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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of General Sessions

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SC Court of Appeals

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2014-001550

THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

MCKENZIE L. DAVIS, APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **The trial judge properly denied Appellant's motion to suppress the blood alcohol results since the officer had probable cause to arrest Appellant for felony driving under the influence where Appellant admitted he was the driver of the vehicle involved in the collision; where Appellant admitted he had consumed alcoholic beverages; and where the officer believed, based upon his observations of Appellant coupled with his extensive training and experience, that Appellant was under the influence of alcohol.**

II. **Appellant's Fourth Amendment rights were not violated and his blood test results were properly admitted where exigent circumstances existed pursuant to Schmerber v. California; where South Carolina's implied consent laws are reasonable under the Fourth Amendment and thus constitutional; and where the good faith exception would preclude suppression in any event.**

STATEMENT OF THE CASE

Appellant was indicted in Allendale County in March 2012 for felony driving under the influence resulting in death, felony driving under the influence resulting in great bodily injury, child endangerment, and driving under suspension. On July 7-10, 2014, Appellant proceeded to trial before the Honorable J. Ernest Kinard, Jr., and a jury. The jury found Appellant guilty of driving under the influence, as a lesser offense of felony driving under the influence resulting in great bodily injury, and also found him guilty of driving under suspension. The jury acquitted Appellant of the other two charges. Judge Kinard sentenced Appellant to one year in prison suspended to 165 days of time served and two years of probation for driving under the influence, and thirty days of time served for driving under suspension. This appeal follows.

ARGUMENT

Background Facts

In the late morning hours of November 1, 2008, Appellant picked up his niece, Valandria, age eighteen, his nephew, Demarcus, age twelve, and another female relative, Cieara (who went by the name "Sha"), age eighteen. (R. p. 255-58). Valandria was going to help Appellant clean his house. (R. p. 257 lines 1-3). Appellant, who was driving, stopped along the way and bought beer at a gas station. (R. p. 260-61). After making a couple of other stops, Appellant started speeding. (R. p. 263-64). On Oswald Road, Valandria asked Appellant to slow down because she was scared, but Appellant refused. (R. p. 264). At that point, Valandria crouched down in the floorboard area because she was so frightened. (R. p. 265). Shortly thereafter, Appellant lost control of the vehicle, went off the road, and crashed into some trees. (R. p. 265-66; p. 97). The next thing Valandria remembered was lying on the ground. (R. p. 266). Demarcus, who had been sitting behind Appellant in the driver's seat, blacked out after the crash but recalled waking up with Sha beside him and recalled the "fire people" removing him from the vehicle. (R. p. 317-18). Tragically, Sha died almost immediately upon impact. (R. p. 88, lines 2-7; p. 249, lines 22-24; p. 332).

Joey Oswald, who lived nearby and was working outside in his father's shed, heard the crash and drove over to check on the occupants. (R. p. 247-48). When he arrived, three passengers were in the wrecked vehicle, and the driver, Appellant, was out "kind of walking around." (R. p. 249). Appellant was mumbling to himself and using profanity. (R. p. 250). Mr. Oswald discovered that the female passenger in the backseat

was deceased, but he stayed with the other passengers until emergency services arrived. (R. p. 249-51). His son called 911. (R. p. 250).

Fire Chief Rodney Stanley was dispatched to the scene first around 2:30 pm. (R. p. 42, line 2-16; p. 86). When he arrived, he saw an SUV against a tree about fifteen feet off the road that had obviously been in a "very severe accident." (R. p. 87; p. 91). He then encountered Appellant and a young lady standing in front of the vehicle. (R. p. 87). The young lady was covered in glass and kept telling Appellant that she had asked him to slow down. (R. p. 88). Notably, the front passenger window was "busted out" since the glass had shattered upon impact. (R. p. 89). Chief Stanley noticed a slight odor of alcohol on Appellant. (R. p. 90-91). Chief Stanley soon discovered that the female passenger in the back was deceased. (R. p. 88).

Corporal Denard Gates of the South Carolina Highway Patrol arrived a little later in the afternoon. (R. p. 94-96). He observed the body of a deceased female in the back seat of the SUV. (R. p. 97). He noted there was not a posted speed limit because it was a rural road, and consequently, the speed limit was 55 miles per hour. (R. p. 98). Corporal Gates remained at the scene for about fifteen or twenty minutes but then proceeded to the hospital to check on the occupants of the SUV. (R. p. 107-108). At the time he left the scene, Corporal Gates did not know who had been driving the SUV at the time of the crash. (R. p. 108).

After arriving at the hospital, Corporal Gates first talked with Demarcus because the hospital was preparing to have him flown to another hospital. (R. p. 109; p. 111). Demarcus was lying in a hospital bed with lots of blankets covering him. (R. p. 109-110). Demarcus indicated that at the time of the crash, he had been sitting behind the

driver's seat.[1] (R. p. 110). As Corporal Gates left Demarcus's room and headed to Valandria's room, he noticed a man following him. (R. p. 111). Corporal Gates had no idea who this man was initially but noticed the man was walking with a limp. (R. p. 111, lines 6-11). Corporal Gates then spoke with Valandria, who was lying in a hospital bed, and Valandria explained that she had been the front-seat passenger at the time of the crash. (R. p. 112). Thereafter, Corporal Gates spoke with the man who followed him into Valandria's room and identified him as Appellant. (R. p. 112-113). Appellant indicated he was involved in the collision also, but at that point he denied being the driver of the vehicle. (R. p. 112). Once Corporal Gates began talking with Appellant, he immediately smelled the odor of alcoholic beverage coming from his breath. (R. p. 114-15). He also noticed Appellant's eyes were red and glassy. (R. p. 115, lines 9-19). Corporal Gates asked Appellant if he had consumed any alcoholic beverages and Appellant claimed he had consumed two beers. (R. p. 115, lines 5-6). Based upon his training and experience, Corporal Gates believed Appellant was under the influence of alcohol.[2] (R. p. 115, lines 20-23).

