STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1518-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JESSICA M. RANDALL,

Defendant-Respondent.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS MCNAMARA PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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ISSUE PRESENTED

A law enforcement officer arrested the Defendant-Respondent, Jessica M. Randall, for operating a motor vehicle while under the influence of an intoxicant (OWI), and Randall voluntarily submitted to a request for a blood sample under the implied consent law. After law enforcement seized a blood sample, Randall attempted to withdraw her consent to the analysis of the blood for the presence and quantity of alcohol and drugs. Is Randall entitled to suppression of the results of the blood test because she withdrew her consent?

The circuit court answered "yes," and suppressed the blood test results.

The court of appeals answered "yes," and affirmed.

This Court should answer "no," and reverse. The search was the blood draw. Once the search was completed, and the blood was lawfully seized, law enforcement was entitled to analyze it without a warrant or consent. The analysis of the blood is not a Fourth Amendment search because a person who voluntarily surrenders a blood sample after being arrested for OWI has no reasonable expectation of privacy in the blood when law enforcement want to test it for the presence and quantity of alcohol and drugs.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

Randall was arrested for OWI, and she submitted to a law enforcement officer's request for a blood sample under the implied consent law. After her blood was drawn, but before the Wisconsin State Laboratory of Hygiene analyzed it,

Randall filed a motion seeking to withdraw her consent to the analysis of the blood sample. After the lab analyzed the sample, Randall moved to suppress the results. The circuit court granted the motion, and the court of appeals affirmed. The court of appeals concluded that the taking of a blood sample and the analysis of the sample constitute a single search to which constitutional protections attach, and that a person can withdraw consent to a search at any time until the search is completed. It therefore concluded that a person arrested for OWI who consents to a blood draw can withdraw that consent after the blood is drawn, thereby preventing analysis of the blood sample without a warrant.

The court of appeals' decision was based on two cases, *State v. VanLaarhoven*, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, and *State v. Wantland*, 2014 WI 58, 355 Wis. 2d 135, 848 N.W.2d 810. Neither case supports the court of appeals' conclusion. Under *VanLaarhoven*, the search is the blood draw. A person can withdraw consent to the search, until the blood is drawn, by refusing the blood draw. But once the blood is drawn, the search is over. The blood sample is the evidence that is seized. And the lawful seizure of evidence includes the analysis of the evidence—the testing at the lab. Law enforcement does not need a warrant or consent to analyze a blood sample that it has validly seized. And *Wantland* did not hold—contrary to well-established precedent—that a suspect can withdraw consent to a search after the search is conducted and law enforcement has lawfully seized the evidence.

This Court should reverse the court of appeals' decision because that decision is contrary to well-established law. Analysis of evidence that has been lawfully seized after a search is part of the seizure and does not require a warrant or an exception to the warrant requirement. The analysis of the blood is not a Fourth Amendment search because a person

arrested for OWI who voluntarily surrenders a blood sample has no legitimate privacy interest in the blood after it is drawn, such that law enforcement is required to obtain a warrant to analyze the blood for the presence and quantity of alcohol and drugs.

STATEMENT OF THE CASE AND FACTS

Randall was arrested for OWI in Fitchburg on October 29, 2016. (R. 1:1; 18:1.) The arresting officer read the Informing the Accused form to Randall, and requested a blood sample. (R. 1:2; 18:1.) Randall agreed to provide a sample, which was drawn at a hospital. (R. 1:2.)

On October 31, 2016, before the blood sample was analyzed, Randall sent a letter to the Wisconsin State Laboratory of Hygiene, stating that she "revokes any previous consent that she may have provided to the collection and analysis of her blood," and that she "demands that it be returned to her or destroyed immediately." (R. 18:4.) An advanced chemist responded in a letter referencing the lab's retention policy, and stating that the lab "requires authorization from the specimen submitter prior to releasing a specimen from the Laboratory." (R. 18:5.) The advanced chemist analyzed the blood sample on November 7, 2016, and the lab prepared a report on November 10, 2016, indicating that analysis of the blood sample revealed a blood alcohol concentration of .210 grams of ethanol per 100 milliliters of blood. (R. 18:6.)

The State charged Randall with OWI and with a prohibited alcohol concentration (PAC), both as a third offense. (R. 1:1–2.) Randall moved to suppress the blood test result on two grounds: (1) that her consent to the blood draw was not free, intelligent, unequivocal, and specific (R. 17), and (2) that the analysis of the blood violated the Fourth

Amendment because she withdrew her consent before the blood was analyzed (R. 18).

