

No. \_\_\_\_\_

---

---

**In The  
Supreme Court of the United States**

—◆—  
JARED S. HOERLE,

*Petitioner,*

v.

THE STATE OF NEBRASKA,

*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The Nebraska Supreme Court**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
MARK E. RAPPL  
*Counsel of Record*

NAYLOR & RAPPL LAW OFFICE  
1111 Lincoln Mall, Ste. 300  
Lincoln, NE 68508  
(402) 474-5529  
mark@naylorandrappllaw.com

December 20, 2017

## QUESTIONS PRESENTED FOR REVIEW

This Court held in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), that the Fourth Amendment prohibits warrantless blood tests incident to arrests for drunk driving, and that motorists cannot be criminally punished for refusing to submit to a blood test based on implied consent. In this case, the Nebraska Supreme Court held that blood draws obtained prior to *Birchfield* were not subject to exclusion at trial, even if the motorist did not voluntarily consent, because officers acted in good faith on state statute. The Nebraska Supreme Court further held that consent obtained after threat of criminal prosecution is not per se involuntary.

This case presents the opportunity for this Court to clarify the appropriate use of the good faith exception. The Nebraska Supreme Court's unprecedented application of the good faith exception in this case greatly expanded the doctrine, and ignored the longstanding precedent that evidence obtained with involuntary consent is inadmissible.

The questions presented are:

1. Whether *Birchfield v. North Dakota* created a categorical rule that consent given after threat of criminal prosecution is per se involuntary.
2. Whether the exclusionary rule applies to pre-*Birchfield* blood draws obtained pursuant to implied consent laws invalidated by *Birchfield v. North Dakota*.

## **PARTIES TO THE PROCEEDINGS**

The parties to the proceedings in the Lancaster County District Court and the Nebraska Supreme Court were the State of Nebraska and petitioner, Jared S. Hoerle. There were no parties to the proceedings other than those named in the caption of the case.

## TABLE OF CONTENTS

|                                                                                                                                                                                                                        | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| QUESTIONS PRESENTED FOR REVIEW .....                                                                                                                                                                                   | i    |
| PARTIES TO THE PROCEEDINGS .....                                                                                                                                                                                       | ii   |
| TABLE OF CONTENTS .....                                                                                                                                                                                                | iii  |
| TABLE OF AUTHORITIES .....                                                                                                                                                                                             | v    |
| OPINIONS AND ORDERS BELOW.....                                                                                                                                                                                         | 1    |
| JURISDICTION.....                                                                                                                                                                                                      | 1    |
| CONSTITUTIONAL PROVISIONS INVOLVED.....                                                                                                                                                                                | 1    |
| STATEMENT OF THE CASE.....                                                                                                                                                                                             | 2    |
| SUMMARY OF FACTS.....                                                                                                                                                                                                  | 3    |
| REASONS FOR GRANTING THE PETITION.....                                                                                                                                                                                 | 5    |
| I. CLARIFYING THE EFFECT A THREAT OF<br>CRIMINAL PROSECUTION HAS ON CON-<br>SENT WILL BRING CONSISTENCY AND<br>UNIFORMITY TO STATE COURTS .....                                                                        | 5    |
| A. Holding that the threat of criminal<br>prosecution does not render consent<br>involuntary is in direct conflict with<br>the holding in <i>Birchfield v. North Da-</i><br><i>kota</i> .....                          | 5    |
| B. State appellate courts are divided on<br>the issue.....                                                                                                                                                             | 6    |
| II. WHETHER THE EXCLUSIONARY RULE<br>APPLIES TO PRE- <i>BIRCHFIELD</i> BLOOD<br>DRAWS HAS IMPORTANT IMPLICA-<br>TIONS ON THE SCOPE OF THE GOOD<br>FAITH EXCEPTION AND HAS DIVIDED<br>STATE COURTS OF LAST RESORT ..... | 7    |

## TABLE OF CONTENTS – Continued

|                                                                                                                                                                                                   | Page |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| A. The Nebraska Supreme Court’s application of the good faith exception to the exclusionary rule when voluntariness of a criminal defendant’s consent to search is at issue is unprecedented..... | 7    |
| B. State courts of last resort are divided on whether the good faith exception applies .....                                                                                                      | 10   |
| CONCLUSION.....                                                                                                                                                                                   | 11   |