When Appellant denied being the driver, Corporal Gates realized that someone was not telling the truth about being the driver. (R. p. 118). He "got both of them together" where they were all sitting in the same room and explained "in a very stern way" that one of the occupants was deceased and that this was a serious matter. (R. p. 121, lines 21-25). Corporal Gates told them there was no way both of them could be the

[1] Demarcus gave a statement to law enforcement two days after the crash while he was a patient at the children's hospital in Richland County. (R. p. 137-38). In this statement, Demarcus told police what happened in the time leading up to the collision and reported that Appellant had been driving the vehicle. (R. p. 318-20). Demarcus confirmed at trial that Appellant was the driver. (R. p. 314).

[2] Corporal Gates had been employed with the South Carolina Highway Patrol for sixteen years, had received training in collision investigation and DUI detection, and, at the time of the collision, had worked about one hundred cases involving alcohol and driving. (R. p. 94-96).

front seat passenger. (R. p. 122). It "got very emotional," and Valandria then told Corporal Gates that she had been the driver. (R. p. 122, lines 7-9). Shortly thereafter, Valandria was taken out of the room by medical personnel. (R. p. 123). As soon as she was gone, Appellant confessed that he had, in fact, been the driver at the time of the crash. (R. p. 123, lines 19-24). At that point, Corporal Gates "started preparing to treat this case as a felony DUI" since he knew there was a death and/or great bodily injury that resulted from the crash and since he believed Appellant's alcohol impairment caused the crash. (R. p. 124-25; p. 135, lines 12-18). He was concerned about the dissipation of alcohol in Appellant's bloodstream. (R. p. 57, lines 12-19). He testified that at that time, he believed Appellant was the driver based upon his observations and based upon the statement Appellant had provided. (R. p. 135, lines 15-18).

Corporal Gates obtained the appropriate paperwork, spoke with medical personnel about taking samples, and read Appellant his Miranda rights. (R. p. 125, lines 2-6). Corporal Gates explained that he did not perform field sobriety tests with Appellant because they were at the hospital, not at the scene, and because Appellant apparently had an injury to one or both of his legs. (R. p. 125, lines 17-25). He stated that he "couldn't give him a sobriety test on the side of the road," and that it would not have been a fair test anyway since Appellant was injured. (R. p. 126, lines 3-7). Corporal Gates read Appellant his "implied consent for felony DUI" and filled out a "Blood and Urine Collection Report," and samples were thereafter taken from Appellant by medical personnel at approximately 4:40 pm. (R. p. 128, lines 2-15; p. 150-51; p. 284-86; p. 520). The results revealed that Appellant's blood alcohol level, at the time the sample was given, was .106, which could have caused euphoria, sedation, and affected Appellant's

ability to "do things" as he normally does. (R. p. 406-409; p. 416-17). The forensic toxicologist testified that it would not be possible to achieve a .106 blood alcohol level by drinking only two beers. (R. p. 416, lines 9-13).

After Appellant's blood sample was taken, Appellant had a conversation with two gentlemen who had been sitting in the visitor's area. (R. p. 132). Following this conversation, these two gentlemen motioned for Corporal Gates to come over to them. (R. p. 132, lines 9-12). The two men told Corporal Gates that Appellant had something to say. (R. p. 132, lines 12-15). At that point Appellant told Corporal Gates that he had not been the driver at the time of the collision. (R. p. 133-34). Later, Corporal Gates once again gathered Appellant and Valandria in the same room together and they both wrote out statements. (R. p. 134). Appellant's written statement claimed Valandria was driving at the time of the crash. (R. p. 133-34). Valandria's statement indicated that Appellant had been showing her how to drive on Oswald Road and that she lost control of the vehicle and flew out the window. (R. p. 273-74).

At trial, Valandria testified that two days after she provided this written statement, she reported to Corporal Gates that she was not telling the truth when she told him she was the driver. (R. p. 269-71). Valandria explained that Appellant asked her to lie and say she was the driver because his driver's license was suspended. (R. p. 269-71). Although she had been trying to help Appellant by covering for him, after she learned that Sha had died in the wreck, she felt she had to do the right thing and tell the truth to the police. (R. p. 268-81). She stated it was selfish of Appellant to ask her to lie for him. (R. p. 281, lines 15-22).

After Appellant recanted his previous statement that he was the driver of the vehicle at the time of the collision, and after Valandria gave her written statement that she was the driver, law enforcement decided to "let the evidence show who would be the driver." (R. p. 134-35). Therefore, law enforcement did not take Appellant into custody that day but instead waited until additional evidence was obtained. (R. p. 136).

Members of the Multi-Disciplinary Accident Investigation Team ("MAIT") subsequently investigated the crash. According to one of the MAIT collision reconstruction experts, the SUV was traveling at 107 miles per hour in the five seconds before the crash. (R. p. 289-94). The investigation of the scene revealed that the driver ran off the right shoulder of the road, overcorrected, crossed the center line, and then lost control and struck two trees. (R. p. 219-20). As a part of their investigation, MAIT officers removed the driver's side airbag and sent it to SLED for DNA testing. (R. p. 190-92). Buccal swabs were obtained from Appellant by consent for comparison purposes. (R. p. 198; p. 210). DNA found on the airbag matched Appellant's DNA, with a 1 in 110 quadrillion chance the DNA on the airbag came from an unrelated person. (R. p. 425-26). Notably, the MAIT experts explained that, once deployed, airbags cannot be re-used and that this particular airbag had never been deployed prior to the collision in question. (R. p. 228-29; p. 296).

