court considered the more intrusive nature

[6] At oral argument, the State asked this Court to limit *Birchfield* to its facts—a misdemeanor DUI—as part of its argument that the blood draw was a valid search incident to arrest. In *Birchfield*, the United States Supreme Court held a breath test, but not a blood test, may be administered as a search incident to a lawful arrest. 579 U.S. at 476. We, however, decline to apply *Birchfield* to only misdemeanor DUI cases because the United States Supreme Court in no way limited its holding in *Birchfield* to only misdemeanor cases. In fact, the Court weighed the government's interest in preventing traffic fatalities with privacy interests in light of the "carnage"

of a blood draw against the less intrusive breath test because a blood draw pierces the skin, takes a sample from the body, and preserves it indefinitely. *Id.* at 463–64, 474. Breath tests, the Court said, are permissible as searches incident to arrests because they have little physical intrusion, the test only reveals the amount of alcohol in the person's breath, and participation in the test is unlikely to enhance the arrestee's embarrassment. *Id.* at 461–63.

In 2019, the United States Supreme Court again revisited the doctrine of exigent circumstances when considering a challenge to an implied consent statute. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). There, the Court refined its holdings in *Schmerber* and *McNeely* to permit an exigent circumstances exception when, "(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." *Id.* at 2537. The Court noted, "[B]oth conditions are met when a drunk-driving suspect is unconscious." *Id.* Yet, the Court made clear:

> We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Id. at 2539. However, in *Key*, we declined to place the burden of proving the absence of an exigency on the defendant:

> We cannot sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case. We must therefore part company with the *Mitchell* Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement.

431 S.C. at 348, 848 S.E.2d at 321 (internal citations omitted).

and "slaughter" caused by drunk drivers. *Id.* at 465. We believe the Court, in its analysis, considered the government's heightened interest in preventing felony DUIs.

Similarly, this Court has seen a gradual movement in our case law governing South Carolina's implied consent statutes. First, in interpreting section 56-5-2946, we held an officer need not offer first a breath test before ordering a blood test for a felony DUI suspect. *State v. Long*, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005). We then declined to address the constitutionality of our implied consent statute in *Hamrick*, where the good-faith exception to the exclusionary rule applied. 426 S.C. at 655, 828 S.E.2d at 604–05. In *McCall*, we reserved the question of section 56-5-2946's constitutionality and held exigent circumstances otherwise justified the warrantless blood draw. 429 S.C. at 413, 839 S.E.2d at 95. Most recently, in *Key*, we ruled, even when the suspect is unconscious, the prosecution has the sole burden of proving exigent circumstances. 431 S.C. at 348, 848 S.E.2d at 321. Parting ways with the *Mitchell* Court, we remanded the case for that determination. *Id.* at 349, 848 S.E.2d at 321.

Notwithstanding the development in the law, we continue to recognize the wisdom of implied consent statutes and note their valid, remedial purposes. *See Sanders v. S.C. Dep't of Motor Vehicles*, 431 S.C. 374, 848 S.E.2d 768 (2020) (affirming the suspension of a driver's license where the suspected driver refused to take a BAC test).[7] Drivers in South Carolina do not hold a right to operate motor vehicles but, instead, have a privilege subject to reasonable regulation. *Id.* at 382–83, 848 S.E.2d at 773. Valid purposes behind regulating conduct with implied consent statutes include obtaining best evidence of a driver's BAC and promoting traffic safety by removing dangerous drivers from the roads. *Id.* at 383, 848 S.E.2d at 773.

Moreover, the distinction between a categorical exception and a general exception to the Fourth Amendment informs our judgment. The United States Supreme Court has recognized a limited class of categorical exceptions to the warrant requirement. *McNeely*, 569 U.S. at 150 n.3. The two types are distinguished by whether or not the exception requires a factually specific inquiry on a case-by-case basis. *Id.* Categorical exceptions, including the automobile exception[8] and the

[7] We also recognize the United States Supreme Court in *Birchfield* noted the general validity of implied consent statutes. 579 U.S. at 476–77. The *Birchfield* Court called only a warrantless blood draw as a search incident to an arrest into question.

[8] *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 580 (1991) ("We therefore interpret *Carroll* [*Carroll v. United States*, 267 U.S. 132 (1925)] as providing one rule to govern all automobile searches. The police may search an automobile and the

search incident to a lawful arrest exception,[9] do not require "an assessment of whether the policy justifications underlying the exception . . . are implicated in a particular case." *Id.* On the other hand, general exceptions require case-by-case inquiries and analyses. *Id.*

Consent operates as a general exception because it demands a fact-specific determination of whether the suspect invoked her consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("Similar considerations lead us to agree [] that the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

In analyzing the constitutionality of section 56-5-2946, we must also consider the difference between as-applied and facial constitutional challenges. "The line between facial and as-applied relief is [a] fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." *Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (quoting 16 C.J.S. *Constitutional Law* § 153, at 147 (2015)) (holding petitioner could only make an as-applied challenge because petitioner did not attack the acts as a whole and this Court has a preference to remedy constitutional infirmities in the least restrictive way possible). "The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

"One asserting a facial challenge claims that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Doe*, 421 S.C. at 502, 808 S.E.2d at 813 (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)). "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015). Under a facial challenge, "a

containers within it where they have probable cause to believe contraband or evidence is contained.").

[9] *See, e.g.*, *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

plaintiff must establish that a 'law is unconstitutional in all of its applications.'" *Id.* at 418 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). Conversely, "[i]n an 'as-applied' challenge, the party challenging the constitutionality of the statute claims that the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.'" *Doe*, 421 S.C. at 503, 808 S.E.2d at 813 (citation omitted).

Returning to the question presented, we recognize an implied consent statute cannot allow what the Fourth Amendment prohibits. Therefore, to satisfy the requirements of the United States Constitution, a warrantless blood draw pursuant to section 56-5-2946 generally must rely on the consent exception[10] to the warrant requirement.[11]

The Fourth Amendment requires a finding that consent be given voluntarily under the totality of the circumstances. *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) (citing *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Durades*, 929 F.2d 1160 (7th Cir. 1991); *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993)); *see also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (holding consent as an exception to the warrant requirement must be voluntarily given). We further recognize that a valid finding of consent requires a suspect to be able to refuse or revoke consent. *See State v. Bruce*, 412 S.C. 504, 511, 772 S.E.2d 753, 756 (2015) (holding a suspect did not object to an officer picking up keys to access a car during a search to which the suspect consented); *State v. Prado*, 960 N.W.2d 869, 879–80 (Wis. 2021) (noting a person has a constitutional right to refuse a warrantless search). Consequently, implied consent cannot justify a categorical exception to the general warrant requirement.