## APPENDIX

|                                      |         |
|--------------------------------------|---------|
| Nebraska Supreme Court Opinion ..... | App. 1  |
| District Court Order .....           | App. 16 |
| Motion for New Trial .....           | App. 18 |

## TABLE OF AUTHORITIES

|                                                                   | Page          |
|-------------------------------------------------------------------|---------------|
| CASES                                                             |               |
| <i>Arizona v. Evans</i> , 514 U.S. 1 (1995).....                  | 8             |
| <i>Birchfield v. North Dakota</i> , 136 S.Ct. 2160<br>(2016)..... | <i>passim</i> |
| <i>Davis v. U.S.</i> , 564 U.S. 229 (2011) .....                  | 8             |
| <i>Herring v. U.S.</i> , 555 U.S. 135 (2009) .....                | 8             |
| <i>Illinois v. Krull</i> , 480 U.S. 340 (1987) .....              | 8             |
| <i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973) ....       | 8, 9          |
| <i>State v. Blackman</i> , 898 N.W.2d 774 (Wis. 2017) ....        | 6, 10         |
| <i>State v. Hoerle</i> , 901 N.W.2d 327 (Neb. 2017).....          | 1, 5          |
| <i>State v. Schmidt</i> , 385 P.3d 936 (Kan. App. 2016).....      | 6             |
| <i>U.S. v. Leon</i> , 468 U.S. 897 (1984) .....                   | 7, 8          |
| CONSTITUTIONAL PROVISIONS                                         |               |
| U.S. Const. amend. IV.....                                        | 1, 10         |
| STATUTES                                                          |               |
| 28 U.S.C. § 1257(a).....                                          | 1             |

## **OPINIONS AND ORDERS BELOW**

The opinion of the Nebraska Supreme Court, reported as *State v. Hoerle*, 901 N.W.2d 327 (Neb. 2017), affirming Petitioner’s conviction and sentence was filed on September 22, 2017 and is reprinted in the Appendix (App.) at App. 1.



## **JURISDICTION**

The decision of the Nebraska Supreme Court sought to be reviewed was filed on September 22, 2017. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 13.1. This Court has jurisdiction to review under 28 U.S.C. § 1257(a).



## **CONSTITUTIONAL 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.” U.S. Const. amend. IV.



### STATEMENT OF THE CASE

On August 13, 2015, an Information was filed in the Lancaster County District Court in Lancaster County, Nebraska, charging Petitioner with driving under the influence with a blood alcohol content over .150, third offense, with an alleged offense date of April 11, 2015. A jury trial commenced on June 20, 2016. As part of its case-in-chief, the State of Nebraska admitted the results of a test conducted on a sample of Petitioner's blood, obtained pursuant to Nebraska's implied consent statute. A jury found Petitioner guilty of driving under the influence with a blood alcohol content over .150. The District Court found beyond a reasonable doubt that Petitioner had two prior convictions and found him guilty of driving under the influence with a blood alcohol content over .150, third offense.

On June 21, 2016, this Court released its decision in *Birchfield v. North Dakota*, holding that blood draws are not a valid search incident to arrest. Based on this decision, Petitioner timely filed a Motion for a New Trial, asserting that the new rule of constitutional law announced in *Birchfield* prohibited the introduction of the blood draw evidence at trial. App. 18-21. An evidentiary hearing on Petitioner's motion was held on September 7, 2016. The District Court issued an Order overruling Petitioner's Motion for a New Trial on October 11, 2016. App. 16.

Petitioner appealed his conviction and sentence to the Nebraska Court of Appeals. The Nebraska Supreme Court moved the case to its own docket and oral

arguments were heard on August 31, 2017. The Nebraska Supreme Court filed its decision on September 22, 2017, affirming the trial court's decision to overrule Petitioner's Motion for a New Trial, holding that the good faith exception to the exclusionary rule applied.

---

◆

### SUMMARY OF FACTS

On April 11, 2015, at approximately 10:45 p.m., Officer Chris Johnson was dispatched to the intersection of 27th and Fletcher streets in Lincoln, Nebraska regarding a motorcycle accident. Officer Johnson arrived on scene at approximately 10:55 p.m. and observed a motorcycle parked in the left turning lane on Fletcher street that appeared to be damaged. Officer Johnson also observed Petitioner standing in the median near the motorcycle.