I. The trial judge properly denied Appellant's motion to suppress the blood alcohol results since the officer had probable cause to arrest Appellant for felony driving under the influence where Appellant admitted he was the driver of the vehicle involved in the collision; where Appellant admitted he had consumed alcoholic beverages; and where the officer believed, based upon his observations of Appellant coupled with his extensive training and experience, that Appellant was under the influence of alcohol.

Appellant argues that the trial judge should have suppressed his blood analysis results because Corporal Gates had no probable cause to believe Appellant was under the influence of alcohol or that he was the driver of the vehicle at the time of the collision. Assuming these arguments are preserved for appellate review,[3] they are without merit.

Applicable Law

Probable cause exists when the circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe a crime has been committed. State v. Cuevas, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005). "In determining whether probable cause exists, 'all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received.'" Id. at 204, 616 S.E.2d at 721 (citing State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). "Probable cause turns not on the

[3] Arguably, Appellant's contention that the blood test results should have been suppressed is not preserved for review because, although Appellant purported to renew his pretrial objections at other points in trial, he failed to object at the critical time: when the forensic toxicologist testified about the actual blood test results. (See R. p. 407, lines 11-15; see also p. 125, lines 7-12; p. 282-89; p. 415, line 24 – p. 416, line 7). See State v. King, 334 S.C. 504, 509-10, 514 S.E.2d 578, 581 (1999) (a contemporaneous objection is required to preserved an issue for appellate review); State v. King, 349 S.C. 142, 149-50, 561 S.E.2d 640, 643-44 (Ct. App. 2002) (finding an issue not preserved where the defendant failed to renew his pretrial motion at the time the evidence was offered for admission during trial and evidence was presented in between the pretrial hearing and the admission of the challenged evidence); see also State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence which is cumulative to other unobjected-to evidence is harmless).

individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). "The term 'probable cause' does not import absolute certainty." State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). Rather, "[p]robable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999) (citation omitted); see also Illinois v. Gates, 462 U.S. 213, 235 (1983) (holding that probable cause necessarily means less evidence than would be required to convict; only a probability of criminal activity is required, not a prima facie showing).

The appellate court reviews the circuit court's probable cause determination under a "clear error" standard. Baccus, 367 S.C. at 48-49, 625 S.E.2d at 220. A trial court's finding regarding probable cause is conclusive on appeal where supported by evidence. State v. Jones, 268 S.C. 227, 233, 233 S.E.2d 287, 289 (1977); see also State v. Barrs, 257 S.C. 193, 198, 184 S.E.2d 708, 710 (1971) (holding because there was evidence to support the circuit court's finding that officer had probable cause to make an arrest, it was conclusive on appeal).

Discussion

Here, contrary to Appellant's arguments, Corporal Gates did have probable cause to seek Appellant's blood samples under the felony DUI statute. See S.C. Code § 56-5-2946 ("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.") (emphasis added). Corporal Gates visited the scene of the accident and learned that there was a single-car collision with no apparent cause, that one person had died as a result of the collision, and that other occupants of the vehicle had been injured and transported to the hospital. Corporal Gates encountered Appellant, who was limping, at the hospital and discovered he was involved in the collision. Corporal Gates smelled alcohol on Appellant's breath and noted he had red and glassy eyes. (R. p. p. 115, lines 9-19). Appellant admitted to Corporal Gates that he had consumed alcohol (although he claimed he only had "two beers"). It was Corporal Gates's opinion, based upon his extensive training and experience, that Appellant was under the influence of alcohol. Furthermore, when Corporal Gates initially spoke with Valandria, she reported without hesitation that she was the front-seat passenger in the vehicle at the time of the crash. Although Valandria subsequently told Corporal Gates she was the driver, immediately after she left the room, Appellant confessed to being the driver. At the time Corporal Gates requested the blood samples, he believed Appellant's confession and believed Appellant was the driver.

The facts within Corporal Gates's knowledge at the time he requested Appellant's blood samples gave him probable cause to believe Appellant was guilty of felony DUI. See State v. Manning, 400 S.C. 257, 268, 734 S.E.2d 314, 319-20 (Ct. App. 2012) (holding that Trooper Baker had probable cause to arrest appellant for felony DUI where there was a violent single-car collision, where a highway patrolman informed Trooper Baker that appellant was the driver, and where Trooper Baker observed appellant at the hospital and noticed appellant had injuries consistent with having been in an accident and

that appellant smelled of alcohol), *cert. denied* June 11, 2014; State v. Martin, 275 S.C. 141, 146, 268 S.E.2d 105, 107 (1980) (officer had probable cause to arrest appellant for DUI where the officer arrived at the scene and observed a two-car collision, where appellant admitted he was the driver of one of the vehicles, and where appellant appeared to be highly intoxicated); State v. Cuevas, 365 S.C. at 204, 616 S.E.2d at 721 (officer had probable cause to arrest defendant for felony DUI where the defendant left the scene of the accident, had a strong smell of alcohol on his breath and an open beer container in his vehicle, and had a bruise on his chest consistent with being hit by an airbag); cf. Lapp v. South Carolina Dep't. of Motor Vehicles, 387 S.C. 500, 505-506, 692 S.E.2d 565, 568-69 (Ct. App. 2010) (officer had probable cause to arrest the defendant for DUI where he was dispatched to the scene of an automobile accident and found the defendant – who smelled strongly of alcohol – sitting in her vehicle, where the defendant admitted she struck two vehicles, and where the defendant refused to perform a field sobriety test); Kelly v. South Carolina Dep't. of Highways, 323 S.C. 334, 337-38, 474 S.E.2d 443, 445 (1996) (officer had probable cause to believe the defendant was under the influence where he observed defendant's vehicle abruptly swerve and almost hit a median and subsequently smelled the odor of alcoholic beverage on the defendant, where the defendant admitted to having a few beers, and where the defendant performed poorly in a field sobriety test).