The circuit court, the Honorable Nicholas McNamara, presiding, rejected Randall's argument that she did not validly consent to the blood draw, and denied that part of her motion without a hearing. (R. 33:40.) But the court granted the motion to suppress the blood test results on the ground that Randall withdrew her consent to analysis of the blood sample before the lab analyzed it. (R. 33:61.) The court stated that Randall was "definitely not entitled to have the blood destroyed," but concluded that she withdrew her consent to have the blood analyzed, so the test results could not be used at trial. (R. 33:59–60.)

The State appealed, and the court of appeals affirmed in a one-judge opinion by Judge Kloppenburg. *State v. Randall*, No. 2017AP1518-CR, 2018 WL 3006260 (Wis. Ct. App. June 14, 2018) (unpublished). The court concluded that the search of Randall's blood comprised both the taking and testing of the blood, and that Randall had a right to withdraw her consent to that search at any point until the blood was analyzed. *Id.* ¶ 13. The court further concluded that after Randall withdrew her consent to the analysis of the blood, "the State lost its only lawful basis for the warrantless search and its subsequent testing was done in violation of Randall's Fourth Amendment rights." *Id.*

This Court granted the State's petition for review.

STANDARD OF REVIEW

"An order granting . . . a motion to suppress evidence presents a question of constitutional fact." *Wantland*, 355 Wis. 2d 135, ¶ 18 (quoting *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463). An appellate court reviews a question of constitutional fact "in a two-step inquiry." *Id.* ¶ 19 (quoting *Robinson*, 327 Wis. 2d 302, ¶ 22). It reviews "the

circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous." *Id.* Then, it independently appl[ies] constitutional principles to those facts." *Id.*

ARGUMENT

A person who voluntarily surrenders a blood sample after being arrested for OWI has no reasonable expectation of privacy in the blood when law enforcement want to test it for the presence and quantity of alcohol and drugs. Analysis of the blood is not a Fourth Amendment search, and law enforcement is entitled to analyze evidence it has lawfully seized.

A. Applicable legal principles.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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, and the persons or things to be seized.

The Fourth Amendment thus prohibits "unreasonable searches and seizures." "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.*

"[T]he taking of a blood sample or the administration of a breath test is a search." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (citing *Skinner v. Ry. Lab. Execs. Assn.*, 489 U.S. 602, 616–17 (1989); *Schmerber v. California*,

384 U.S. 757, 767–68 (1966)). "[A] search conducted pursuant to a valid consent is constitutionally permissible." *Wantland*, 355 Wis. 2d 135, ¶ 20 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). A person who has voluntarily consented to a search may withdraw that consent by unequivocal act or statement. *Id.* ¶¶ 33–34.

1. Under well-established precedent, police are entitled to analyze a blood sample that they have lawfully seized from a person arrested for OWI to determine the presence and quantity of alcohol and drugs in the blood. The person has no legitimate privacy interest in the blood when law enforcement seek to analyze it for that purpose.

This Court has recognized that when law enforcement validly seizes evidence, it is entitled to analyze it. *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991) (*overruled in part on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479). In *Petrone*, this Court considered whether police could validly analyze undeveloped rolls of film that they seized pursuant to a search warrant. The defendant argued that even if the film was lawfully seized, the developing of the film was a separate search for which officers needed a warrant. *Id.* at 544. This Court unanimously rejected the defendant's argument, because "[d]eveloping the film is simply a method of examining a lawfully seized object." *Id.* at 545. This Court explained that "[l]aw enforcement officers may employ various methods to examine objects lawfully seized in the execution of a warrant. For example, blood stains or substances gathered in a lawful search may be subjected to laboratory analysis." *Id.*

The United States Supreme Court similarly recognized that law enforcement has the right to analyze lawfully seized evidence in *Schmerber*. In *Schmerber*, the defendant was arrested for OWI, and his blood was drawn without his consent. *Schmerber*, 384 U.S. at 758–59. The blood was analyzed, and that analysis revealed an alcohol concentration indicating intoxication. *Id.* at 759. The defendant challenged both the blood draw and the admission of the blood test results at trial. *Id.* The Supreme Court concluded that the blood sample was properly drawn incident to the defendant's arrest for drunk driving because of exigent circumstances, and it affirmed the appellate opinion which had affirmed the defendant's conviction. *Id.* at 759, 770–71.