Officer Johnson described Petitioner as "dazed," and observed a strong odor of alcohol on his breath and watery/bloodshot eyes. Petitioner admitted to having a few shots and some beers at a nearby bar. Other officers arrived on scene to process the accident, while Officer Johnson continued with a DUI investigation. Due to Petitioner's involvement in an accident, the standardized field sobriety tests were not conducted. Petitioner was read a preliminary breath test advisement form, which stated that refusal to submit to the preliminary breath test would result in a criminal charge separate from refusal to submit to a chemical test.

Petitioner was placed under arrest after failing the preliminary breath test.

At approximately 11:32 p.m., Officer Johnson and Petitioner arrived at the Lancaster County Jail where they were informed Petitioner would need to be examined at the hospital before being accepted into the facility due to the accident. Officer Johnson then transported Petitioner to Bryan West hospital. At the hospital, Officer Johnson read the Post Arrest Chemical Test Advisement form which states Petitioner is required by law to submit to a blood test and refusal to submit to a test of his blood would result in a criminal charge. A sample of Petitioner's blood was drawn at approximately 12:34 a.m. Petitioner was then transported to the local detox center. From the time Officer Johnson first made contact with Petitioner to the time the investigation was complete, three and a half hours expired. Officer Johnson made no attempt to attain a search warrant for Petitioner's blood prior to requiring him to submit to the blood test.



## REASONS FOR GRANTING THE PETITION

### I. CLARIFYING THE EFFECT A THREAT OF CRIMINAL PROSECUTION HAS ON CONSENT WILL BRING CONSISTENCY AND UNIFORMITY TO STATE COURTS.

#### A. Holding that the threat of criminal prosecution does not render consent involuntary is in direct conflict with the holding in *Birchfield v. North Dakota*.

In affirming the trial court's decision, the Nebraska Supreme Court held that the threat of criminal prosecution does not render an individual's subsequent consent per se involuntary. This holding is based on an erroneous interpretation of this Court's decision in *Birchfield* and is in direct conflict with this Court's holding.

In *Birchfield*, this Court stated, "we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield*, 136 S.Ct. at 2186. The Nebraska Supreme Court held that this language did not "make categorically invalid a warrantless blood draw based on actual consent when a driver is incorrectly advised that the driver is required to submit to such a test or will face criminal penalties for a refusal." *Hoerle*, 297 Neb. at 846. The Nebraska Supreme Court supported this holding by pointing out that this Court reversed and remanded Beylund's case, which involved a blood draw obtained through an implied consent advisement. The Nebraska Supreme Court interpreted this

remand as proof that this Court did not resolve the issue of consent as a matter of law, even though Beylund was not subjected to a criminal charge, but rather, an administrative penalty. This holding is in direct conflict with this Court's clear holding in *Birchfield* that consent obtained after threat of criminal prosecution is involuntary.

Ultimately, the Nebraska Supreme Court did not make a finding either way whether Petitioner's consent was voluntary, applying the good faith exception instead. However, a determination on the voluntariness of Petitioner's consent is necessary to resolve the matter, as discussed in more detail below.

**B. State appellate courts are divided on the issue.**

State courts have divided over their interpretation of the language in *Birchfield*. In contrast to the Nebraska Supreme Court's decision, two other courts have properly applied this Court's clear and direct holding that a warrantless blood draw could not be upheld based on consent after the motorist was informed that failure to submit would result in additional consequences. *State v. Schmidt*, 385 P.3d 936 (Kan. App. 2016) (holding motorist's consent to a blood draw involuntary when given after being told refusal would result in an additional criminal charge); *State v. Blackman*, 898 N.W.2d 774 (Wis. 2017) (holding motorist's consent to a blood draw was involuntary when given

after being told refusal would result in his operating privilege being revoked).

**II. WHETHER THE EXCLUSIONARY RULE APPLIES TO PRE-*BIRCHFIELD* BLOOD DRAWS HAS IMPORTANT IMPLICATIONS ON THE SCOPE OF THE GOOD FAITH EXCEPTION AND HAS DIVIDED STATE COURTS OF LAST RESORT.**

**A. The Nebraska Supreme Court’s application of the good faith exception to the exclusionary rule when voluntariness of a criminal defendant’s consent to search is at issue is unprecedented.**

