NO. 23-5826

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether *Birchfield* rendered South Carolina's felony DUI implied consent statute "clearly unconstitutional" such that the officer's reliance on it was objectively unreasonable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

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.

The South Carolina Code provides:

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 [driving under the influence resulting in death or great bodily injury].

S.C. Code Ann. § 56-5-2946(A).

STATEMENT OF THE CASE

Petitioner was convicted of driving under the influence resulting in death ("felony DUI"). The sole issue in this case is the trial court's admission of blood test results showing petitioner's blood-alcohol content ("BAC") taken at a hospital at the direction of a law enforcement officer after an automobile accident. Petitioner argued the warrantless seizure of her blood violated the Fourth Amendment. The South Carolina Supreme Court agreed and held South Carolina's implied consent statute authorizing warrantless blood draws in felony DUI cases was unconstitutional as applied to petitioner. However, the court affirmed admission of the test results under the good faith exception.

1. *Facts.* On the evening of July 9, 2016, petitioner got drunk at a roadside bar near Beaufort, South Carolina. Petitioner purchased an "all you can drink" bracelet and consumed a beer and four to six liquor drinks. Pet.App. 3. Petitioner became "vocal" and was asked to leave the bar. R.211. She drove away in her pickup truck, striking a vehicle in the parking lot on the way out. R.174–83. She pulled onto the wrong side of a four-lane highway and struck an oncoming car head-on, killing the driver. R.14–17. EMS transported her to a local hospital where she received medical treatment. The South Carolina Highway Patrol was dispatched to the scene of the accident. At around 2:00 a.m., a highway patrolman arrived at the hospital and arrested petitioner for felony DUI. R.18, 22. At the officer's direction, a nurse collected a blood sample to determine petitioner's BAC. Pet.App. 4.

The officer acted under the authority of section 56-5-2946 of the South Carolina Code of Laws. Originally enacted in 1998, this section governs BAC

sample collection in DUI cases involving death or great bodily injury. The statute provides an arrestee "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" felony DUI. S.C. Code Ann. § 56-5-2946. A separate statute provides that drivers have the right to refuse BAC testing in DUI cases not involving death or great bodily injury, but refusal will result in the suspension of their driver's license. S.C. Code Ann. § 56-5-2950. The statute provides blood samples must be collected within three hours of arrest. *Id.* South Carolina does not criminalize refusal to submit to BAC testing.

It was not possible to perform a breath test at the hospital. Pet.App. 4. The officer advised petitioner he was ordering the collection of a blood sample. R.36. Petitioner became belligerent and refused to sign the implied consent form. R.21. Petitioner was biting, spitting, yelling, and cursing at doctors and nurses. R.52. After the blood draw, the doctor administered sedative drugs. R.61.

The officer did not seek a search warrant. He explained the highway patrol was "shorthanded" that night and "didn't have probably the personnel . . . to do that." R.41. Regardless, he testified police "do not need permission" to order a blood draw in a DUI case involving death because that is what "the law states . . . for felony DUIs." R.42. When asked the basis for his belief that he was not required to seek a warrant in death cases, he testified he relied on section 2946.

R.42–43. He explained: "I was trained that way from when I came into law enforcement." R.42.

2. *Motion to suppress.* Before trial, defense counsel sought suppression of the test results. Counsel argued the blood draw did not comply with statutory requirements and the search violated the Fourth Amendment. Petitioner cited this Court's opinions in *Schmerber v. California*, 384 U.S. 757 (1966), *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 579 U.S. 438 (2016). *Birchfield* was issued 17 days before this accident. The State argued the search was legal under South Carolina's implied consent statute, that *McNeely* and *Birchfield* were distinguishable, and that the good faith exception to the exclusionary rule applied. R.70–74. The trial court denied petitioner's motion to suppress. R.573. The court held *McNeely* and *Birchfield* were not controlling because the State was not relying on the exigent circumstances or search incident to arrest exceptions. The Court did not engage in a meaningful constitutional analysis, holding simply that section 2946 was valid even in the wake of *McNeely* and *Birchfield*. R.573–74.

Petitioner's BAC was 0.275% at the time of the blood draw, more than three times the legal limit. R.393–94. Petitioner did not seriously contest she was intoxicated, but claimed she drove because she was being attacked by other bar patrons. R.524. Petitioner was convicted and sentenced to 11 years' incarceration.

