

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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May 28 2020

S.C. SUPREME COURT

GREENVILLE COUNTY
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001013

State of South Carolina, Petitioner,

v.

Kathryn Martin Key, Respondent.

PETITION FOR REHEARING

On May 13, 2020, this Court issued its opinion in State v. Key, Opinion No. 27971 (S.C. Sup. Ct. filed May 13, 2020), vacating and remanding to the trial court for a hearing to determine whether exigent circumstances existed to justify a warrantless blood draw. The State respectfully submits that the Court overlooked or misapprehended a significant point of law when it declared that it was “parting ways” with the United States Supreme Court’s authoritative interpretation of the federal constitution in Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019). The Court wrote that Mitchell required defendants to prove the existence of their Fourth Amendment rights. The State asks the Court to reconsider this portion of its opinion to reflect that the Mitchell opinion is not intended to place any burden on the defendant to show the existence of Fourth Amendment rights. Rather, the opinion establishes a clear constitutional rule applicable when the State establishes that probable cause exists that a person drove while intoxicated and

subsequently became unconscious, preventing the administration of a breath test. While the burden of showing exigency ultimately remains with the State, the Mitchell opinion recognizes that the burden of **persuasion** switches to a defendant in this specific factual scenario. Because Mitchell is an authoritative interpretation of the federal constitution, this Court is required to follow it.

The Mitchell opinion does not require a defendant to show the absence of exigent circumstances. Instead, it creates a case-specific rule that an exigency “almost always” exists when certain facts are established by the prosecution. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2539 (2019). The Mitchell court recognized that while “exigent-circumstances precedent requires a ‘totality of the circumstances’ analysis, ‘the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us’ Indeed, our exigency case law is full of general rules providing such guidance.” Id. at 2535 n.3. The prosecution is still required to proffer officer testimony laying out the facts establishing exigency. Specifically, the State must establish that: 1) probable cause exists that the defendant drove while intoxicated; and 2) the defendant was unconscious and unable to consent to a BAC test. After the State makes this showing, Mitchell establishes that exigency exists unless the defendant can show otherwise. Accordingly, if the State establishes these facts, the burden of persuasion switches to the defendant to show his case is so unique that it does not fit within the Court’s general rule that this scenario presents an exigent circumstance. See State v. Hill, 313 S.C. 330, 444 S.E.2d 215 (1994) (explaining distinction between burden of production and burden of persuasion).

The Supreme Court has explained that “the Fourth Amendment should reflect administrable bright-line rules” for the benefit of law enforcement officers and the public.

Virginia v. Moore, 553 U.S. 164 (2008). The case of an unconscious driver presents a unique scenario presenting a delicate balance of medical and law enforcement interests, often in the context of a deadly accident. Mitchell was the Supreme Court's way of providing a clear rule to promote the consistent and orderly application of the Fourth Amendment in this specific category of cases.

To the extent that this rule deviates from the United States Supreme Court's precedents, that is the Court's prerogative. Fourth Amendment law is comprised largely of fact-intensive, ad hoc rules based on certain fact patterns. This Court is bound by those interpretations of the Fourth Amendment reasonableness requirement. This Court's statement that it must "part ways" with the Mitchell court creates an impermissible conflict between the two courts. "The Supremacy Clause forbids state courts to dissociate themselves from federal law because of **disagreement with its content** or a refusal to recognize the superior authority of its source." Howlett By & Through Howlett v. Rose, 496 U.S. 356, 357 (1990) (emphasis added). The Mitchell opinion is "an authoritative interpretation" of the Fourth Amendment. "Consequently, the judges of every State must follow it." DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015) (citing U.S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States")). This court has recently recognized that "a long line of Supreme Court precedent prohibits [it] from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set." State v. Slocumb, 426 S.C. 297, 306, 827 S.E.2d 148, 153 (2019) (citing Oregon v. Hass, 420 U.S. 719 (1975)).

The State respectfully submits that this Court may not contradict a decision of the United States Supreme Court on a matter of federal constitutional law. The United States Supreme Court's opinion in Mitchell is a binding, substantive interpretation of Fourth Amendment

reasonableness. This Court should remove the portion of its opinion indicating disagreement with a superior court and remand the case for an exigency hearing consistent with the United States Supreme Court's holding in Mitchell.

Respectfully submitted,

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