Here, the trial court unconstitutionally applied section 56-5-2946 to the warrantless search of Appellant's blood. Because the statute is not unconstitutional

[10] *But see Mitchell*, 139 S. Ct. at 2531 (recognizing exigent circumstances almost always allows a warrantless blood test).

[11] Despite the State's insistence that section 56-5-2946 is constitutional as a search incident to an arrest, we find, fundamentally, it must rely on consent. As *Birchfield* made clear, a blood draw cannot be constitutional as a search incident to an arrest, and we decline to limit *Birchfield* to its facts. *See supra* n.6.

in all its applications, Appellant brings an as-applied challenge to its constitutionality. As applied, the trial court should have conducted an inquiry into Appellant's consent to determine whether her Fourth Amendment rights were violated. Several cases from other jurisdictions, among others,[12] have followed and applied this reasoning, often recognizing statutes as invalid when they do not fall within an exception to the warrant requirement.

In *Prado*, the Supreme Court of Wisconsin found Wisconsin's incapacitated driver provision unconstitutional beyond a reasonable doubt because it did not fit within any recognized exceptions to the warrant requirement. 960 N.W.2d at 878. There, the court distinguished the exigent circumstances exception and the consent exception to the Fourth Amendment's warrant requirement. *Id.* at 879. Turning to consent, the court made the following finding:

> In the context of warrantless blood draws, consent "deemed" by statute is not the same as actual consent, and in the case of an incapacitated driver the former is incompatible with the Fourth Amendment. Generally, in determining whether constitutionally sufficient consent is present, a court will review whether consent was given in fact by words, gestures, or conduct. This inquiry is fundamentally at odds with the concept of "deemed" consent in the case of an incapacitated driver because an unconscious person can exhibit no words, gestures, or conduct to manifest consent.

Id. (internal citations omitted). The court further recognized that "[t]he concept of a statutory per se exception to the warrant requirement violates both *McNeely* and *Birchfield*," as we agree today. *Id.* at 880; *supra* nn.6 & 7. Although the Wisconsin court considered the constitutionality of the incapacitated driver provision,

[12] *See, e.g.*, *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017) ("In recent years, a multitude of courts in our sister states have interpreted their respective—and similar—implied consent provisions and have concluded that the legislative proclamation that motorists are deemed to have consented to chemical tests is insufficient to establish the voluntariness of consent that is necessary to serve as an exception to the warrant requirement."); *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014) ("[I]rrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent.").

distinguishable from our statute, here, Appellant had the ability to exhibit and effectuate words, gestures, and conduct to manifest her opposition to the search. Seeing as the court was concerned about unconscious drivers not having the ability to evince consent, there exists no greater manifestation than when the suspect is conscious.

Further, in *Williams v. State*, the Supreme Court of Georgia reiterated, "[T]his [c]ourt plainly distinguished compliance with the implied consent statute from the constitutional question of whether a suspect gave *actual consent* for the state-administered testing." 771 S.E.2d 373, 376 (Ga. 2015). There, because the trial court did not determine whether the defendant gave his consent under the exception, the Supreme Court of Georgia vacated the judgment and remanded the case to determine the voluntariness of the consent under the totality of the circumstances. *Id.* at 377.

Additionally, in *State v. Yong Shik Won*, the Supreme Court of Hawaii found, "[I]n order to legitimize submission to a warrantless BAC test under the consent exception, consent may not be predetermined by statute, but rather it must be concluded that, under the totality of the circumstances, consent was in fact freely and voluntarily given." 372 P.3d 1065, 1080 (Haw. 2015). In considering Hawaii's implied consent law, the court further found, "[A] person may refuse consent to submit to a BAC test under the consent exception, and the State must honor that refusal." *Id.*

Again, analyzing consent, the Supreme Court of Nevada, in *Byars v. State*, found the exigent circumstances exception did not justify the warrantless blood draw. 336 P.3d 939, 944–45 (Nev. 2014). The state, there, argued consent was implied from the driver's decision to drive on Nevada's roads. *Id.* However, the court held consent cannot be irrevocable by electing to drive on Nevada's roads. *Id.* Further, the implied consent statute allowing for an officer to use force to obtain a blood sample could not be read constitutionally because it does not allow a driver to withdraw consent and, thus, is not given voluntarily. *Id.* at 946.

Turning to the instant case, we conclude Appellant did not consent to the warrantless blood draw while hospitalized on the night of the accident. First, the state trooper acknowledged that he could have procured a warrant, yet he decided to order the blood draw without one. As he testified, he relied solely on what he thought section 56-5-2946 authorized. Second, Appellant refused to sign the implied consent form the state trooper presented to her, even though it was the wrong form.

Appellant's signature was marked, "refused to sign." Third, Appellant, by her actions, did not impliedly consent. She became belligerent and was obstinate with hospital personnel. Fourth, when ordering the blood draw, the state trooper told Appellant, "like it or not, we are getting a blood draw." Under the totality of the circumstances, by her actions, Appellant refused to consent to the warrantless search. Because the state trooper proceeded anyway and section 56-5-2946 does not exist as a separate exception to the general warrant requirement, the blood draw was an unreasonable search and seizure under the Fourth Amendment.

Although we find section 56-5-2946 unconstitutional as applied to Appellant, we conclude this section is facially constitutional. "Finding a statute or regulation unconstitutional as applied to a specific case does not affect the facial validity of that provision." *Travelscape v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011). Faithful to our standard of review, we recognize that an officer legally can obtain a warrant or the suspect's consent to request a blood draw, pursuant to the Fourth Amendment's mandates. Exigent circumstances also justify a warrantless blood draw in the proper case. *Mitchell*, 139 S. Ct. at 2531. Additionally, breath tests do not intrude greatly into the body, they do not reveal more than one piece of information, and they do not cause more embarrassment than what is inherent in an arrest. *Birchfield*, 579 U.S. at 462–63. Accordingly, we recognize the continued validity of section 56-5-2946, as it authorizes implied consent for breath tests.

B. Constitutionality under the South Carolina Constitution

Appellant maintains the State violated her right against unreasonable invasions of privacy. We agree.

The South Carolina Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* 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, the person or thing to be seized, and the information to be obtained.