3. *Appeal.* At the South Carolina Supreme Court, the State argued the warrantless search was constitutional under the exigent circumstances and search incident to arrest exceptions. The State presented these arguments as alternate

sustaining grounds because they were not made at trial. *See* SCACR 220(C). The State argued alternately that suppression was not warranted because the officer acted in good-faith reliance on the implied consent statute. The court held the warrantless search violated the Fourth Amendment and South Carolina's implied consent statute was unconstitutional as applied to petitioner because police did not secure a search warrant. Pet.App. 6–15. The court further held the search violated the state constitution, but later withdrew its original opinion and substituted an opinion wherein two justices concurred with respect to the federal constitutional analysis but declined to address the state constitutional argument. Pet.App. 25. A fifth member of the court dissented, opining the consent exception applied. Pet.App. 21–24. The majority explained it had bypassed earlier opportunities to address the constitutionality of the statute, but that "clarity of the law is needed." Pet.App. 6. The court held the State waived its arguments related to exigent circumstances and search incident to arrest because the State did not present these arguments at trial. Pet.App. 7. Instead, the court analyzed whether the consent exception applied. Pet.App. 7, 11–15. After finding the statute unconstitutional as applied to petitioner, the court affirmed admission of the test results under the good faith exception. Pet.App. 18–20.

REASONS WHY THE PETITION SHOULD BE DENIED

The state court correctly applied the good faith exception, finding *Birchfield* did not render South Carolina's felony DUI implied consent statute clearly unconstitutional such that an officer could not reasonably rely on it. Petitioner ignores controlling precedent and seeks to challenge the theoretical scope of the good faith exception through arguments which are not squarely presented by the facts or law of this case. The petition should be denied.

A. This case does not present a *Davis* question.

Petitioner asks this Court to address the scope of the "*Davis* good faith exception," which applies when officers act in reliance on binding appellate precedent. *Davis v. United States*, 564 U.S. 229 (2011). Petitioner asserts "lower courts apply *Davis* in different ways," with some courts applying the good faith exception in cases where binding appellate precedent "specifically authorizes law enforcement's actions," and other courts giving law enforcement the benefit of the doubt "when the law is unsettled . . . ." Petition at 8. Petitioner cites Justice Sotomayor's concurrence in *Davis* for the proposition that there is an open question whether the good faith exception applies when police conduct a warrantless search in circumstances where its legality is uncertain.

This case does not present a *Davis* question. The officer in this case did not rely on binding appellate precedent—he relied on South Carolina's implied consent statute. South Carolina's appellate courts had not previously addressed the

constitutionality of section 2946. The *Davis* rule regarding reliance on binding appellate precedent is simply not applicable to the facts of this case.

Petitioner's discussion of the "strict" and "loose" approaches to applying *Davis* is inapposite. Section 2946 explicitly authorized the officer's conduct in this case. There is no need for this court to consider whether "express authorization for police conduct" is required when police rely on binding appellate precedent because the officer in this case had express statutory authorization. *See* Petition at 9.

The issue resolved below was whether South Carolina's implied consent statute was clearly unconstitutional at the time of this search such that the officer's reliance on it was objectively unreasonable. In *Illinois v. Krull*, 480 U.S. 340 (1987), this Court held the exclusionary rule does not apply to evidence seized in objectively reasonable reliance on a statute authorizing a warrantless search. This Court explained that "[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Id.* at 349–50.

The same standard applies in this case. But petitioner does not seek review of that question and does not discuss *Krull* in her petition. Instead she focuses on the inapposite *Davis* rule regarding binding appellate precedent. Because petitioner seeks review of a question not presented by this case, her petition should be denied.

B. The state court properly applied the good faith exception.

Even if petitioner's question is read generously so that it encompasses the issue in this case, the lower court properly applied the good faith exception. Section 2946 was not "clearly unconstitutional" at the time of this search. South Carolina police had been acting under its authority for 18 years. Even as constitutional challenges began in the wake of *McNeely* and *Birchfield*, no appellate court had reached the question. The lower court explained it had declined to address this issue in past cases and that "clarity of the law is needed." Pet.App. 6.

Birchfield addressed statutes authorizing warrantless blood draws in misdemeanor DUI cases and held warrantless blood draws were not permitted incident to "arrest for drunk driving." *Birchfield*, 579 U.S. at 476. By contrast, section 2946 applies only in felony DUI cases. This is a fundamental distinction, and one that could produce a different result in the balancing test applicable in search incident to arrest cases. For example, this Court's statement that it had no reason to believe injuries "are common in drunk-driving arrests" is not true in felony DUI cases. *Id.* at 475. The state interest is much greater in felony DUI cases and extends far beyond than the deterrence rationale explained in *Birchfield*.

Furthermore, *Birchfield* addressed only the search incident to arrest exception to the warrant requirement. The applicability of the consent exception continued to be litigated in the years after *Birchfield*, and was argued to this Court in *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019). The lower court addressed the

consent exception at length in its opinion in this case. Pet.App. 7–15. The consent argument was widely advanced in other state courts. Pet.App. 13–14.

Even if *Birchfield* cast doubt on the validity of section 2946, it did not clearly invalidate it. The question, then, is whether the good faith exception applies when a statute's constitutionality is called into question by a decision of this Court invalidating a similar, yet distinguishable, statute on limited grounds. This question is analogous to the one raised by Justice Sotomayor in her concurring opinion in *Davis* regarding the applicability of the good faith exception when the law is "unsettled." *Davis*, 564 U.S. at 250 (Sotomayor, J., concurring in judgment).