Accordingly, the trial judge's determination that Corporal Gates had probable cause to request the blood samples must be affirmed. (See R. p. 67-68). See Jones, 268 S.C. at 233, 233 S.E.2d at 289 (a trial court's finding regarding probable cause is conclusive on appeal where supported by evidence).

II. Appellant's Fourth Amendment rights were not violated and his blood test results were properly admitted where exigent circumstances existed pursuant to Schmerber v. California; where South Carolina's implied consent laws are reasonable under the Fourth Amendment and thus constitutional; and where the good faith exception would preclude suppression in any event.

Standard of Review/Applicable Law

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers. Elkins v. United States, 364 U.S. 206, 213 (1960). "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"). Significantly, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

The well-settled rule is warrantless searches are unreasonable *per se* unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). "[W]arrantless searches are allowed when the circumstances made it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." Kentucky v. King, __ U.S. __,

131 S.Ct. 1849, 1858 (2011). There are several recognized exceptions to the warrant requirement. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Exceptions to the Fourth Amendment's warrant requirement include, among other things, consent, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973), search incident to a lawful arrest, Arizona v. Gant, 556 U.S. 332, 338 (2009), and exigent circumstances, Mincey v. Arizona, 437 U.S. 385, 393–94 (1978). "It is well-established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct and otherwise permissible search without first obtaining a warrant." Kentucky v. King, 131 S. Ct. at 1853-54. Aside from the above-mentioned exceptions, the United States Supreme Court has also recognized additional exceptions to the warrant requirement when "special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like" render a warrantless search or seizure reasonable. Illinois v. McArthur, 531 U.S. 326, 330-31 (2001); Maryland v. King, __ U.S. __, 133 S. Ct. 1958, 1969 (2013). Such special circumstances diminish the need for a warrant either because the public interest is such that a warrant or probable cause is not required, or because an individual is already on notice that some reasonable police intrusion on his privacy is to be expected. King at 1969. To determine the constitutionality of a particular search, the Court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." United States v. Place, 462 U.S. 696, 703 (1983). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the

search intrudes upon reasonable privacy expectations." Grady v. North Carolina, 135 S.Ct. 1368, 1371 (2015).

The Limited Scope of McNeely

In Missouri v. McNeely, __ U.S. __, 133 S. Ct. 1552 (2013),[4] the defendant was stopped around 2:08 am by highway patrol after he was observed speeding and repeatedly crossing the center line. McNeely at 1556. The officer observed several signs of intoxication, and the defendant admitted he had consumed beer. Id. After the defendant performed poorly on field-sobriety tests and declined a portable breath test, the officer arrested him. Id. at 1556-57. While being transported to the police station for a breath sample, the defendant told the officer he would again refuse to provide a sample. Id. At that point, without securing a warrant, the officer decided to take the defendant to the hospital for a blood test. Id. Reading from a standard implied consent form, the officer explained to the defendant that refusal to submit to the test would lead to revocation of his driver's license and could be used against him in a future prosecution. Id. The defendant still refused, and the officer directed hospital personnel to take a blood sample. Id. The sample was secured at 2:35 am. Id.

At trial, the defendant moved to suppress the blood test results, arguing that taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment. Id. The trial court agreed, concluding that there were no exigent circumstances other than the fact that alcohol was being metabolized by the defendant's liver. Id. The Missouri Supreme Court affirmed, ruling that exigency

[4] Five justices – Justices Sotomayor, Scalia, Kennedy, Ginsburg, and Kagan – joined the majority opinion. In addition, four of those justices – Justices Sotomayor, Scalia, Ginsburg, and Kagan – issued a plurality opinion, and Justice Kennedy issued a concurring opinion. Chief Justice Roberts – joined by Justices Breyer and Alito – issued an opinion concurring in part and dissenting in part. Justice Thomas issued a dissenting opinion.

depends heavily on the existence of special facts, such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital, as had been the case in Schmerber. Id. Finding there were no "special facts" in McNeely's case, since it was unquestionably a "routine" driving under the influence case, the court affirmed the suppression of the blood test results. Id. The state appealed to the United States Supreme Court, arguing that the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that justifies, on its own, an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases. Id. at 1558. The state presented only this narrow question and did **not** argue that any other exceptions to the warrant exception applied. See id. at 1560.

Acknowledging there was a "split of authority,"[5] the United States Supreme Court granted certiorari to resolve the narrow question before it. Id. at 1558. The Court pointed out that the totality of the circumstances in Schmerber v. California, 384 U.S. 757 (1966), supported an exigency because the defendant was involved in a car accident which had to be investigated; the defendant suffered injuries in the accident and had to be taken to the hospital; and, under these circumstances, the officer might reasonably have believed he was confronted with an emergency and that the delay necessary to obtain a warrant threatened the destruction of evidence due to the natural dissipation of alcohol in the defendant's blood. Id. at 1559-60. The Court ultimately determined that a *per se* exigency did not exist under the circumstances of McNeely's case – where the **only** "exigency" was the natural dissipation of alcohol in the defendant's blood – and instead

[5] Like many jurisdictions, South Carolina interpreted Schmerber v. California, 384 U.S. 757 (1966), to mean that the natural metabolism of alcohol in a person's bloodstream was an exigent circumstance justifying an exception to the usual warrant requirement. See State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989); see also State v. Shriner, 751 N.W.2d 538 (Minn. 2008); State v. Bohling, 494 N.W.2d 399 (Wis. 1993); State v. Woolery, 775 P.2d 1210 (Idaho 1989); State v. Dyal, 478 A.2d 390 (N.J. 1984).

upheld the "totality of the circumstances" analysis as applied in Schmerber. Id. at 1559-61. The Court pointed out, however, that the dissipation of alcohol remains an essential factor to be considered in the totality of the circumstances because "a significant delay in testing will negatively affect the probative value of the results." Id. at 1560-61. The Court also noted that advances in technology as relevant to obtaining warrants since the time Schmerber was decided may be pertinent to an assessment of exigency. Id. at 1562-63. In conclusion, the Court stated that "[i]n short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically." Id. at 1563.