S.C. Const. art. I, § 10 (emphasis added). We have interpreted South Carolina's express right against unreasonable invasions of privacy provision to provide greater—or, a more "heightened"—protection than that provided by the United

States Constitution. *State v. Weaver*, 374 S.C. 313, 321, 649 S.E.2d 479, 483 (2007) (holding ultimately the search in question met the automobile exception to the warrant requirement and did not violate the more expansive right to privacy); *see also State v. Brown*, 423 S.C. 519, 533, 815 S.E.2d 761, 769 (2018) (Beatty, C.J., dissenting) (noting the heightened protection afforded by the state constitution and finding it protected petitioner from the warrantless search of his cell phone). "State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 625 n.13 (1997). "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). "South Carolina and the other states with a right to privacy provision imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context." *Id.* at 644, 541 S.E.2d at 841.

In the context of medical treatment, we held the State violates the right of privacy when a prison inmate would be forced to take medication solely for the purpose of facilitating execution. *Singleton v. State*, 313 S.C. 75, 89, 437 S.E.2d 53, 61 (1993). Further, we declared, "An inmate in South Carolina has a very limited privacy interest when weighed against the State's penological interest; however, the inmate must be free from unwarranted medical intrusions." *Id.*

In *Forrester*, this Court considered whether the right against unreasonable invasions of privacy requires informed consent to government searches. Although we held in *Forrester* that South Carolina's right against unreasonable invasions of privacy did not require informed consent on the part of the suspect before government searches,[13] we noted the drafters of the constitution were concerned with the emergence of new technology increasing the government's ability to conduct a search. *Id.* at 647–48, 541 S.E.2d at 842–43. Specifically, we recognized the special committee to study the constitution, in drafting the provision, both intended for it to

[13] Ultimately, in *Forrester*, we reversed the court of appeals and found that an officer exceeded the scope of Forrester's consent when he searched the contents of her pocketbook beyond a visual inspection in violation of her right against unreasonable invasions of privacy. *Id.* at 648, 541 S.E.2d at 843.

cover electronic surveillance and recognized it would have a far greater impact. *Id.* at 647, 541 S.E.2d at 842. Later, we explained in *Weaver*:

> The focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy to be searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met.

374 S.C. at 322, 649 S.E.2d at 483.

In *State v. Counts*, this Court again had an opportunity to expand the analysis in *Forrester* and *Weaver*. In *Counts*, the petitioner argued the "knock and talk" technique done without probable cause or reasonable suspicion violated article I, section 10. 413 S.C. 153, 162, 776 S.E.2d 59, 65 (2015). We looked to other jurisdictions with similar rights against unreasonable invasions of privacy for guidance. *Id.* at 170–71, 776 S.E.2d at 69. However, we did not find a persuasive basis to require an officer to tell a citizen of his or her right to refuse consent to a search. *Id.* at 171, 776 S.E.2d at 69. Continuing the development of the law, we noted there must be some analysis of the privacy interests involved when a warrantless search is made: "Because the privacy interests in one's home are the most sacrosanct, we believe there must be some threshold evidentiary basis for law enforcement to approach a private residence." *Id.* at 172, 776 S.E.2d at 69. In applying the new rule, we upheld the trial court's denial of petitioner's motion to suppress because the findings of fact established law enforcement's reasonable suspicion to conduct the "knock and talk." *Id.* at 173, 776 S.E.2d at 70.

Turning to the instant case, we find the provision in our state constitution is implicated when law enforcement obtains a warrantless blood draw. As the United States Supreme Court recognized in *Schmerber v. California*, there is a constitutional right to privacy in one's blood. 384 U.S. 757, 767 (1966). Because blood draws intrude upon an individual's privacy to a much higher degree, the Court distinguished a blood draw from a breath test in Fourth Amendment jurisprudence precisely. *Birchfield*, 579 U.S. at 463–64. Blood tests require piercing the skin and the extraction of a part of the person's body, and a blood test provides law enforcement with a preservable sample that contains a person's DNA and other medical information besides the BAC reading. *Id.* at 464. The drafters of our constitutional provision were concerned with the emergence of new technology

enabling more invasive searches, and a blood test's process certainly is one of the most invasive government searches a suspect may encounter.

Although the state trooper had, at a minimum, a reasonable evidentiary basis to believe Appellant committed the felony DUI before obtaining the blood draw, Appellant refused consent to the search. In *Counts* and *Forrester*, we held law enforcement was not required to inform the suspect of the right to refuse consent prior to a search; however, had Counts or Forrester nevertheless refused consent, law enforcement would have needed to obtain a warrant to proceed with the search. Because Appellant clearly refused her consent by refusing to sign the implied consent form and she acted inconsistently with consent, the state trooper needed to obtain a warrant to legally proceed with the blood draw under the South Carolina Constitution. Because he ordered the blood draw despite Appellant's refusal, he violated Appellant's right to be free from an unreasonable invasion of privacy.

Nevertheless, we still must closely scrutinize "unwarranted medical intrusions" to effectuate the protection of South Carolina's right against unreasonable invasions of privacy. *Singleton*, 313 S.C. at 89, 437 S.E.2d at 61. At bottom, implied consent, as referred to in the impaired driver statutory scheme, is non-existent outside of matters involving the civil suspension or revocation of driver's licenses. There is no constitutionally approved, statutory per se implied consent to a blood draw. Law enforcement's demand for a warrantless blood test must be founded on an approved exception to the warrant requirement of the Fourth Amendment. A mandatory and forced blood draw is patently distinct from other modes of DUI investigation and, consequently, violates the South Carolina Constitution when administered without a warrant.

C. Good faith

Even though the warrantless blood draw violated Appellant's rights under the Fourth Amendment and our state constitution, the State asserts the exclusionary rule should not apply because law enforcement acted in good faith. We agree.

The exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Leon*, 468 U.S. 897 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). "[T]he sole purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis v. United States*, 564 U.S. 229, 246 (2011). The rule does not

apply "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Id.* at 238. In *Davis*, the United States Supreme Court concluded the officers who conducted the search did not violate Davis's Fourth Amendment rights "deliberately, recklessly, or with gross negligence." *Id.* at 240. Where there is no misconduct and no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction." *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014).

In *Hamrick*, we held the good-faith exception to the exclusionary rule applied and BAC evidence from the blood test was admissible. 426 S.C. at 653, 828 S.E.2d at 604. The warrantless blood draw occurred on November 14, 2011, two years before the Supreme Court's ruling in *McNeely*. *Id.* at 643, 828 S.E.2d at 598. Because the law seemed to support the existence of exigent circumstances before the *McNeely* ruling, we ruled the officers acted lawfully based on a reasonably good-faith belief. *Id.* at 654, 828 S.E.2d at 604.

