No. 15-1052

In The

Supreme Court of the United States

Joseph Wayne Hexom,

Petitioner,

v.

State of Minnesota,

Respondent.

On Petition for A Writ of Certiorari

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent objects to Petitioner's question presented as it fails to accurately reflect the scope and application of the Minnesota Court of Appeals' decision in *Hexom*.

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JURISDICTION

On August 17, 2015, the Minnesota Court of Appeals affirmed the denial of Petitioner's motion to suppress the results of his urine test. *State v. Hexom*, No. A14-1934, 2015 WL 4877733 (Minn. App. Aug. 17, 2015). The Minnesota Supreme Court denied his petition for review on November 17, 2015. The Minnesota Court of Appeals entered judgment on December 24, 2015.

Petitioner filed his Petition for a Writ of Certiorari on February 16, 2016. This Court's jurisdiction to review the decision of the Minnesota Supreme Court on a writ of certiorari is based on 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE AND FACTS[1]

On March 15, 2013, Eden Prairie Police Officers Linda Williams and Tyler Quesenberry stopped and arrested Petitioner Joseph Wayne Hexom based on probable cause that he was driving while impaired. Officer Quesenberry transported Petitioner to the Eden Prairie Police Station where he read Petitioner the Minnesota Implied Consent Advisory, informing him that "Minnesota law requires [him] to take a test" and that "refusal to take a test is a crime." Minn. Stat. § 169A.51, subd. 2(a)(1), (2) (2012).

Petitioner acknowledged that he understood the Advisory and, after unsuccessfully attempting to contact an attorney, freely agreed to provide a sample of his urine for testing. The urine test revealed an alcohol concentration of .18, more than twice the legal limit in Minnesota. The State charged Petitioner with two counts of driving while impaired and one count of careless driving.

Petitioner filed motions to suppress the results of the urine test and to dismiss the charges against him, arguing that his consent to the warrantless urine test was invalid.[2] Specifically, Petitioner contended that his consent to the test was coerced, and therefore involuntary, because he consented only after being informed that refusal is a crime.[3]

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[1] Unless otherwise noted, the following facts are taken from the Minnesota Court of Appeals' opinion. *Hexom*, 2015 WL 4877733, at *1.

[2] Petitioner also challenged the State's use of his two prior Wisconsin alcohol-related driving convictions to enhance the severity of charges against him. The district court denied Petitioner's motion on these enhancement grounds, and the Minnesota Court of Appeals affirmed. *Hexom*, 2015 WL 4877733, at *2. Petitioner does not challenge this ruling in his Petition.

[3] Petitioner also argued to the lower courts that his presence in custody at the police department compelled the conclusion that his consent was coerced. The district court and the Minnesota Court of Appeals implicitly rejected this argument. Petitioner did not renew this argument in his Petition.

The Hennepin County District Court denied Petitioner's motions, finding that

> [t]he State has sustained its burden and has established by a preponderance of the evidence that Hexom consented. Officers had probable cause to stop and arrest Hexom, the Advisory was properly read and was in compliance with statutory requirements, Hexom was granted the limited right to speak to an attorney prior to testing, and Hexom's compliance with testing establishes consent given freely and voluntarily.

Pet. App. 20.

After a stipulated-facts trial, the district court convicted Petitioner of: (1) driving a motor vehicle with an alcohol concentration greater than .08 (a gross-misdemeanor offense due to Petitioner's prior DWI convictions); and (2) careless driving.

Petitioner appealed the district court's denial of his motion to suppress. The Minnesota Court of Appeals affirmed, concluding that the district court's factual finding of consent was not clearly erroneous. *Hexom*, 2015 WL 4877733, at *2 ("Whether a driver consented to a search is a question of fact, and we will not reverse the district court's finding unless it is clearly erroneous."). Following the Minnesota Supreme Court's decision in *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014), the court of appeals held that Petitioner "was not unconstitutionally coerced" into consenting to the urine test. *Id.* at *3 ("Because the circumstances here are indistinguishable from those in *Brooks*, we find that Hexom was not unconstitutionally coerced.").

The Minnesota Supreme Court denied Petitioner's request for review of the court of appeals' decision. Petitioner now brings this Petition for a Writ of Certiorari (the "Petition").

SUMMARY OF ARGUMENT IN RESPONSE TO PETITION

Minnesota law imposes criminal consequences on a driver who refuses to submit to a test of his or her blood, breath, or urine to detect the presence of alcohol. Minn. Stat. § 169A.20, subd. 2 (2012). At the time a test is requested, the police officer must read the Minnesota Implied Consent Advisory, informing the driver that "Minnesota law requires the [driver] to take a test" and that "refusal to take a test is a crime." Minn. Stat. § 169A.51, subd. 2(1), (2).

