



ALAN WILSON
ATTORNEY GENERAL

September 16, 2021

VIA HAND DELIVERY

The Honorable Patricia A. Howard
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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SEP 16 2021

S.C. SUPREME COURT

Re: **State v. Mary Ann German**
Appellate Case No.: **2018-002090**

Dear Ms. Howard,

This case is scheduled for oral argument on September 21, 2021, 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) State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009). In Covert, this Court explained that South Carolina's search warrant statute, S.C. Code Ann. §17-13-140, requires that a search warrant be signed by the issuing magistrate. It explained that "under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17-13-140. . . . Without the signature, it is merely an 'unfinished paper.'" Covert, 382 S.C. at 209-10, 675 S.E.2d at 742. Covert makes clear that telephonic or electronic warrants are not valid in South Carolina. Rather, police must submit a physical copy of a search warrant form and affidavit, and the issuing judge must physically sign the warrant. This consideration is relevant to the Court's exigent circumstances analysis because it shows that the State would have had to spend substantial time securing a valid search warrant, particularly when, as in this case, police are tasked with dealing with a catastrophic late-night accident with limited resources. The police would have had to type out a written warrant form and affidavit, deliver it to the magistrate for signature, and the deliver it to the hospital. See also S.C. Code §17-13-150 ("When any person is served with a

search warrant, such person shall be furnished with a copy of the warrant along with the affidavit upon which such warrant was issued."); Covert, 382 S.C. at 208, 675 S.E.2d at 742 (explaining signed search warrants should be served on person to be searched).

- 2) Hammer v. Gross (Hammer I), 884 F.2d 1200 (9th Cir. 1989), and Hammer v. Gross (Hammer II), 932 F.2d 842 (9th Cir. 1991) (rehearing en banc), cert. denied 502 U.S. 980 (1991). These cases concern the reasonableness of the method by which police may execute a blood draw. These opinions concern a §1983 suit against police officers who compelled a blood draw from a non-felony DUI suspect who physically resisted officers' attempts to conduct a blood draw at the hospital. Officers resorted to physical force, holding down Hammer while a nurse drew his blood. There was conflicting evidence about the extent of force used. A three-judge panel of the Ninth Circuit Court of Appeals held the search was reasonable as a matter of law under the Fourth Amendment, explaining the "use of force or physical restraint bears on the reasonableness of the *manner* in which the blood test was carried out, and weighs into the Schmerber balance as a factor in assessing the 'nature and quality of the intrusion on the individual's Fourth Amendment interests . . .'" Hammer I, 884 F.2d at 1207. The court described Hammer's claim as involving "the use of physical compulsion in connection with a search and seizure conducted as an incident of his arrest." Hammer I, 884 F.2d at 1204. The court relied heavily on Schmerber's holding that a blood draw is a reasonable means of securing evidence in a DUI case, but noted there could be circumstances where police use unreasonable force to secure a blood sample. Hammer I, 884 F.2d. at 1208 n.15 (citing a case where an officer used a "scissors lock on the legs of a 'defensive' DUI suspect" as an example of unreasonable force).

In Hammer II, the Ninth Circuit reviewed Hammer I en banc, affirming the core of its holding while concluding that Hammer alleged facts sufficient to create a jury issue regarding the reasonableness of the manner in which the blood draw was conducted. The court "assume[d] for purposes of decision that Schmerber does not preclude the use of force in some circumstances to extract a blood sample from a resistant suspect" and explained the proper test "balances the intrusion on the individual's Fourth Amendment right against the governmental interests at stake . . . and the reasonableness of the search is 'judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" Hammer II, 932 F.2d at 845 and n.1. Importantly, the court explained the jury was entitled to "consider several factors in determining whether

the force used against Hammer was unreasonable. One is the fact that Hammer was actively resisting the extraction of his blood. Others include 'the severity of the crime at issue' and whether Hammer posed 'an immediate threat to the safety of the officers or others.' It is also appropriate to consider whether the police 'refused to respect a reasonable request to undergo a different form of testing.' Finally, in weighing the 'countervailing governmental interests at stake,' some attention must be given to the degree of the authorities' need for the blood sample." Hammer II, 932 F.2d at 846 (internal citations omitted).

These cases are relevant to illustrate and expand on Schmerber's holding that a blood draw is a constitutionally reasonable method of obtaining biological evidence in a DUI prosecution—even when officers resort to physical force to compel a suspect to comply. Like Lee, they illustrate that police searches of the body are subject to constitutional limits, and that police must use reasonable methods to secure biological evidence even when the Fourth Amendment permits them to demand a sample. This qualifies the State's argument that it is always reasonable for police to demand that a suspect submit to a blood draw when there is probable cause to believe the suspect has committed felony DUI. It is always reasonable for police to demand a sample—and they may resort to reasonable force to execute the search if necessary—as long as their conduct does not cross the line into unreasonably violent or inhumane treatment, judged on a case-by-case basis. The court should take into account the State's need for the evidence, its probative value, and the seriousness of the offense. While police did not have to physically restrain German in order to draw her blood, R.63, the above cases provide a constitutional framework for a workable "search incident to arrest exception" in felony DUI cases. The cases are also relevant to the exigent circumstances analysis because they explain that courts should take into account the seriousness of the offense when judging the reasonableness of a search.

- 3) Illinois v. Krull, 480 U.S. 340 (1987). In this Case, the United States Supreme Court held the good faith exception to the exclusionary rule applies when officers act in reasonable reliance on a statute authorizing a particular type of search. The Court explained: "The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. 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. This case supplements the State's reliance on Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019).

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: David Alexander, Esquire (*via electronic mail*)

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