Here, Appellant's blood was drawn in the early morning hours of July 10, 2016 pursuant to section 56-5-2946, which had not been directly called into question in this state until *McCall*, over three years later.[14] At the time, *McNeely* only declined to create a categorical exigency in every DUI case. *Birchfield*, though it most seriously calls into question the validity of implied consent, was only released three weeks before the blood draw in this case and dealt only with a blood draw as a search incident to arrest. When Appellant's blood was drawn, the state trooper reasonably relied on section 56-5-2946 and did not violate Appellant's rights deliberately, recklessly, or with gross negligence. At trial, the state trooper testified he was trained to not seek a warrant before a blood draw in the situation of a felony DUI. He relied on this training when making the decision to draw Appellant's blood that night.

Therefore, we hold the good-faith exception applies because of the state trooper's reasonable reliance on section 56-5-2946 and its uncertain validity at the time.[15] Although the state trooper violated Appellant's rights under both the Fourth

[14] *McCall* was heard on May 30, 2019 and filed on February 5, 2020.

[15] Because we find the good-faith exception to the exclusionary rule applies, we do not need to address the State's harmless error argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)

Amendment and South Carolina's Constitution, exclusion is not warranted. We are confident law enforcement will take care to use section 56-5-2946 in accordance with what the South Carolina Constitution and the Fourth Amendment require.[16]

IV. CONCLUSION

The state trooper violated Appellant's rights under the Fourth Amendment and South Carolina's Constitution when he obtained the blood draw under section 56-5-2946 without a warrant. However, the state trooper acted in good faith based on the law existing at the time.

Despite its unconstitutional application here, section 56-5-2946 remains facially constitutional. We recognize a suspect may consent to chemical testing, and even revoke consent, as section 56-5-2946 contemplates. Additionally, we acknowledge the lower privacy interests at stake in breath analyses under the statute. Our holding today only invalidates the law enforcement practice of obtaining blood samples for BAC testing when a warrant has not been obtained, no other exceptions to the warrant requirement justify the search, and the suspect neither consents nor revokes her consent.

AFFIRMED.

Acting Justice Kaye G. Hearn, concurs. FEW, J., concurring in a separate opinion. JAMES, J., concurring in a separate opinion in which KITTREDGE, J., concurs.

(declining to address petitioner's remaining issues when the first issue was dispositive).

[16] "Responsible law enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis*, 564 U.S. at 241 (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)).

JUSTICE FEW: I concur in result. The Court is deciding this case by addressing the wrong issue. The question before us is not whether the implied consent statute is unconstitutional, but rather whether the State demonstrated the consent exception applies to excuse the Fourth Amendment's warrant requirement. German's implied consent is one circumstance to be considered in answering that question. I believe the consent exception does apply, and thus, I agree the trial court did not err in denying German's motion to suppress. I firmly disagree that our implied consent statute is unconstitutional, even as applied to German.

As I wrote for a unanimous Court in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019), "pursuant to South Carolina's implied consent statute," a defendant in a felony driving under the influence case "is deemed by law to have consented to have his blood drawn by virtue of driving a motor vehicle in South Carolina." 426 S.C. at 654, 828 S.E.2d at 604. Under our implied consent law—subsections 56-5-2950(A) and 56-5-2946(A) of the South Carolina Code (2018)—German impliedly consented to the warrantless blood draw conducted in this case. German's motion to suppress the results of the blood draw, however, was based on the Fourth Amendment. Under the Fourth Amendment, the fact the implied consent law required her to consent before she was allowed to drive does not alone answer the question of whether the consent exception excused the otherwise applicable requirement the officer obtain a search warrant. Rather, German's implied consent is one circumstance a court must consider in determining whether the blood draw was a reasonable search and seizure under the Fourth Amendment. *See State v. Alston*, 422 S.C. 270, 288, 811 S.E.2d 747, 756 (2018) ("The existence of voluntary consent is determined from the totality of the circumstances." (quoting *State v. Provet*, 405 S.C. 101, 113, 747 S.E.2d 453, 460 (2013))). If the consent exception does not apply, that does not make the implied consent statute unconstitutional; it simply means the State failed—on the unique facts of this or any case—to demonstrate the consent exception excused the warrant requirement, and therefore, the search was unreasonable under the Fourth Amendment. *See id.* ("When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary." (quoting *Provet*, 405 S.C. at 113, 747 S.E.2d at 460)); *State v. Frasier*, 437 S.C. 625, 638, 879 S.E.2d 762, 769 (2022) (stating warrantless searches are unreasonable under the Fourth Amendment unless an exception to the warrant requirement applies). Thus, the question before this Court is a Fourth Amendment question, not a question of the constitutionality of the implied consent statute.

In this case, the trial court erred by failing to consider the totality of circumstances affecting whether German consented to a search and seizure without a warrant. The majority has now done that and concluded the consent exception does not apply. I would find under the totality of circumstances in this case the consent exception does apply.

First, I would put great weight on implied consent. *See generally Mitchell v. Wisconsin*, 588 U.S. ___, ___,139 S. Ct. 2525, 2532-33, 204 L. Ed. 2d 1040, 1045-46 (2019) (explaining the Supreme Court's historical approval of "many of the defining elements" of implied consent statutes). German—like all adults who hold a driver's license in South Carolina—is an adult. She made a voluntary decision to accept the privilege of driving in this State in exchange for granting consent to have her blood drawn under the circumstances of this case.

Second, I would put little weight on the fact German was agitated and drunk in the emergency room. The officer testified German was "very belligerent, and was giving the hospital personnel a very hard time." The treating physician testified, "I remember [German] because she was extremely belligerent and rude to staff." The physician said German stuck out in her memory "because she was trying to bite nurses, spitting at us, yelling at us, cursing at us." This disruptive behavior does not indicate a lack of consent, but rather, is typical of someone who is extremely drunk. The fact a suspect is agitated, belligerent, and extremely drunk does not affect the person's capacity to consent to a search. *See United States v. Watters*, 572 F.3d 479, 483 (8th Cir. 2009) (recognizing intoxication is a circumstance to be considered as to whether consent is voluntary, "but intoxication alone does not render consent invalid"); *United States v. Rambo*, 789 F.2d 1289, 1297 (8th Cir. 1986) (noting "the mere fact that one has taken drugs, or is intoxicated, or mentally agitated, does not render consent involuntary"). Importantly, German was not intoxicated when she voluntarily granted consent under the implied consent law.