Petitioner argues that his consent to the urine test was not voluntary because the officer complied with the statutory mandate to inform him of the criminal consequences of refusal. The crux of Petitioner's argument rests on the validity of the test-refusal statute itself. That is, Petitioner argues, if Minnesota cannot

constitutionally criminalize test refusal, any consent received after a suspect is informed of the criminal consequences of refusal is invalid.

The constitutionality of Minnesota's test-refusal statute as applied to breath tests is currently before the Court in *Bernard v. Minnesota*, No. 14-1470. Two companion cases, *Birchfield v. North Dakota*, No. 14-1468 and *Beylund v. Levi*, No. 14-1507, mount similar challenges to North Dakota's criminal test-refusal statute.[4] Although the present case involves Petitioner's voluntary consent to a urine test, Respondent acknowledges that the outcomes of *Bernard*, *Birchfield*, and *Beylund*, which were argued on April 20, 2016, may have an effect on the Court's analysis of the Petition. Alternative arguments in response to the Petition are therefore warranted.

First, the Court should deny the Petition outright because, regardless of the outcome of *Bernard*, *Birchfield*, and *Beylund*, the good-faith exception applies to justify the warrantless urine test in this case. Second, because the Minnesota Supreme Court is currently considering the constitutionality of the refusal statute as applied to warrantless urine tests, review by this Court is premature.

Alternatively, Respondent asks the Court to hold the Petition until it issues its decisions in *Bernard*, *Birchfield*, and *Beylund*. If the Court affirms *Bernard* and *Birchfield* and upholds the constitutionality of criminal test-refusal statutes, the Petition in this case should be denied. If the state-court decisions in those cases are reversed, however, the Court should grant the Petition, vacate the lower court decision, and remand the matter for further proceedings consistent with the intervening decisions.

ARGUMENT

I. The Petition should be denied because the warrantless urine test is admissible under the good-faith exception to the exclusionary rule.

Regardless of whether the validity of Minnesota's implied-consent scheme or test-refusal statute is called into question by this Court's opinions in *Bernard* or *Birchfield*, thereby implicating the voluntariness of Petitioner's consent to the urine test, the test results in this case are admissible on an alternative ground.

In *Davis v. United States*, this Court held that "when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." 564 U.S. 229, 131 S. Ct. 2419, 2434 (2011). The Minnesota Supreme Court recently adopted the *Davis* good-faith exception. *State v. Lindquist*,

[4] The issue presented in *Beylund* is whether consent is valid when it is obtained by informing the suspect that failure to submit to a test will result in criminal prosecution. Brief for Petitioner, *Beylund v. Levi* (No. 14-1507). Rather than a criminal conviction, however, the petitioner in *Beylund* challenges a civil driver's license revocation. *Id.* at 4.

869 N.W.2d 863 (Minn. 2015) ("[W]e hold that the exclusionary rule does not apply to violations of the Fourth Amendment to the U.S. Constitution, or Article I, Section 10, of the Minnesota Constitution when law enforcement acts in objectively reasonable reliance on binding appellate precedent.").

On March 15, 2013, the date of Petitioner's arrest, Minnesota appellate courts permitted warrantless urine tests under the "exigent-circumstances" exception to the warrant requirement. *See, e.g., Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 807 (Minn. App. 2011) ("[E]xigent circumstances allow for the warrantless collection of appellant's urine sample."). *Ellingson* relied on *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), which held that the rapid dissipation of alcohol in the blood created a single-factor exigency that permitted a warrantless blood test. *Ellingson*, 800 N.W.2d at 807. At the time of Petitioner's arrest, therefore, the warrantless urine test was valid under the exigency exception, regardless of consent.

It was not until April 17, 2013—more than a month *after* Petitioner's arrest—that this Court issued its opinion in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). *McNeely* held that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 1568.

Because Officer Quesenberry acted in objective compliance with binding appellate precedent—*Ellingson*—at the time of Petitioner's arrest, the good-faith exception applies to justify the warrantless urine test, and the test results need not be suppressed. *See Lindquist*, 869 N.W.2d at 878 (stating that, in applying the good-faith exception, courts "must determine whether a reasonable officer would have understood the binding appellate precedent as authorizing the conduct undertaken").[5]

In sum, because an alternative legal ground exists to justify the warrantless search of Petitioner's urine, this Court should deny the Petition.

II. Review in this Court is premature because the issue of the constitutionality of criminal consequences for refusal of a warrantless urine test is currently pending before the Minnesota Supreme Court.

Petitioner's arguments are premised on the allegation that Minnesota's test-refusal law is unconstitutional. The Minnesota Court of Appeals recently affirmed an as-applied challenge to Minnesota's test-refusal statute, concluding that the state's imposition of criminal charges for a driver's refusal to submit to a warrantless urine test violated his right to substantive due process. *State v. Thompson*, 873 N.W.2d 873, 880 (Minn. App. 2015), *review granted* (Minn. Feb. 24, 2016). The Minnesota Supreme Court has granted review of *Thompson*, and the case is currently in the briefing stage.