Krull already provides the answer to this question. Officers may rely on a statute unless it is "clearly unconstitutional." Even after *Birchfield*, the unconstitutionality of section 2946 was "not sufficiently obvious" to make the officer's continued reliance on it objectively unreasonable. *Krull*, 480 U.S. at 359. While *Birchfield* may have cast doubt on section 2946, it did not render it clearly unconstitutional. The lower court correctly applied the good faith exception.

C. The "grace period" issue was not important to the decision below and is not a source of confusion or controversy nationally.

Petitioner claims the lower court improperly gave police a "grace period" in which it was permissible for them to be unaware of *Birchfield*. This case was not about a "grace period." It was about whether *Birchfield* rendered South Carolina's implied consent statute "clearly unconstitutional." If it did not, the period of time which elapsed between the issuance of *Birchfield* and the search in this case is

unimportant. Thus the "grace period" issue is buried underneath a *Krull* analysis and is not presented cleanly.

The "grace period" issue was not necessary to the ruling below. The court's decision was primarily based on the fact that section 2946 "had not been directly called into question" at the time of the search. Pet.App. 19. It distinguished *McNeely* and *Birchfield* on the basis that they did not address the consent exception. The court only briefly noted the short interval between the issuance of *Birchfield* and the search in this case. This passage was not necessary to the decision and is unlikely to generate reliance from other courts. *See Black v. Cutter Lab'ys*, 351 U.S. 292, 298 (1956) ("[I]t is our duty to look beyond the broad sweep of the language [of the decision below] and determine for ourselves precisely the ground on which the judgment rests.").

Vehicle concerns aside, the "grace period" issue does not warrant review. This Court has already announced the test that will apply in a "grace period" situation—whether a "reasonably well trained officer" would have been aware of the correct law. *United States v. Leon*, 468 U.S. 897, 923 n.8 (1984). Petitioner cites only one case where a "grace period" was really at issue, an opinion from a Florida intermediate appellate court. Petition at 12. In that case, the court declined to apply the good faith exception. The absence of additional or contradictory authority shows this issue is not ripe for this Court's review.

Petitioner mischaracterizes the lower court's decision as adopting a subjective standard to determine when an officer should be aware of binding appellate

precedent. There is no indication the lower court based its decision on the officer's subjective understanding of the law. Rather, the opinion merely noted the objectively brief period of time between this court's issuance of *Birchfield* and the search in this case. No other case cited by petitioner employs a subjective test.[1]

D. The search was constitutional.

This case does not cleanly present the good faith issue because the search was constitutional under alternate theories not addressed by the lower court on procedural grounds. Petitioner incorrectly asserts "[n]o serious dispute exists that the blood draw violated her Fourth Amendment rights." Petition at 14. Respondent argued below that two exceptions to the warrant requirement were applicable, but the lower court refused to address the arguments because they were not raised to the trial court. Pet.App.7.

First, there were exigent circumstances. Just as in *Schmerber*, "time had to be taken to bring the accused to the hospital and investigate the scene of the accident . . . ." *Schmerber*, 384 U.S. at 770–71. The highway patrol was short-staffed and busy with other pressing law enforcement needs including traffic control and investigation. R.41. As in *Mitchell*, there was a medical emergency where petitioner's blood was drawn for diagnostic purposes and doctors administered drugs which could have skewed the probative value of her blood test results. R.53, 60–61. Telephonic warrants are not available in South Carolina, which requires a

[1] Petitioner claims application of the good faith exception will become increasingly important as courts address advancing technology. But this case does not involve advancing technology; it involves a simple blood draw, the same search method at issue in *Schmerber*. This case is not a good vehicle to address the dangers of advancing technology because those facts are not present here.

signed warrant accompanied by written affidavit. S.C. Code §17-13-140; *In re Snyder*, 308 S.C. 192, 196, 417 S.E.2d 572, 574 (1992); *State v. Covert*, 382 S.C. 205, 208–09, 675 S.E.2d 740, 742 (2009). The lower court declined to consider the argument on procedural grounds, but the record strongly supports a finding of exigency.

Second, section 2946 validly authorizes warrantless blood draws incident to arrest. As discussed above, *Birchfield*'s rationale does not apply in equal force in felony DUI cases because the balancing of state and individual interests is drastically different. Section 2946 applies only where there is probable cause to believe the suspect committed DUI resulting in death or great bodily injury, and warrantless searches pursuant to the statute should be categorically permissible incident to arrest in this small category of cases. The lower court declined to address the argument, but in a footnote rejected any distinction between misdemeanor and felony DUI. Pet.App. 7–9.

Both of these alternate grounds justified the warrantless search in this case. This Court should not address petitioner's good faith argument in a case where the search was constitutional in the first place. The good faith issue is not cleanly presented.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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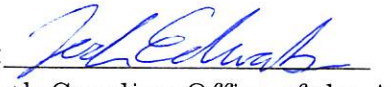
By: 
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