Third, the officer read German a form stating, as the officer described it, "she doesn't have to take the test or give the samples." As the majority explains, the officer read German the wrong form. Under the Fourth Amendment, however, the error weighs in favor of a finding of voluntary consent because the "correct" form does not

indicate the suspect may refuse the test.[17] The fact the officer told German she did not have to allow the blood draw—which the officer was not required to do under the Fourth Amendment—is important in the totality of circumstances affecting whether the consent exception applies. *See Frasier*, 437 S.C. at 638, 879 S.E.2d at 769 ("Police do not need to tell an individual that he can refuse to consent, but it is a factor in the overall analysis." (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041, 2058, 36 L. Ed. 2d 854, 875 (1973); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001))); *Forrester*, 343 S.C. at 645, 541 S.E.2d at 841 ("The lack of [a] warning [that a suspect may refuse consent] is only one factor to be considered in determining the voluntary nature of the consent." (citing *State v. Wallace*, 269 S.C. 547, 552, 238 S.E.2d 675, 677 (1977))); *Wallace*, 269 S.C. at 552, 238 S.E.2d at 677 ("[K]nowledge of the right to refuse consent to search is merely another factor to be considered in the 'totality of the circumstances' in determining the voluntariness of the consent to search." (citing *Schneckloth*, 412 U.S. at 248, 93 S. Ct. at 2058, 36 L. Ed. 2d at 875)).

As to the fact German did not sign the form, there is no evidence she "refused" to sign it. Rather, the evidence indicates she was too unruly to even realize she was being asked to sign it. The officer testified "she really didn't want to listen . . . and there was no way she was going to sign this paperwork." He explained it is his policy to write "refused to sign" when confronted with such disruptive behavior. Nobody testified German actually refused to sign. For all we know, she did not sign the form because she believed doing so was unnecessary in light of the implied consent law. It is not for this Court to speculate as to her reasons for not signing the form. In any event, when a suspect actually refuses to sign such a form, the refusal does not by itself invalidate the implied consent. It is only part of the totality of the circumstances a court must consider in determining whether the State has demonstrated voluntary consent under the Fourth Amendment.

Fourth, the phlebotomist who actually drew the blood testified German "was willing to have the blood drawn." I would put the most weight on this fact, that when the officer told German "like it or not, we are getting a blood draw," she willingly gave

[17] The "correct" form under the felony DUI statute provides, "Pursuant to Section 56-5-2946, you must submit to either one or a combination of chemical tests for the purpose of determining the presence of alcohol [or] drugs . . . ." Rec. on Appeal at 349, *State v. McCall*, 429 S.C. 404, 839 S.E.2d 91 (2020) (No. 2015-001097).

the sample. At the actual time of the blood draw, therefore, she gave no indication she refused the test. This compelling fact tips the totality of the circumstances and—in my view—requires a finding that she voluntarily consented to the blood draw.

In summary, German made a voluntary decision to grant consent for a Fourth Amendment search and seizure when she accepted a license to drive in this State. In the emergency room the night of the incident, she was told she did not have to allow the blood draw, but she willingly did so. There is nothing in this record that indicates German withdrew or revoked the consent she impliedly gave. Under the totality of the circumstances, I would find German voluntarily consented to have her blood drawn and the consent exception excused the warrant requirement.

The majority wrongly focuses on the constitutionality of the implied consent law. Our implied consent statute should be read to place implied consent into the Fourth Amendment analysis as one circumstance indicative of voluntary consent. Reading the statute in this way, we fulfill our obligation to interpret our statutes as constitutional, if possible. *See State v. Ross*, 423 S.C. 504, 514-15, 815 S.E.2d 754, 759 (2018) (recognizing we must construe statutes as constitutional if possible and finding a way to read a subsection of the Sex Offender Registry Act as constitutional (citing *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999))).

JUSTICE JAMES: I concur in Chief Justice Beatty's well-reasoned opinion in all respects except for section III.B., in which he addresses Article I, section 10 of the South Carolina Constitution. Because the analysis of constitutionality under the Fourth Amendment to the United States Constitution resolves this appeal, there is no need to address the heightened protection afforded by Article I, section 10.

KITTREDGE, J., concurs.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 28149

THE STATE,

RESPONDENT,

V.

MARY ANN GERMAN,

APPELLANT.

APPELLATE CASE NO. 2018-002090

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Mary Ann German requests that this Court grant rehearing on the decision (substituted April 19, 2023) because: (1) the good faith exception to the Fourth Amendment does not apply to this case; (2) this Court should not adopt the controversial, broad federal interpretation of the good-faith exception for the South Carolina Constitution. Any good faith exception under the state constitution should err on the side of protecting citizens' privacy if a grey area in the law exists.

1. Davis Good-Faith Does Not Apply

The good faith analysis adopted by this Court will prove unworkable in future cases and violates the federal constitution. It gives the police a grace period to violate the law after appellate decisions. The correct approach is a bright-line rule using the date of an appellate decision as the cut-off for good faith. Citizens are charged with knowing the law even as it constantly evolves. The police need to be held to this same standard—if not a higher one.

Davis v. United States, 564 U.S. 229 (2011) created a new exception to the exclusionary rule for police who rely on incorrect "binding appellate precedent" when they violate a citizen's Fourth Amendment rights. 564 U.S. at 249-50. Such reliance must be "objectively reasonable." Davis, 564 U.S. at 241. The Supreme Court traced the officers' reliance in Davis to a specific, easily understood rule in an Eleventh Circuit decision. Id. at 239-40. The Court stated, "The police acted in strict compliance with binding precedent, and their behavior was not wrongful." Id. at 240.

The two cases at play in Davis were decided in 1981 and in 2009. New York v. Belton, 453 U.S. 454 (1981); Arizona v. Gant, 556 U.S. 332 (2009). The search by the officers in Davis happened between the two decisions—in 2007. Davis, 564 U.S. at 235. The officers' search was legal under the old rule of Belton as interpreted in the Eleventh Circuit, but not under Gant. Id. at 240. At no point in Davis did the Court entertain giving the police a grace period after an appellate decision changes the law. The Court's analysis simply compared the dates of the decisions to the date of the search.

When discussing the application of the exclusionary rule, the Court stressed that its purpose was to deter police misconduct. Id. at 246. The Court reasoned that excluding the evidence seized would only deter "conscientious police work." Id. at 241. "Responsible law

enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to those rules." Id. (internal quotation omitted). The Court stressed that binding appellate precedent "specifically *authorized*" the police's search. Id. (emphasis in original).