In part III of the opinion, a plurality of the Court recognized that the McNeely opinion was limited to addressing the "exigency" exception by pointing out that "consent" is a separate exception:

> States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

Id. at 1566 (citations omitted).

The most important points to be gleaned from McNeely can be summarized as follows:

(1) McNeely addressed only the narrow question before the Court which involved the exigency exception to the warrant requirement and no other exception or justification;

(2) McNeely is different from Schmerber because McNeely was a "routine" driving under the influence case while Schmerber – which remains good law – involved a car accident and injuries requiring hospitalization;

(3) The natural dissipation of alcohol in the blood continues to be an important factor in a totality of the circumstances analysis under the exigent circumstances exception to the warrant requirement;

(4) A plurality of the Court seemed to cite with approval the "implied consent" statutes that exist in some form in every state.

Admission of the Blood Test Results was Proper

(1) Exigent Circumstances and *Schmerber*

As discussed above, the McNeely court expressly upheld Schmerber, which concluded that the totality of the circumstances warranted a nonconsensual test of the defendant's blood under the exigency exception. The facts in Appellant's case reveal an even greater exigency than the facts in Schmerber; therefore, admission of Appellant's blood draw should be upheld under the totality of the circumstances test.

In Schmerber, the defendant, who was intoxicated, crossed the road and drove into a tree. Schmerber, 384 U.S. at 758-59 & 768-69. Both the defendant and his passenger were injured in the accident and were taken to the hospital. Id. at 759 n.2. Within about two hours of the accident, and after law enforcement observed several indicators he was intoxicated, the defendant was arrested at the hospital for driving under the influence of intoxicating liquor. Id. at 768-69. Then, at the direction of a police officer, the defendant's blood was drawn by a physician at the hospital. Id. at 758-59. The defendant expressly refused to consent to this blood draw on the advice of his attorney. Id. at 759. The subsequent chemical analysis revealed a blood-alcohol concentration consistent with intoxication, and the results of the analysis were admitted at

trial over the defendant's objection. Id. The state appellate court affirmed, and the United States Supreme Court granted certiorari. Id.

The Supreme Court stated that the Fourth Amendment question squarely presented was "whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure." Id. at 766-67. After concluding that the blood draw resulted from the seizure of a person and the blood test plainly constituted a search, the Court held that the issues to be determined were whether or not the police were justified in requiring the defendant to submit to the blood test and whether the means and procedures employed in taking his blood met Fourth Amendment standards of reasonableness. Id. at 768. Further, while it was clear there was probable cause for the defendant's arrest, and that the blood test would likely produce relevant evidence, the question remained whether the officer was permitted to draw these inferences himself or whether he was required to procure a warrant first. Id. at 770. The Court ultimately held that the officer in the defendant's case was not required to first obtain a warrant because he "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Id (citation omitted). Therefore, the exigency exception applied since there was "no time to seek out a magistrate and secure a warrant" in light of the "special facts" presented: (1) the natural dissipation of alcohol in the defendant's system; (2) the fact that time had to be taken to investigate the car accident; and (3) the fact that time had to be taken to bring the accused to the hospital. Id. at 770-71. Accordingly, the Court concluded "that the present record

shows no violation of Petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures." Id.

The facts in Appellant's case are even more egregious than those in Schmerber – and even more illustrative of exigent circumstances. Here, Appellant's vehicle was speeding in excess of 100 miles per hour and crashed into some trees on the side of a rural road around 2:30 in the afternoon. One of the vehicle's passengers died as a result of the collision, and the other two passengers were seriously injured. All of the surviving occupants, including Appellant, were taken to the hospital before highway patrol officers arrived. After briefly visiting the scene to gather information, Corporal Gates traveled to the hospital to check on the injured occupants. He spoke with Demarcus, Valandria, and Appellant. In the course of his interviews, he discovered that Appellant had been involved in the collision and that Appellant appeared intoxicated. He also received conflicting information about who was driving the vehicle at the time of the collision. By the time Appellant confessed to being the driver, nearly two hours had passed since the collision. Understandably, Corporal Gates was concerned about the dissipation of alcohol in Appellant's bloodstream.[6] Accordingly, he arranged for Appellant's blood samples to be taken by hospital personnel around 4:40 pm. Unlike the defendant in Schmerber, Appellant did not expressly refuse to consent to the blood draw.[7]

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[6] As the trial judge noted in the pretrial hearing, further delay in obtaining Appellant's blood sample could have resulted in the State losing evidence that Appellant's blood alcohol level was above the permissible inference level. (R. p. 68, lines 9-11). See S.C. Code § 56-5-2950 (G)(3) ("[I]f the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.").

[7] Arguably, Appellant's blood draw was valid on the basis of consent since there is no indication in the record that the blood draw was nonconsensual or that Appellant withdrew his consent under the implied consent laws. See State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement; one of the recognized exceptions is "consent"); see also S.C. Code § 56-5-2950 (A) ("A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of

During the time Corporal Gates was investigating the collision and attempting to determine who had been driving, highly probative blood evidence had been diminishing and was continuing to diminish. As in Schmerber, any further delay at that point would have threatened the destruction of evidence. Also as in Schmerber, there was no time to seek out a magistrate and secure a warrant in light of the special facts presented: (1) the natural dissipation of alcohol in the defendant's system; (2) the fact that time had to be taken to investigate the car accident; and (3) the fact that further time had to be taken to attempt to obtain truthful information about who was driving at the time of the accident. See Schmerber at 770-71. Accordingly, due to the exigent circumstances existing at the time, Corporal Gates was not required to obtain a warrant before obtaining Appellant's blood sample. Cf. State v. Jones, 96 A.3d 297, 305 (N.J. Super. Ct. App. Div. 2014) (finding that the defendant's suppression motion should have been denied because the same "special facts" that supported a warrantless blood sample in Schmerber – which were absent in the McNeely case – were present in this case: an accident, injuries requiring hospitalization, and an hours-long police investigation; therefore, it was not necessary for the officers to shoulder the further delay entailed in securing a warrant that would have threatened the destruction of the blood alcohol evidence). Appellant's Fourth Amendment rights were not violated.

