THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM 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.

RETURN TO PETITION FOR REHEARING

The Respondent, Kathryn Martin Key by and through her attorneys hereby submits this return to the Petitioner's May 28, 2020 Petition for Rehearing. The Respondent respectfully requests that Petitioner's Petition for Rehearing be denied and dismissed.

Pursuant to the Appellant Court Rules a party is only entitled to a rehearing if there are points that have been overlooked or misapprehended by the Court. The Respondent contends that the Court has applied the law and has not overlooked or misapprehended any law or issue that was necessary to make a valid decision in this case.

I. The Court has not misapprehended or overlooked the holding in Mitchell v. Wisconsin, 139 S.Ct. 2535 (2019).

The Mitchell Court held:

> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Mitchell v. Wisconsin, 139 S.Ct. 2525, 2539 (2019).

This Court carefully considered Mitchell and correctly declined to impose upon defendants the burden of establishing the absence of exigent circumstances. It is well settled that "the burden is upon the State to justify a warrantless search." State v. Peters, 271 S.C. 498, 501 (1978). "The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant." Birchfield v. North Dakota, 136 S. Ct. 2160, 2173 (2016). This Court has consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement. See, e.g., State v. Bruce, 412 S.C. 504, 510 (2015); State v. Robinson, 410 S.C. 519, 530 (2014); State v. Gamble, 405 S.C. 409, 416 (2013); State v. Weaver, 374 S.C. 313, 319-20 (2007); State v. Brown, 289 S.C. 581, 587 (1986); State v. Huggins, 275 S.C. 229, 232 (1980). This Court also noted that the United States Supreme Court as well as all state and lower federal courts have consistently held the State bears the burden of establishing exigent circumstances. See, e.g., Welsh v. Wisconsin, 466 U.S. 740, 750 (1984)

(stating "the burden is on the government to demonstrate exigent circumstances"); McDonald v. United States, 335 U.S. 451, 456 (1948) ("We cannot be true to the constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."); United States v. McGee, 736 F.3d 263, 269 (4th Cir. 2013) ("The government bears the burden of proof in justifying a warrantless search or seizure.").

Petitioner argues that, under Mitchell, the State meets its burden of establishing exigent circumstances simply by proffering testimony that (1) probable cause exists that the defendant drove while intoxicated; and (2) the defendant was unconscious and unable to consent to the BAC test; then the "burden of persuasion" switches to defendant. Nowhere in this analysis is the longstanding requirement that the State must show reasonable belief of insufficient time to get a search warrant. Petitioner references State v. Hill, 341 S.C. 330 (1994) explaining the distinction between burden of production and burden of persuasion, however, that case concerns the rebuttable presumption against bond in capital cases as opposed to this context of a trial where the rules of evidence apply. Furthermore, Court in Hill reasoned that the burden of production in such a case is appropriately placed on the defendant because "the defendant has greater access to the kinds of evidence which tend to negate the risk of flight and danger to the community." Id. n. 4. It simply cannot be said that a defendant has greater access to the kinds of evidence tending to show that law enforcement could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Petitioner's reliance on Hill is simply inapplicable in this case.

II. The Court correctly parted ways with the Mitchell Court.

Article I section 10 of the South Carolina Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* 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, the person or thing to be seized, and the information to be obtained.

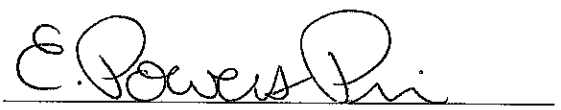
(emphasis added) (1970).

States may afford more expansive rights under state constitutional provisions than the rights conferred by the United States Constitution. See State v. Forrester, 343 S.C. 637 (2001). Article One Section Ten of the South Carolina Constitution provides the same constitutional protections as the Fourth Amendment plus an express right to privacy. See State v. Forrester, 343 S.C. 637 (2001). This additional language shows a clear legislative intent to provide more protections to the citizens of this state than the very basic rights provided in the United States Constitution. "Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." State v. Forrester, 343 S.C. 637, 644 (2001). This relationship is often described as the federal Constitution setting the floor for individual rights while the state constitution establishes the ceiling. Id. With a specific prohibition against "unreasonable invasions of privacy," our courts can and should enforce a higher level of privacy than just the Fourth Amendment prohibition against unreasonable searches and seizures. See S.C. Const. art. 1 § 10; State v. Forrester, 343 S.C. 637, 644 (2001).

CONCLUSION

For the reasons set forth above, the Respondent's submits the Petitioner's Petition for Re-hearing should be denied and dismissed.

Respectfully submitted,



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