This Court erred in not applying this straightforward analysis to the timeline of events. The officer forcibly, and without consent, drew Mary German's blood on July 10, 2016. The relevant precedent is Missouri v. McNeely, which was decided three years earlier, in 2013. Missouri v. McNeely, 569 U.S. 141 (2013). McNeely was further confirmed by Birchfield v. North Dakota, 579 U.S. 438 (2016), decided three weeks before the illegal seizure of German's blood. Unlike Davis, the decisions making the officers' conduct illegal were issued before the conduct.

This Court's Opinion erroneously begins with the date of state law decisions interpreting McNeely. Opinion at 32. The decisions of the United States Supreme Court are binding on and control the actions of police officers. Davis good faith does not begin from the time a state court addresses a United States Supreme Court decision. It begins with the date of that decision. The "responsible law enforcement officer" envisioned in Davis must know the law as the United States Supreme Court pronounces it.

It was obvious after McNeely that section 56-5-2846's head was on the chopping block. Categorical reliance on the statute was ended by McNeely. The McNeely Court said, "[w]hether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case based on the totality of the circumstances." McNeely, 569 U.S. at 156. The Court rejected Missouri's argument that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain

the blood sample without a warrant." Id. The Court ultimately held, "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Id. at 152. If the Fourth Amendment mandates using a warrant if practicable, then no officer could objectively rely on section 56-5-2946's categorical approach.

The axe unquestionably came down for section 56-5-2946 with Birchfield. The Birchfield Court held that neither the search incident to arrest doctrine nor state implied consent statutes would uphold categorical warrantless blood tests. Birchfield, 136 S.Ct. at 2184-87. The Court concluded that "motorists cannot be deemed to have consented to a blood test on pain of committing a criminal offense." Id. at 2186. The State knew at the time of the suppression hearing in German's case that neither exigent circumstances nor the search incident to arrest exceptions for a warrantless blood draw survived McNeely and Birchfield because it expressly waived any reliance on them. R. 71, l. 16 – 73, l. 8.

The officer who ordered German's blood drawn candidly admitted that it would have been possible to get a warrant. R. 41, ll. 10 – 14. Because it was practicable to get a warrant, McNeely mandated the police obtain one. This mandate existed three years before German's blood was drawn. Unlike in Davis, the officer here was simply ignorant of United States Supreme Court precedent. The police were not "conscientious" or "responsible." They just did not know or respect the law.

The exclusionary rule's purpose of deterring police misconduct applies to ignoring developments in the law. The good faith analysis used here deters police from keeping up with the law. It invites the mischief of willful blindness. Giving police three weeks of a grace period

after Birchfield will prove unworkable. It turns an objective analysis into a subjective one. It invites the question of what grace period is reasonable—a question that must now be litigated.

Defense attorneys will have to subpoena police training manuals and emails, communications from the Attorney General, and other entities that advise law enforcement in order to make a record and argue against the application of good faith. Defendants will have to prove that an officer knew or should have known about a relevant development in the law. Defendants will have to engage in discovery and litigate issues related to willful blindness of developments in the law.

This Court should not open that door. It should keep the law focused on the objective, simple application of the date of an appellate decision instead of a sideshow about what an officer knew about the law and when. Unless an appellate court says differently, its decision becomes the law immediately upon release. That rule certainly applies to citizens. If it does not apply to the police, then a two-tiered system related to Fourth Amendment law will exist. Citizens will be faced with the maxim, which serves us well, that "ignorance of the law is no excuse." But under this Court's interpretation of Davis good faith, the police's ignorance of the law becomes an excuse. The United States Supreme Court provided no grace period and this Court's interpretation of Davis contravenes its holding.

2. This Court Should Reject an Expansive Davis Good Faith Exception under the South Carolina Constitution

The Court assumes without deciding that a broad federal Davis good faith exception is the same under the South Carolina Constitution's privacy guarantee. This step should not be taken lightly. Even if this Court's interpretation of Davis is correct, our right of privacy's greater

protections than the Fourth Amendment are better served by rejecting the broad scope of the controversial Davis decision.

Davis was a 6-1-2 decision, with Justice Sotomayor concurring and Justices Breyer and Ginsburg dissenting. Justice Sotomayor's concurrence concisely explains why South Carolina should reject Davis. She agreed with the majority that the near-uniform interpretation of Belton to allow the police conduct in Davis meant that exclusion served no useful purpose for deterrence. Davis, 564 U.S. at 250-52.

She wrote separately to warn of what would happen if Davis were interpreted too broadly. Id. She was concerned primarily with what incentives were created for police when the law was unsettled. Id. She quoted the accurate prediction of United States v. Johnson, 457 U.S. 537, 561 (1982) that "in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior." Id.

South Carolina's constitutional right of privacy was adopted because of fear of technological surveillance and police action. "The genesis of the privacy provision related solely to modern technology and the ever-increasing volume and acquisition of data and personal information." Planned Parenthood South Atlantic v. State, 438 S.C. 188, 310, 882 S.E.2d 770, 835 (2023) (Kittredge, J., dissenting). These concerns were sufficient to pass this constitutional provision in 1967.

The erosion of privacy by technology has gotten exponentially worse since 1967. The members of the West Committee would be shocked and horrified at law enforcement's ability to penetrate the private lives of South Carolinians through a device that everyone carries in their pockets—the smartphone. Cameras are on street corners and doorbells. License plate readers log and store forever the comings-and goings of citizens on our highways.

The rate of technological advance far outstrips the ability of the law to keep pace. Under the Davis regime, the police have every incentive to use technology to invade citizens' privacy until an appellate court forbids it. The gap between the use of a new technology and an appellate decision restricting its use will be years.

During these gap years, the privacy rights of South Carolinians will be worthless under a Davis good faith regime. In the long run, the law may push back against technological invasion, but as the legendary economist John Maynard Keynes famously said, "In the long run we are all dead." John Maynard Keynes, The Tract on Monetary Reform (1923).

Our state constitution should protect South Carolinians from warrantless searches and technology run amok. Interpreting good faith narrowly would only allow the police to avoid application of the exclusionary rule when they rely on clear, specific appellate decisions. If the law is unsettled and the police choose to push the boundaries of what the constitution allows, the police should bear the risk of exclusion, not the citizenry.