Never has the United States Supreme Court held that evidence obtained during a search based on consent, later deemed to be involuntary, was nevertheless admissible because the officer reasonably believed the defendant’s consent was voluntary. The good faith exception to the exclusionary rule was first recognized in *U.S. v. Leon*, 468 U.S. 897 (1984), which addressed the admissibility of evidence obtained pursuant to a search warrant that was later deemed to be invalid. The Court held that when law enforcement acts in reasonable reliance on a search warrant that was issued by a detached and neutral magistrate, exclusion of evidence is improper, even though the warrant is later found to be invalid, because officers acted in “good faith” that the warrant was valid. *Id.*

Since its inception in *Leon*, the good faith exception has only been applied in a limited number of circumstances. See, e.g., *Davis v. U.S.*, 564 U.S. 229 (2011) (holding that the illegally obtained evidence was admissible because the officer conducted a search in objectively reasonable reliance on binding judicial precedent, even though that precedent was later overruled); *Herring v. U.S.*, 555 U.S. 135 (2009) (holding that the good faith exception applied when an officer arrested defendant based on faulty information from a county clerk that defendant had an active arrest warrant); *Arizona v. Evans*, 514 U.S. 1 (1995) (holding that the exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment where the erroneous information resulted from clerical errors of court employees); *Illinois v. Krull*, 480 U.S. 340 (1987) (holding good faith applies when officers conducted a search in objectively reasonable reliance upon a statute that authorized warrantless administrative searches which was later found to be unconstitutional).

The touchstone of the good faith analysis is the objective reasonableness of law enforcement. In contrast, the voluntariness of a criminal defendant's consent is analyzed from the subjective view of that particular defendant, and the circumstances surrounding the encounter. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). For the first time, the Nebraska Supreme Court expanded the good faith exception to encompass situations where law enforcement relies on their understanding of the voluntariness of a criminal defendant's

consent to search. The Nebraska Supreme Court attempted to support its holding by framing the issue as whether law enforcement reasonably relied on a state statute that was later found unconstitutional. Although Officer Johnson relied on state statute by informing Petitioner he would face criminal prosecution for refusing to submit to a blood test, that does not resolve the question of whether Petitioner's consent to the blood draw was in fact voluntary.

“The question whether a consent to a search was in fact voluntary or was a product of duress or coercion, express or implied, is a question of fact to be determined by the totality of the circumstances.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (emphasis added). In other words, consent must “in fact” be voluntary. To be effective under the Fourth Amendment, consent to a search must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. The burden of proving the voluntariness of the consent is on the prosecution which must demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied. *Schneckloth*, supra. The issue in pre-*Birchfield* blood draw cases is not whether the officers reasonably relied on their understanding of the law, but rather, whether each defendant gave free and voluntary consent to the blood draw. The good faith exception has never been applied to the voluntary consent analysis. Once a court has determined that consent was involuntary, the analysis stops because

evidence seized with involuntary consent is inadmissible under the Fourth Amendment.

The Nebraska Supreme Court failed to analyze whether Petitioner's consent was in fact voluntary, opting to utilize the good faith exception instead. This holding expands the good faith exception beyond reasonable mistakes and reasonable reliance on statute or court precedent, and for the first time, interjects it into the issue of whether consent is voluntary.

**B. State courts of last resort are divided on whether the good faith exception applies.**

The two state courts of last resort that have addressed the question whether the good faith exception applies to pre-*Birchfield* blood draws have split. In contrast to the Nebraska Supreme Court, in *State v. Blackman*, 898 N.W.2d 774 (Wis. 2017), the Wisconsin Supreme Court held that the defendant's consent to a blood draw pursuant to the implied consent law was involuntary, and therefore, the good faith exception does not apply. The Wisconsin Supreme Court further supported its decision by finding that suppression of the blood draw would assist to deter law enforcement. However, even if law enforcement would not be deterred, suppression of blood draws obtained with involuntary consent is still the appropriate remedy.

Such a conflict amongst the states undermines the uniformity of application of the Fourth Amendment. Absent a decision by this Court, the discord between

states will continue, as rulings by the court of last resort in a state is definitive, and change to that ruling unlikely. Finally, a decision by this Court would control the final outcome of Petitioner's case.



### CONCLUSION

Petitioner respectfully requests that this Court grant the petition.

Respectfully submitted,

MARK E. RAPPL

*Counsel of Record*

NAYLOR & RAPPL LAW OFFICE

1111 Lincoln Mall, Ste. 300

Lincoln, NE 68508

(402) 474-5529

mark@naylorandrappllaw.com