The Court in *Schmerber* did not separately address the constitutionality of the analysis of the blood that had been lawfully seized. But as the United States Court of Appeals for the Ninth Circuit later recognized, *Schmerber* did not conclude that the analysis of the blood was justified by exigent circumstances. It could not have done so, because the analysis was conducted long after the blood was seized. *United States v. Snyder*, 852 F.2d 471, 473 (9th Cir. 1988). And the Court did not conclude that the analysis was justified by a warrant, or another exception to the warrant requirement, because no warrant was obtained, and no other exception applied. "The only justification for the seizure of defendant's blood was the need to obtain evidence of alcohol content." *Id.* at 474. "The Court therefore necessarily viewed the right to seize the blood as encompassing the right to conduct a blood-alcohol test at some later time." *Id.* The Ninth Circuit concluded that "under *Schmerber*, so long as blood is extracted incident to a valid arrest based on probable cause to believe that the suspect was driving under the influence of alcohol, the subsequent performance of a blood-alcohol test has no independent

significance for fourth amendment purposes, regardless of how promptly the test is conducted." *Id.*

The Wisconsin Court of Appeals has recognized that under *Petrone* and *Snyder*, the analysis of a blood sample legally seized from a person arrested for OWI has no separate Fourth Amendment significance and does not require a warrant or an exception to the warrant requirement—police are entitled to analyze it. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16–17; *State v. Reidel*, 2003 WI App 18, ¶¶ 16–17, 259 Wis. 2d 921, 656 N.W.2d 789.

In *VanLaarhoven*, the defendant was arrested for OWI, and he submitted to an officer's request for a blood sample under the implied consent law. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 2. After his blood was drawn and analyzed, the defendant moved to suppress the test results, arguing that the analysis was a search that required a warrant. *Id.* ¶ 3. The circuit court rejected the defendant's argument, and the court of appeals affirmed. The court of appeals dismissed the defendant's assertion that he had a reasonable privacy interest in his blood after it was extracted from his body so that analysis of the blood required a warrant. *Id.* ¶¶ 10–11. It concluded that "VanLaarhoven has consented to both the extraction of his blood and its subsequent testing and has waived any privacy interest in the blood sample." *Id.* ¶ 11.

The *VanLaarhoven* court then applied *Petrone* and *Snyder*, cases which it determined to be "on point." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 12. The court observed that "*Petrone* and *Snyder* teach that the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." *Id.* ¶ 16. The court added that "[b]oth decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components each to be given independent

significance for purposes of the warrant requirement." *Id.* The court concluded that "law enforcement was permitted to conduct an analysis of VanLaarhoven's blood to determine if it contained evidence of a blood alcohol concentration in excess of the legal limit." *Id.* ¶ 17.

In *Reidel*, the court of appeals reached the same result in a case in which a defendant arrested for OWI did not consent to a blood draw, but refused and withdrew his implied consent. *Reidel*, 259 Wis. 2d 921, ¶¶ 1–2. The defendant's blood was drawn under the exigent circumstances exception to the warrant requirement. *Id.* ¶ 6. He moved to suppress the results of the analysis of his blood, arguing that the analysis was a second search, which was not justified by exigent circumstances, and for which officers did not obtain a warrant. *Id.* ¶¶ 4, 7. The circuit court denied the motion, and the court of appeals affirmed. The court of appeals noted that unlike in *VanLaarhoven*, the defendant did not consent to the initial search. *Id.* ¶ 11. But like in *VanLaarhoven*, the court of appeals relied on *Petrone* and *Snyder*, in which the defendants refused the initial search, deeming those cases "informative and persuasive." *Id.*

The court of appeals in *Reidel* noted that in *VanLaarhoven*, it had concluded that:

> *Snyder* and *Petrone* stand for the proposition that the 'examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components.'

Id. ¶ 16 (quoting *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16). The court found "the reasoning of *Snyder*, *Petrone* and *VanLaarhoven* persuasive," and adopted their holdings. *Id.* ¶ 16. It concluded that "the police were not required to obtain

a warrant prior to submitting Riedel's blood for analysis." *Id.* The court further concluded that "the subsequent analysis of Riedel's blood was simply the examination of evidence obtained pursuant to a valid search." *Id.* ¶ 17.

The holdings in *VanLaarhoven* and *Reidel* are clear. When police have lawfully seized a blood sample from a person arrested for OWI, whether with a warrant, the person's consent, or another exception to the warrant requirement, police may analyze the blood for the presence and quantity of alcohol and drugs. No further justification is required because analyzing the blood is not a Fourth Amendment event.