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determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.").

(2) The Blood Draw was Reasonable Under the Fourth Amendment Pursuant to South Carolina's Implied Consent Laws

Balancing Test

It is beyond dispute that the "touchstone" of the Fourth Amendment is reasonableness. To determine the constitutionality of a particular search, the Court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." United States v. Place, 462 U.S. 696, 703 (1983). In Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999), the United States Supreme Court stated as follows:

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. (citations omitted).

In Kentucky v. King, __ U.S. __, 131 S. Ct. 1849, 1858 (2011), the United States Supreme Court reiterated these principles and stated that "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." Two years later, in holding that taking and analyzing a cheek swab of an arrestee's DNA is a legitimate police booking procedure that is reasonable under the Fourth Amendment, the United States Supreme Court explained:

> In some circumstances, such as "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or

> individual, circumstances may render a warrantless search or seizure reasonable." Those circumstances diminish the need for a warrant, either because "the public interest is such that neither a warrant nor probable cause is required," or because an individual is already on notice, for instance because of his employment, or the conditions of his release from government custody, that some reasonable police intrusion on his privacy is to be expected. The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the "interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer."

Maryland v. King, 133 S. Ct. 1958, 1969-70 (2013) (citations omitted). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015).

South Carolina's Implied Consent Laws

It is well-settled in South Carolina that driving on a roadway is a privilege, not a right. Peake v. South Carolina Dep't. of Motor Vehicles, 375 S.C. 589, 595, 654 S.E.2d 284, 288 (Ct. App. 2007); South Carolina State Highway Dep't. v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955). This privilege is "subject to reasonable regulations under the police power in the interest of the public safety and welfare." Peake, 375 S.C. at 595, 654 S.E.2d at 288 (citations omitted). "As part of this privilege, individuals operating motor vehicles implicitly consent to chemical tests of their breath, blood, or urine to determine whether they are under the influence of drugs or alcohol." Taylor v. South Carolina Dep't. of Motor Vehicles, 368 S.C. 33, 36-37, 627 S.E.2d 751, 753 (Ct. App. 2006); *aff'd by* Taylor v. South Carolina Dep't. of Motor Vehicles, 382 S.C. 567, 677 S.E.2d 588 (2009).

Several decades ago, our legislature, in an attempt to combat the drunk driving problem in our state, determined that people who choose to drive on South Carolina roadways have impliedly given consent for chemical testing of their breath, blood, or urine when it is believed they were driving under the influence. The current version of the statute, in pertinent part, states as follows:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.

S.C. Code § 56-5-2950 (A). Generally, a person may refuse to provide a sample. S.C. Code § 56-5-2950 (B)(1). However, a person who refuses to provide a sample will have his or her driver's license suspended and the refusal can be used against the person in court. Id.

In 1998, our legislature enacted S.C. Code §56-5-2946. This statute provides that "[n]otwithstanding 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 [the felony DUI statute]." S.C. Code § 556-5-2946 (A). Accordingly, a person suspected of felony DUI may not refuse to submit to chemical testing and a mandatory blood draw may be taken if there is sufficient probable cause.

Our Implied Consent Laws are Constitutional

The blood draw in this case was valid because it was conducted pursuant to South Carolina's felony DUI mandatory blood draw statute, which is a constitutionally valid alternative to the warrant requirement since statutory schemes of this type are reasonable under the Fourth Amendment.[8] Balancing the State's legitimate interests against the degree to which blood tests intrude upon personal privacy interests, obtaining a driver's blood sample for testing under the circumstances and procedures set forth in the implied consent statutes is reasonable and does not violate the Fourth Amendment. The State's interest in securing the safety of people traveling on the public roadways and ridding the highways of drunk drivers is undoubtedly legitimate, strong, and compelling.[9] See e.g., Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); South Dakota v. Neville, 459 U.S. 553, 558 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have,

[8] Contrary to Appellant's implicit argument, and as discussed above, McNeely did not categorically invalidate implied consent laws. As mentioned previously, McNeely removed only one legal justification for upholding the constitutionality of search under the implied consent laws, since McNeely addressed only the narrow question of whether the dissipation of alcohol in the bloodstream establishes a *per se* exigent-circumstances exception to the warrant requirement for nonconsensual blood draws in DUI arrests. The majority opinion in McNeely did not address other potential exceptions to the warrant requirement or the validity of implied consent statutes. Significantly however, the pluarilty opinion actually cited with approval the implied consent laws of "all 50 States." See McNeely, 133 S. Ct. at 1556. Indeed, the United States Supreme Court has previously cited implied consent laws with approval. See Breithaupt v. Abram, 352 U.S. 432 (1957); Mackey v. Montrym, 443 U.S. 1 (1979); South Dakota v. Neville, 459 U.S. 553 (1983).