The current litigation over cell phone searches illustrates this problem. See Zachary C. Bolitho, Specifically Authorized by Binding Precedent Does Not Mean Suggested by Persuasive Precedent: Applying the Good-Faith Exception After Davis v. United States, 118 W. Va. L. Rev. 643, 671–72 (2015). Likening cell phones to cigarette boxes, the police used the search incident to arrest exception to rummage through every arrestee's phone without a warrant. Id. The practice began to end with the Supreme Court's decision in Riley v. California, 573 U.S. 373 (2014), but the Davis decision extended the life of warrantless searches and denied relief to defendants' whose constitutional rights were violated. Id.

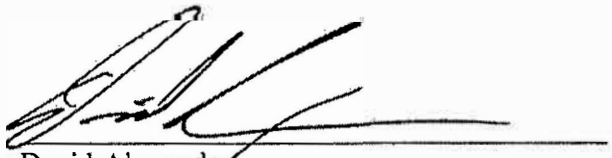
The lesson learned by police is that they can run wild with new technology because of a broad interpretation of Davis. If South Carolina were instead to adopt a more restrictive rule that

good faith cannot apply where the law is unsettled, the police incentives would change. They would become more cautious about using technology. Instead of adopting Silicon Valley's mantra of "go fast and break things," the police would be forced to use a more conservative approach. A conservative approach is certainly more in line with the values of South Carolinians. A healthy fear of government power counsels rejecting a broad good faith exception in South Carolina.

While German's case involves an old technology—a syringe—this Court's adoption of a broad Davis good faith interpretation has large ramifications for new technology. While appellant rejects the notion that the law was unsettled and arguably allowed the police action in this case, that was this Court's judgment. But even if that view is adopted, it does not follow that this Court should automatically apply a broad good faith interpretation under the state constitution without considering its implications beyond this case. This Court should grant rehearing to consider and restrict the scope of a good faith exception under state law. The federal government has shown little interest in protecting Americans from the erosion of their privacy rights. South Carolina can do better.

Conclusion

Davis good faith does not apply because the illegal police conduct occurred after the United States Supreme Court's decisions. Under the South Carolina Constitution, the incentives for police should be to err on the side of caution when invading citizens' privacy. This Court should grant rehearing and reverse German's conviction because of the search that four members of this Court determined was illegal.



David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 19th day of April, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARY ANN GERMAN,

APPELLANT.

APPELLATE CASE NO. 2018-002090

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Mary Ann German, #378319, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 19th day of April, 2023.

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Beaufort County
Court of General Sessions

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-002090

State of South Carolina, ...Respondent,

v.

Mary Ann German, ...Petitioner.

Opinion No. 28149 (S.C. S.Ct. filed April 5, 2023, re-filed April 19, 2023)

RETURN TO PETITION FOR REHEARING

Petitioner Mary German filed a petition for rehearing in response to this Court's April 19, 2023, opinion affirming her conviction for Felony DUI resulting in Death. This Court requested a return to the petition on April 20. The State respectfully submits that this Court properly applied the good faith exception to the warrantless collection of German's blood sample, and the petition for rehearing should be denied.

I.

This Court correctly refused to suppress German's blood-alcohol test results because the state trooper who ordered the collection of German's blood sample relied on a state statute explicitly authorizing him to do so. Evidence seized in accordance with a statutory provision should be suppressed "only if it can be said that the law enforcement officer had knowledge, or

may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Illinois v. Krull, 480 U.S. 340, 348–49 (1987). "[T]he **sole** purpose of the exclusionary rule is to deter misconduct by law enforcement." Hamrick v. State, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019) (citing Davis v. United States, 564 U.S. 229, 238 (2011) (emphasis added).

As the Krull court explained, "[u]nless a statute is **clearly unconstitutional**, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." Krull, 480 U.S. at 349 (emphasis added). Evidence seized pursuant to a statute authorizing the seizure should not be suppressed unless the statute's defects are "**so obvious** that an objectively reasonable police officer would have realized the statute was unconstitutional . . . ." Krull, 480 U.S. at 360 (emphasis added).

South Carolina's implied consent statute was not clearly unconstitutional when the trooper relied on it to order the collection German's blood sample. This Court had never passed on the constitutionality of the statute until its opinion in this case, despite many opportunities to do so. Even then, this Court only declared it unconstitutional as applied to German. This Court noted in its opinion that, with respect to the validity of the implied consent statute, "**clarity** of the law is needed." State v. German, Op. No. 28149 (S.C. Sup. Ct. filed April 19, 2023) (Howard Adv. Sh. No. 15 at 19) (emphasis added).

German claims the officer could not have acted in good-faith reliance on this statute because the United State Supreme Court had, three weeks earlier, ruled that North Dakota's

implied consent statute authorizing blood draws in all DUI cases violated the Fourth Amendment. The Birchfield opinion did not address South Carolina's implied consent law, and did not render it "clearly unconstitutional." Even if the trooper could be fairly charged with knowledge of the Birchfield opinion, there are important differences between South Carolina's implied consent statute and the statute at play in Birchfield, the principal difference being that North Dakota's statute authorized blood draws in all DUI cases, whereas the statute at issue in this case applies only to felony DUI cases.

As the State argued in its brief and at oral argument, this is a major distinction because it fundamentally alters the balancing of State and individual interests at the core of the Fourth Amendment analysis. This Court rejected this argument for the first time in its opinion in this case. Because this Court had not previously found the statute violated the Fourth Amendment, the statute was not "clearly unconstitutional" when the trooper relied on it to collect German's blood sample. See State v. Prado, 397 Wis. 2d 719, 960 N.W.2d 869, 883 (Wis. 2021) ("Even accepting arguendo Prado's contention that court decisions had muddied the status of the incapacitated driver provision, what is clear is that no court had explicitly declared it to be unconstitutional until now. It would be unreasonable to expect a police officer to synthesize the relevant case law to divine that the statute was unconstitutional when no court had clearly said so."); State v. Weddle, 224 A.3d 1035, 1046–47 (Me. 2020) (explaining "the suppression of the results of the warrantless blood draw would not serve the purpose of the exclusionary rule. The officer who ordered Weddle's blood draw acted in good faith reliance on a statute blessed as constitutional as recently as 2007 . . . . Further, we note our own recent inability to reach a consensus on the handling of blood draws . . . and, as shown in the Concurring Opinion, the view that [Maine's implied consent statute] is constitutional still has some support").