Courts in other jurisdictions have reached the same conclusion in regards to blood tests for people arrested for OWI. In *People v. Woodard*, the Michigan Court of Appeals addressed a situation much like the one in this case, and it relied on the reasoning of *VanLaarhoven*. Police arrested the defendant for OWI, and her blood was drawn with her consent. *People v. Woodard*, 909 N.W.2d 299, 302 (Mich. Ct. App. 2017). Before the blood was analyzed, the defendant sought to revoke her consent. *Id.* After the blood was analyzed, the defendant moved to suppress the results. *Id.* The circuit court denied the motion, concluding that "testing of a lawfully obtained sample did not violate the Fourth Amendment." *Id.*

The Michigan Court of Appeals affirmed. It concluded that the defendant was lawfully searched, and her blood was lawfully seized. *Woodard*, 909 N.W.2d at 305–06. The court concluded that "the testing of blood evidence 'is an essential part of the seizure.'" *Id.* at 306 (quoting *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16). After analyzing decisions from other jurisdictions, including *VanLaarhoven*, *Schmerber* and *Snyder*, the court concluded that "[f]rom these persuasive authorities, we draw the basic understanding that blood

which has been lawfully collected for analysis may be analyzed without infringing additional privacy interests or raising separate Fourth Amendment concerns." *Id.* at 307.

In *State v. Fawcett*, the Minnesota Court of Appeals rejected the argument that a warrant was necessary to test blood for drugs when the blood was drawn pursuant to a warrant that authorized testing only for alcohol. *State v. Fawcett*, 877 N.W.2d 555, 558 (Minn. Ct. App. 2016). The court concluded that a second warrant was unnecessary because "[o]nce a blood sample has been lawfully removed from a person's body, a person loses an expectation of privacy in the blood sample, and a subsequent chemical analysis of the blood sample is, therefore, not a distinct Fourth Amendment event." *Id.* at 561.

In *Harrison v. Comm'r of Pub. Safety*, the Minnesota Court of Appeals similarly concluded that no warrant was necessary to analyze blood drawn with the suspect's consent. It reasoned that "when the state has lawfully obtained a sample of a person's blood under the implied-consent law, specifically for the purpose of determining alcohol concentration, the person has lost any legitimate expectation of privacy in the alcohol concentration derived from analysis of the sample." *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 921 (Minn. Ct. App. 2010).

In *State v. Loveland*, police obtained a urine sample without the suspect's consent, in order to test for marijuana. *State v. Loveland*, 696 N.W.2d 164, 165 (S.D. 2005). But a drug screen revealed the presence of cocaine in the urine. *Id.* at 165. The suspect moved to suppress, asserting that testing the sample for cocaine violated the Fourth Amendment. *Id.* The circuit court granted the motion, but the Supreme Court of South Dakota reversed. It concluded that "[o]nce a urine sample is properly seized, the individual that provided the sample has no legitimate or reasonable expectation that the

presence of illegal substances in that sample will remain private." *Id.* at 166. It thus reasoned that testing the sample for other substances "did not implicate the Fourth Amendment's protection against unreasonable searches and seizures." *Id.* at 167.

In *Dodd v. Jones*, the United States Court of Appeals for the Eighth Circuit rejected the argument that the testing of blood that has been lawfully seized is a separate search that must be independently justified. The Eighth Circuit noted that the "search" is completed upon the drawing of the blood. *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010) (citing *Johnson v. Quander*, 440 F.3d 489, 500 (D.C. Cir. 2006)). It concluded that "the subsequent testing of that blood had 'no independent significance for Fourth Amendment purposes.'" *Id.* (quoting *Snyder*, 852 F.2d at 474).

The State's research has not revealed a single case in any jurisdiction—other than Judge Kloppenburg's decision in *Randall*—that has reached a different result. Every case has recognized that a warrant, consent, or another exception to the warrant requirement is unnecessary for the State to analyze a blood sample that it has lawfully seized from a person arrested for OWI.

2. In *State v. Sumnicht*, the Wisconsin Court of Appeals correctly rejected the argument that a person who has consented to a blood draw under the implied consent law can withdraw that consent after the police have lawfully seized the blood, thereby preventing the State from analyzing the sample.