[9] According to the National Highway Traffic Safety Association, in 2013, 44% of all traffic fatalities in South Carolina were caused by alcohol-impaired driving. See http://www-nrd.nhtsa.dot.gov/Pubs/812101.pdf; see also http://responsibility.org/get-the-facts/state-map/?state=south-carolina. This is substantially higher than the national average of 31% and was the **highest percentage of all the states** in 2013. Id. It is also noteworthy that in that same year, approximately 14,742 people were arrested on DUI charges in South Carolina. See http://www.statisticbrain.com/number-of-dui-arrests-per-state/. A different website reports the number of DUI arrests in 2013 as 18,919. http://responsibility.org/get-the-facts/state-map/?state=south-carolina.

has repeatedly lamented the tragedy."); McNeely, 133 S. Ct. at 1565 ("While some progress has been made, drunk driving continues to exact a terrible toll on our society.").

On the other hand, the intrusion on one's personal privacy caused by a blood test is minimal. First, only a driver subject to arrest on probable cause of felony DUI is subject to a blood test. Such a person would already have a diminished expectation of privacy, particularly while driving on public roads. See King, 133 S. Ct. at 1978 (individuals taken into custody have diminished expectations of privacy); California v. Carney, 471 U.S. 386, 391 (1985) (holding that there is a reduced expectation of privacy stemming from a motor vehicle's use as a licensed motor vehicle subject to pervasive police regulation); Stovall et al. v. Sawyer, 181 S.C. 379, 187 S.E. 821, 824 (1936) ("Motor vehicles are dangerous instrumentalities and are, therefore, a proper subject of police regulation.") (citation omitted); cf. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989) (the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety). Second, a driver's objective expectation of privacy is further diminished (if not totally extinguished) in light of the implied consent laws, which gives all drivers in South Carolina notice that if arrested for felony DUI, they are subject to a mandatory blood draw.[10] See, e.g., Labruce v. City of North Charleston, 268 S.C. 465, 467, 234 S.E.2d 866, 867 (1977) ("Citizens are charged with knowledge of existing law."). In other words, the people of South Carolina have spoken, through their legislators, regarding the diminished level of privacy they expect if caught driving in an impaired

[10] Notably, the purpose of the statute would be defeated if a driver could freely revoke his or her implied consent to a blood test – after having voluntarily chosen to accept the benefits of driving on South Carolina roadways – at the only relevant time period. People who wish to avoid the inconvenience of a warrantless blood draw can do so easily by choosing not to drive if they become impaired by alcohol or drugs.

condition. Third, the blood draw itself is minimally intrusive. Blood draws are "commonplace," extract a "minimal" amount of blood, and involve "virtually no risk, trauma, or pain." See Schmerber, 384 U.S. at 771; see also Neville, 459 U.S. at 563 ("The simple blood-alcohol test is so safe, painless, and commonplace, that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test."). The statutory framework ensures that a blood draw is performed by a medical professional in an appropriate manner. See S.C. Code 56-5-2946; -2950. Moreover, the test of the blood is conducted only after the sample is sent through a strict chain of custody, and the blood is analyzed only for the presence of a distinct panel of substances that could cause impairment. (See Trial Transcript p. 56; p. 70-76; p. 97-101; p. 102-17; p. 123-34; p. 136-66). See http://www.sled.sc.gov/documents/Forensics/EvidenceSubmissionManual.pdf at pages 63-73.

Considering the decreased expectation of privacy and the minimal invasiveness of the blood test against the State's compelling and legitimate interest in reducing drunk driving and thereby promoting the safety of its citizens, it becomes clear that a blood test conducted pursuant to the felony DUI statute is reasonable under the Fourth Amendment. Cf. Stevens v. Comm'r of Pub. Safety, 850 N.W.2d 717, 730 (Minn. Ct. App. 2014) ("[W]e conclude that the state's strong interest in ensuring the safety of its roads and highways outweighs a driver's diminished privacy interests in avoiding a search following an arrest for DWI. Thus, if we assume that the implied-consent statute authorizes a search of a driver's blood, breath, or urine, such a search would not violate the Fourth Amendment."); State v. Yong Shik Won, 332 P.3d 661, 680-82 (Haw. Ct. App. 2014) (using Fourth Amendment balancing test to hold that Hawaii's statutory implied consent scheme is reasonable and constitutional); Williams v. State, __ So.3d __,

2015 WL 3511222 (Fla. Dist. Ct. App. 2015) (finding a warrantless post-arrest breath test pursuant to Florida's implied consent statutes would be constitutional under a general Fourth Amendment reasonableness test); Maryland v. King, 133 S. Ct. 1958 (2013) (using Fourth Amendment balancing test to conclude that taking and analyzing a cheek swab of the arrestee's DNA is a legitimate police booking procedure that is reasonable under the Fourth Amendment); United States v. Knights, 534 U.S. 112, 118 (2001) (using a "reasonableness" Fourth Amendment balancing test to uphold a warrantless search of a probationer's home, when the search was authorized by the terms and conditions of his probation); Samson v. California, 547 U.S. 843 (2006) (using the same reasonableness balancing test to conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee); United States v. Biswell, 406 U.S. 311 (1972) (using a balancing test to find that warrantless searches pursuant to the Gun Control Act, a federal statutory scheme regulating firearms dealers, are reasonable under the Fourth Amendment); see also Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602 (1989) (upholding warrantless drug testing of certain railway employees); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (upholding urinalysis testing of certain customs employees); Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding drug testing of student athletes).

Our implied consent statutes contain substantial safeguards which ensure their reasonable operation consistent with the Fourth Amendment. Moreover, defendants may demand that a trial judge exercise independent judicial review over whether or not law enforcement complied with the terms of the statutes, including whether or not there was probable cause for arrest. The implied consent statutes, including S.C. Code § 56-5-

2946, are a valid and constitutional exercise of South Carolina's police power, in the interest of public safety and welfare, over people who elect to drive motor vehicles in this state. See Shumpert v. South Carolina Dep't. of Highways and Pub. Transp., 306 S.C. 64, 409 S.E.2d 771 (1991) ("Clearly, the State has the authority, under its police power, to impose reasonable regulations upon the conduct of drivers."). Accordingly, Appellant's blood draw was reasonable under the Fourth Amendment, and the trial judge properly admitted the results of Appellant's blood test at trial.