The officer in this case candidly testified he sought a blood sample because of the statute explicitly authorizing him to do so. As a state trooper, he was trained to methodically follow the procedure outlined in this statute to the letter. This trooper did everything he had been taught to do, and relied on statutory language explicitly authorizing him to act exactly as he did. See Stewart v. State, 442 P.3d 158, 164 (Okla. 2019) (refusing to suppress blood-alcohol results where "trooper's reliance in this case on [Oklahoma's implied consent statute] as the basis for drawing Stewart's blood was objectively reasonable and unquestionably done in good faith"). Even the implied consent forms in this case quote directly from the statute authorizing this blood draw. There is nothing to support German's specious assertion that this officer did not "know or respect the law." The officer did exactly as he was trained to do, based on the words of the statute our legislature enacted. As in Hamrick, "[t]here is nothing in this record that in any way suggests the officers did not 'act with an objectively reasonable good-faith belief' that their conduct is lawful." Hamrick v. State, 426 S.C. 638, 654, 828 S.E.2d 596, 604 (2019).

"Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." Michigan v. DeFillippo, 443 U.S. 31, 38 (1979). "To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule." DeFillippo, 443 U.S. 31, n.3. In accordance with the foregoing authority, this Court correctly applied the good faith exception in this case.

II.

German further argues that this Court should refuse to recognize a good faith exception to the exclusionary rule under the South Carolina Constitution. German cites the "controversial" 6-1-2 opinion in Davis v. United States, 564 U.S. 229 (2011), and asserts that police will abuse ambiguities in appellate court precedent to exploit advancements in technology to infringe the privacy of South Carolinians. German urges this Court not to adopt a "broad" good faith exception under the South Carolina Constitution.

German's argument has very little to do with the facts or law of this case, in which an officer, in good faith, relied on an unambiguous statute authoring a search, not an appellate court decision. See Krull. Contrary to German's arguments, the good faith exception does not allow police to willfully and systematically abuse citizens' privacy rights. The good faith exception is applied in the discretion of the appellate court, only when the court is convinced that suppression will not serve a deterrent purpose because officers acted in objective good faith. Like the exclusionary rule itself, it is not mechanical or compulsory. This Court should follow the extensive precedent of the United States Supreme Court and the majority of state courts and recognize that the exclusionary rule serves no purpose when applied blindly to police actions done in good faith.

The good faith exception, like the exclusionary rule itself, is a judicially-created rule which is not found in the text of the Federal Constitution. Likewise, the South Carolina Constitution does not contain a textual exclusionary rule or good faith exception. However, the rationales for the exclusionary rule and good faith exception apply equally to the Federal and South Carolina Constitutions.

The United States Supreme Court, and this Court, have repeatedly explained the rationale

for the exclusionary rule. The exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." United States v. Leon, 468 U.S. 897, 906 (1984). The Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." Herring v. United States, 555 U.S. 135, 141 (2009). Instead, it has "focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." Id. The exclusionary rule is aimed at "flagrant," "intentional," and "deliberate" violations of rights. Id. at 144. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Id. The rule serves no deterrent purpose when applied to innocent police conduct undertaken in objective good faith.

The Supreme Court has further explained that "the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute . . . . There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent." Krull, 480 U.S. at 352. The United States Supreme Court has continued to expand the scope of the good faith exception, each time emphasizing that the exclusionary rule is not a blind mechanism indiscriminately excluding evidence regardless of police culpability. Rather, the only purpose of the exclusionary rule is to deter systematic or willful constitutional violations by police. Herring, 555 U.S. at 147 (noting the court's "repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system").

This Court has not explicitly adopted the good faith exception in the context of the South Carolina Constitution. See State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 816–17 (Ct. App. 1991) (declining to address the issue where the argument was not preserved). However, there is no principled basis to depart from the United States Supreme Court's extensive, well-reasoned jurisprudence in this area. German argues this Court should reject the good faith exception because the South Carolina Constitution provides for "more expansive rights" than the Federal Constitution because it contains an express "right to privacy" clause. See State v. Forrester, 343 S.C. 637, 644, 541 S.E.2d 837, 841 (2001). But this enhanced "right to privacy" in no way negates the rationale behind the good faith exception, which addresses the **remedy** for a constitutional violation, not the extent of the underlying right. See State v. Lindquist, 869 N.W.2d 863, 872 (Minn. 2015) (distinguishing between the greater rights afforded by the Minnesota Constitution and the remedy for a violation of those rights, explaining "the appropriate remedy" for a constitutional violation is a "'separate, analytically distinct issue' from whether a constitutional violation occurred. . . . Thus, our jurisprudence regarding whether to afford greater protection under a provision in the Minnesota Constitution than is provided by its federal counterpart is not applicable" to whether the court would apply the good faith exception, which the court adopted under the Minnesota Constitution).

South Carolina should follow the United States Supreme Court and the majority of states and recognize that a good faith exception is implicit in our exclusionary rule. See Heien v. North Carolina, 574 U.S. 54, 75 and n.3 (2014) (Sotomayor, J., dissenting) (recognizing that most states have adopted a good faith exception under state law); People v. Goldston, 470 Mich. 523, 541, 682 N.W.2d 479, 489 n.10 (2004) (collecting cases where state courts adopted the good faith exception as a matter of state law). The rationale for the rule is sound, and there is no

principled reason why this Court should not recognize it, as the Court did in this case. See State v. Reynolds, 504 S.W.3d 283, 313 (Tenn. 2016) (recognizing a good faith exception and explaining "we discern no 'textual, historical, or other basis' on which to part company with the United States Supreme Court on this issue"); State v. Lindquist, 869 N.W.2d 863, 872 (Minn. 2015) ("We see no principled basis to [reject a good faith exception] when we have made clear that the exclusionary rule in Minnesota, like the federal exclusionary rule, does not require automatic suppression of evidence obtained by unlawful means.").

The good faith exception as defined by the United States Supreme Court strikes the appropriate balance between protection of individual rights and the public interest in maintaining a safe and orderly society. This Court can decline to apply the good faith exception in any case where exclusion would serve to deter unlawful police conduct. This is not such a case.

CONCLUSION

For all the foregoing reasons, German's petition for rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BY: _____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 1, 2023

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001496

HOLMES SIMPSON-DAVIS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served a copy of the within Return To Petition For Writ Of Certiorari on both Susan Ranee Saunders, Esquire and Elizabeth A. Franklin-Best, Esquire, counsel of record for the Petitioner by electronic mail to the addresses listed for each counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 1st day of May 2023.

Anne Mueller

Anne A. Mueller
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Mary Ann German, Appellant.

Appellate Case No. 2018-002090

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and, hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

J.

A.J.

Columbia, South Carolina
June 28, 2023.

cc:
Alan McCrory Wilson, Esquire
David Alexander, Esquire
Joshua Abraham Edwards, Esquire
Isaac McDuffie Stone, III, Esquire