[5] *Lindquist* was issued on August 19, 2015, just two days after the Minnesota Court of Appeals' decision in this case.

Because the Minnesota Supreme Court has not yet weighed in on the validity of the test-refusal statute as applied to urine tests, this Court's consideration of the related issue in this case—whether a driver can validly consent to a urine test after being informed of the criminal consequences of refusal—is premature.

III. The Petition should be denied if the Court affirms *Bernard* and/or *Birchfield* because Minnesota Court of Appeals' decision does not conflict with governing precedent of this Court or of the Minnesota Supreme Court.

Reasons in support of upholding criminal test-refusal statutes are fully and accurately briefed by the respective states in *Bernard* and *Birchfield*. To the extent that Petitioner argues against the constitutionality of Minnesota's test-refusal statute, Respondent will not repeat those arguments here. Assuming the Court rejects the challenges to the test-refusal statutes in *Bernard* and *Birchfield*, it should deny the Petition in this case.

Petitioner contends that the court of appeals' decision "cannot be reconciled with this Court's Fourth Amendment jurisprudence" established in *McNeely*. Pet. at 7. *McNeely*, however, is factually and legally distinct from this case because it governs only nonconsensual blood tests, as opposed to urine tests for which the driver has given his voluntary consent. 133 S. Ct. at 1554, 1568.

Further, the Minnesota Court of Appeals followed binding state-law precedent in considering Petitioner's appeal. In a post-*McNeely* opinion, the Minnesota Supreme Court addressed the exact issue raised in the present case—whether consent to an alcohol test can be deemed voluntary when a suspect has been informed that refusal to take the test is a crime. *Brooks*, 838 N.W.2d at 568. The *Brooks* court soundly rejected the argument that the reading of the Minnesota Implied Consent Advisory rendered his consent the product of coercion. *Id.* at 570–72. This Court denied certiorari in *Brooks*. 134 S. Ct. 1799 (2014).

The court of appeals closely adhered to *Brooks* when it determined that Petitioner's consent to the urine test was not "unconstitutionally coerced" just because he was told that he was required by Minnesota law to take a chemical test and that test refusal is a crime. *Hexom*, 2015 WL 4877733, at *3 ("Because the circumstances here are materially indistinguishable from those in *Brooks*, we find that Hexom was not unconstitutionally coerced.").

Because the Minnesota Court of Appeals' decision in this case does not conflict with binding precedent of this Court or of the Minnesota Supreme Court, the Petition should be denied.

IV. If the Court reverses *Bernard* or *Birchfield*, it should grant the Petition, vacate the lower court decision, and remand the case for further proceedings.

This Court has the discretion to "GVR" a case—that is, grant certiorari, vacate the judgment below, and remand a case for reconsideration in light of an intervening development, such as a new decision of this Court. *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) ("Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate."). "A GVR order conserves the scarce resources of this Court, assists the court below by flagging a particular issue that it does not appear to have fully considered, and assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Wellons v. Hall*, 558 U.S. 220, 225–26 (2010) (per curiam) (internal quotation marks omitted) (quoting *Lawrence*, 516 U.S. at 604).

Although neither *Bernard* nor *Birchfield* involved a urine test (or refusal thereof), Respondent anticipates that this Court's reversal of *Bernard* or *Birchfield* may alter the legal landscape of criminal test-refusal statutes in general. In the event of such reversal, the Court should issue a GVR order to give the lower court the first opportunity to apply any new precedent to the facts of Petitioner's case. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that this Court is "a court of review, not of first view").

Further, the district court and the court of appeals found that Petitioner's consent to the test was voluntary under the totality of the circumstances. The circumstances included, but were not limited to, the reading of the implied-consent advisory informing Petitioner that refusal to test is a crime. Should this Court invalidate the state's imposition of a criminal penalty for refusal, the lower courts should be given the opportunity to re-evaluate whether the totality of the circumstances still support a finding of voluntary consent absent the reading of the advisory.

Respondent therefore requests that, if *Bernard* and/or *Birchfield* are reversed and the Petition is not otherwise denied, the Court issue a GVR order.

CONCLUSION

Respondent respectfully requests that the Court deny the Petition because an alternative ground exists to justify the search and because this Court's consideration of the question presented is premature. In the alternative, Respondent submits that this Court's disposition of the Petition should hinge on the outcome of *Bernard* and *Birchfield*. If those cases are affirmed, no compelling reasons exist for this Court to grant the Petition and it should be denied in all respects. If those cases are reversed,

however, this Court should grant the Petition, vacate the lower court judgment, and remand the case for further proceedings consistent with the new decision(s).

Dated: April 21, 2016

Respectfully submitted,

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