(3) The Good Faith Exception Precludes Suppression

However, even assuming for argument's sake that there was a constitutional violation regarding the taking of Appellant's blood, the exclusionary rule should not apply since Corporal Gates was acting in good faith when he obtained Appellant's blood sample. In Illinois v. Krull, 480 U.S. 340 (1987), the United States Supreme Court held that the exclusionary rule does not apply where officers act in objectively reasonable reliance upon a statute authorizing a particular warrantless search but the statute is later found to violate the Fourth Amendment. The Court stated:

> When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. The Court has stressed that the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." Application of the exclusionary rule "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" Rather, the 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.'" As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced. Thus, in various circumstances, the Court has examined whether the rule's deterrent effect will be achieved, and has

> weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process.

Krull, 480 U.S. at 347 (citations omitted). The Court further explained:

> Unless 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.

Id. at 349-50. The Court also pointed out that state legislators are required to take an oath to support the Federal Constitution and that "courts presume that legislatures act in a constitutional manner." Id. at 351. However, the Court did recognize that "[a] statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional." Id. at 355. This "standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers." Id.

Furthermore, the United States Supreme Court and the South Carolina Supreme Court have recognized an exception to the exclusionary rule where an officer relies in good faith on existing appellate precedent. See Davis v. United States, __ U.S. __, 131 S. Ct. 2419, 2434 (2011) ("It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to the governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.") (citation omitted); State v. Brown, 401 S.C. 82, 95, 736 S.E.2d 263, 270 (2012) (holding that the exclusionary rule

should not be applied where the officers carried out their search in accordance with existing appellate precedent, since excluding the evidence would serve no deterrent purpose); Narciso v. State, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012) ("[E]xcluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.").

In this case, Appellant's blood sample was taken on November 1, 2008, nearly **five years** before McNeely was decided. Corporal Gates was relying on S.C. Code § 56-5-2946, which had been in existence since 1998. See Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (all statutes are presumed constitutional and will generally be construed to render them valid); see also Life & Cas. Ins. Co. v. McCray, 291 U.S. 566, 572 (1934) ("The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years."). Notably, implied consent laws like South Carolina's have existed in most states for decades, and, as mentioned previously, the United States Supreme Court itself issued opinions after Schmerber which appeared to approve of implied consent laws. See e.g., Neville, 459 U.S. at 559 ("Schmerber, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test.").

In addition, at the time of the blood draw, South Carolina – along with many other jurisdictions – had interpreted Schmerber to mean that a warrant for a suspect's blood was not required as long as the police had probable cause to arrest. See State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989); State v. Martin, 275 S.C. 141, 146, 268 S.E.2d 105, 107 (1980); State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005); see also McNeely at 1558 ("We granted certiorari to resolve a *split of authority* on the question . . . ." (emphasis added)); cf. State v. Jones, 96 A.3d 297, 302 (N.J. Super. Ct. App. Div. 2014) (pointing out that McNeely marked a "clear departure" from New Jersey precedent interpreting Schmerber). At the time Appellant's blood was drawn, Corporal Gates was justified in relying on the statute and on binding South Carolina precedent reasonably interpreting Schmerber. Corporal Gates followed the requirements of the statute and acted in an objectively reasonable and good faith belief that a warrant was not required. Corporal Gates had absolutely no reason to doubt the statute's constitutionality at the time of the blood draw in November of 2008. Accordingly, the good faith exception applies in this case. See United States v. Lechliter, 3 F. Supp. 3d 400 (D. Md. 2014); Byars v. State, 336 P.3d 939 (Nev. 2014); State v. Foster, 856 N.W.2d 847 (Wis. 2014); State v. Edwards, 853 N.W.2d 246, 252 (S.D. 2014); State v. Harris, 234 Cal. App. 4th 671, 184 Cal. Rptr. 3d 198 (Cal. Ct. App. 2015) (all applying good faith exception in similar scenarios). Appellant's blood test results were properly admitted at trial.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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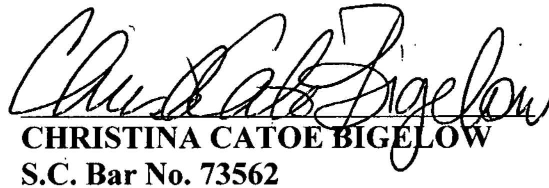
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit



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October 13, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ALLENDALE COUNTY
Court of General Sessions

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2014-001550

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

MCKENZIE L. DAVIS,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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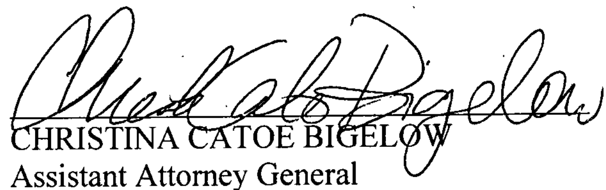
THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

MCKENZIE L. DAVIS, APPELLANT.

AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Tiffany L. Butler**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **13th** day of **October, 2015.**



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SC Court of Appeals

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October 13, 2015

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

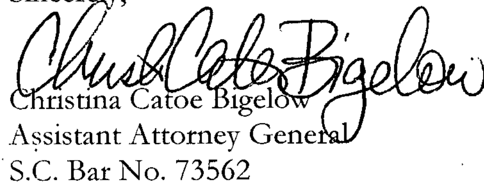
RE: State of South Carolina v. McKenzie L. Davis
Appellate Case No. 2014-001550

Dear Ms. Kitchings:

Enclosed please find the original and nine copies of the **Final Brief of Respondent,** along with **Certificate of Counsel** and **Proof of Service**, in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,



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