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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

October 23, 2019

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: State v. Kathryn Martin Key  
Appellate Case No.: 2017-001013

Dear Mr. Shearouse,

This case is scheduled for oral argument on November 20, 2018, at 10:30 a.m. Pursuant to Rule 208(b)(7) SCACR, Petitioner respectfully wishes to call to the Court's attention the following additional authority:

- 1) Mitchell v. Wisconsin, 588 U.S. \_\_\_\_, 139 S. Ct. 2531 (2019). In June of this year, the United States Supreme Court addressed the exact issue before this Court in this case: whether police must obtain a search warrant before taking a blood sample to determine the blood-alcohol level of a motorist who is "unconscious and therefore cannot be given a breath test." Id., 139 S. Ct. at 2531. There, as here, police had probable cause to believe the driver was under the influence of alcohol. The Court established a "general rule . . . that a warrant is not needed." Id. The Court did not address the constitutionality of Wisconsin's implied consent statute, but instead based its decision on the exigent circumstances exception to the warrant requirement. Relying heavily on Schmerber v. California, 384 U.S. 757 (1966), and Missouri v. McNeely, 569 U.S. 141 (2013), the Court held that police "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." Id., 139 S. Ct. at 2539. The Court emphasized that the time-consuming complications that arise when an officer must tend to an unconscious driver while also fulfilling his other law-enforcement duties of investigation and traffic safety present special facts that justify a reasonable belief that

evidence will be lost or significantly diminished if the officer is required to go through the warrant procedure. Writing that unconscious-driver cases sit “much higher than McNeely on the exigency spectrum,” the Court analogized the scenario to that presented in accident cases: “Just as the ramifications of a car accident pushed Schmerber over the line into exigency, so does the condition of an unconscious driver bring his blood draw under the exception.” Id., 139 S. Ct. at 2533 and 2538. In this case, the responding officer was presented with **both** an accident and an unconscious driver, combining the exigent circumstances of Schmerber and Mitchell. Mitchell establishes a presumption of reasonableness in cases involving a blood draw from an unconscious motorist. Id., 139 S.Ct. at 2550–51 (Sotomayor, J., dissenting) (noting plurality opinion established a “presumption” that such a search is valid). The Mitchell Court further held that, in order to overcome the presumption, a defendant must show that his blood **would not have otherwise been drawn**. Id., 139 S.Ct. at 2539. Although the Court essentially passed on addressing the novel questions related to the law of consent raised by Wisconsin’s implied consent statute, the opinion establishes such laws are constitutional as applied to unconscious drivers like Mitchell and Key. In sum, the Court held that blood testing of an unconscious driver will “almost always” be constitutionally reasonable and the burden is on the defendant to make a strong showing otherwise.

- 2) Breithaupt v. Abram, 352 U.S. 432 (1957). In this case, the United States Supreme Court affirmed an involuntary manslaughter conviction despite the admission of blood test results obtained by means of a warrantless blood draw from an unconscious motorist. As in Ms. Key’s case, the officer had probable cause to suspect the Petitioner was driving while intoxicated based on the fact that he was involved in an accident and officers found a mostly-empty liquor bottle in his glove compartment. Rejecting the Petitioner’s due process argument, the Court first noted that “there is nothing ‘brutal’ or ‘offensive’ in the taking of a sample of blood when done, and in this case, under the protective eye of a physician,” and that “the test as administered here would not be considered offensive by even the most delicate.” Id. at 435–36. The Court concluded that “Modern community living requires modern scientific methods of crime detection lest the public go unprotected,” and “the individual’s right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect . . . .” Id. at 439–40. Although the case was not decided on Fourth Amendment grounds, the opinion reflects the Court’s view, still valid today, that the warrantless seizure of the unconscious motorist’s blood is reasonable in the circumstances, and does not offend the “sense of justice” protected by the Due Process

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Clause. The Court's opinion is persuasive and relevant to this Court's Fourth Amendment reasonableness determination.

By copy of this letter, I am notifying opposing counsel of the submission of this supplemental authority.

Sincerely,



Joshua A. Edwards

Assistant Attorney General

Bar No. 101188

cc: James H. Price, III, Esquire (*via regular mail and to email to [chip@price-law-firm.com](mailto:chip@price-law-firm.com)*)  
Elizabeth Powers Price, Esquire (*via regular mail and email to [powers@price-law-firm.com](mailto:powers@price-law-firm.com)*)  
J. Falkner Wilkes, Esquire (*via regular mail and email to [jfalknerwilkes@gmail.com](mailto:jfalknerwilkes@gmail.com)*)