As noted, in *VanLaarhoven* and *Reidel*, the court of appeals concluded that when police have lawfully seized a blood sample from a person arrested for OWI, whether with a

warrant, the person's consent, or another exception to the warrant requirement, police may analyze the blood for the presence and quantity of alcohol and drugs. *VanLaarhoven*, 248 Wis. 2d 881, ¶¶ 16–17; *Reidel*, 259 Wis. 2d 921, ¶¶ 16–17. They do not need a warrant, consent, or another exception to analyze the evidence because the person does not have a reasonable expectation of privacy in the blood once it has been lawfully seized, when officers want to analyze it for the presence and quantity of alcohol and drugs.

The court of appeals correctly applied this law in a case with facts materially identical to the facts of this case. *State v. Sumnicht*, No. 2017AP280-CR, 2017 WL 6520961 (Wis. Ct. App. December 20, 2017) (unpublished). In *Sumnicht*, the defendant was arrested for OWI, and she consented to a blood draw under the implied consent law. *Id.* ¶¶ 2–3. After her blood was drawn, but before it was analyzed, Sumnicht's defense counsel wrote a letter to the Wisconsin State Laboratory of Hygiene, asserting that Sumnicht was withdrawing her consent to the analysis of the blood sample. *Id.* ¶ 4. The lab analyzed the blood, and Sumnicht moved to suppress the results of that analysis. *Id.* ¶¶ 4–5. The circuit court denied the motion, concluding that the defendant could not withdraw her consent to the analysis "because 'the right to test the blood follows' from her original consent." *Id.* ¶ 7.

The court of appeals affirmed in a one-judge opinion by Judge Neubauer, concluding that Sumnicht could not withdraw her consent after her blood was drawn, because it "was simply too late." *Sumnicht*, 2017 WL 6520961, ¶ 21. The court relied on *Reidel* and *VanLaarhoven*, noting that in those cases, the court of appeals had "squarely rejected arguments challenging the examination of lawfully seized evidence, including subsequent testing of blood drawn pursuant to a warrant, consent, or exigent circumstances." *Id.* The court rejected the defendant's argument that *Reidel* and

VanLaarhoven were distinguishable because in those cases the defendant did not withdraw consent. *Id.* ¶ 22. It noted that under *Reidel* and *VanLaarhoven*, "the search and seizure of the blood was completed at the time of the lawful blood draw." *Id.* ¶ 22. The court observed that like in *Petrone*, "analysis of Sumnicht's blood was simply a method of examining lawfully seized evidence." *Id.* The court concluded that Sumnicht could not revoke her consent after her blood was lawfully seized, because "[b]y voluntarily consenting to take the test, Sumnicht passed on the opportunity to revoke her implied consent." *Id.* ¶ 23.

B. Just as in *VanLaarhoven*, *Reidel*, and *Sumnicht*, police were entitled to analyze the blood sample that they lawfully seized from Randall to determine the presence and quantity of alcohol and drugs in the blood. She had no legitimate privacy interest in the blood when law enforcement wanted to analyze it for that purpose.

Randall voluntarily surrendered a blood sample when police requested a sample under the implied consent law. *Randall*, 2018 WL 3006260, ¶ 10. The drawing of Randall's blood was a search for Fourth Amendment purposes. *Birchfield*, 136 S. Ct. at 2173. There is no dispute that the search comported with the Fourth Amendment because Randall consented to the blood draw. And there is no dispute that Randall attempted to withdraw her consent before the blood sample was analyzed, and did so with clear and unequivocal language. *Randall*, 2018 WL 3006260, ¶ 10.

But Randall's attempt to withdraw her consent after her blood was drawn had no effect, because the police did not need her consent to analyze the blood. Once the police lawfully seized Randall's blood, they were entitled to analyze it for the presence and quantity of alcohol and drugs. That

analysis was not a Fourth Amendment search because Randall no longer had a reasonable expectation of privacy in it to prevent analysis of the blood for the presence and quantity of alcohol and drugs. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16–17; *Reidel*, 259 Wis. 2d 921, ¶¶ 16–17; *Sumnicht*, 2017 WL 6520961, ¶¶ 21–23.

C. In *Randall*, the court of appeals misapplied the law, and reached a conclusion inconsistent with *Reidel* and *VanLaarhoven*.

In *Randall*, the court of appeals addressed the same legal issues that it addressed in *Sumnicht*, with materially identical facts. *Randall*, 2018 WL 3006260, ¶ 15. But Judge Kloppenburg reached the opposite result. The court did not distinguish *Sumnicht* in any way. Instead, it determined that *Sumnicht* is incorrect, and that *VanLaarhoven*, "the controlling case on which the *Sumnicht* court relied . . . compels a different result." *Id.* ¶ 16.

The *Randall* court said that in *VanLaarhoven*, it had "set the beginning and end points of a search of a person's blood, specifically ruling that the taking and testing of blood comprise one continuous search under the Fourth Amendment." *Randall*, 2018 WL 3006260, ¶ 11 (citing *VanLaarhoven*, 248 Wis. 2d 881, ¶¶ 8, 13, 16–17). The court noted, correctly, that in *VanLaarhoven*, it had rejected the argument that the testing of the blood sample was a separate search requiring a warrant. *Id.* (citing *VanLaarhoven*, 248 Wis. 2d 881, ¶¶ 3–4, 9).

But when the *Randall* court explained why it had rejected the "separate search" argument in *VanLaarhoven*, it quoted *VanLaarhoven* in manner that distorts the court's reasoning in that case.

The *Randall* court said that in *VanLaarhoven*, it had reasoned that analyzing "blood lawfully taken pursuant to a 'warrant requirement or an exception to the warrant requirement is *an essential part of the [search]*' and that defendants may not 'parse the lawful [search] of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement.'" *Randall*, 2018 WL 3006260, ¶ 11 (quoting *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16) (alteration in original). The court concluded that "*VanLaarhoven* teaches us that there is one continuous search that begins with the taking of blood and continues through the testing of that blood." *Id.*

But when quoting *VanLaarhoven*, the court in *Randall* changed the word "seized" to "taken," and twice changed the word "seizure" to "search."

VanLaarhoven	*Randall* quoting *VanLaarhoven*
"[T]he examination of evidence **seized** pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the **seizure** and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the lawful **seizure** of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement."	The "testing of blood lawfully **taken** pursuant to a 'warrant requirement or an exception to the warrant requirement is *an essential part of the **[search]***' and that defendants may not 'parse the lawful [**search**] of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement."

VanLaarhoven, 248 Wis. 2d 881, ¶ 16; *Randall*, 2018 WL 3006260, ¶ 11 (quoting *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16 (bolding added).

In *VanLaarhoven*, the court of appeals recognized that the analysis of a blood sample is part of the lawful *seizure* of the blood. In *Randall*, the court of appeals said that in *VanLaarhoven* it recognized that the analysis of a blood sample is part of the initial *search*—the blood draw.

A "search" and a "seizure" are not the same thing. Again, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Jacobsen*, 466 U.S. at 113. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.*

By changing "seized" to "taken," and "seizure" to "search," the court of appeals significantly changed the meaning of *VanLaarhoven*. The court did not say in *VanLaarhoven* that the *search* begins with the blood draw and ends with the analysis. It said that the search—the blood draw—resulted in a lawful *seizure* of the defendant's blood, and that the analysis of the blood is an essential part of the *seizure*. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16.

The court of appeals' reasoning in *VanLaarhoven* and *Reidel* is clear. The search is the blood draw. A person can withdraw consent to the search, until the blood is drawn, by refusing the blood draw. But once the blood is drawn, the search is over. The blood sample is the evidence that is seized. And the lawful seizure of evidence includes the analysis of the evidence—the testing at the lab. As the court of appeals has recognized, "the search does not consist of multiple parts and is not ongoing until the analysis is conducted." *Sumnicht*, 2017 WL 6520961, ¶ 21. "Rather, the search ended upon the blood being drawn. From that point on, the evidence was

lawfully seized, and the subsequent examination of seized evidence is part and parcel of the lawful search and seizure." *Id*.

The court of appeals in *VanLaarhoven* and *Reidel* recognized the distinction between search and seizure when it relied on *Snyder* and *Petrone* for the proposition that "the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16; *Reidel*, 259 Wis. 2d 921, ¶ 16. That is why the court concluded in both cases that the police were not required to obtain a warrant in order to have blood samples analyzed. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16; *Reidel*, 259 Wis. 2d 921, ¶ 16.

By mistakenly equating the search with the seizure of evidence, the *Randall* court misapplied *VanLaarhoven* and *Reidel*, and reached a conclusion entirely at odds with those cases. And the *Randall* court did not address *Petrone* or *Snyder*, the underpinnings of *VanLaarhoven* and *Reidel*. Under *Petrone* and *Snyder*, the court's conclusion in *Randall* is plainly wrong.

The *Randall* court noted that in *VanLaarhoven*, it stated that by submitting to a blood draw, and affirming his implied consent, the defendant "consented to a taking of his blood and the chemical analysis of that sample." *Randall*, 2018 WL 3006260, ¶ 11 (citing *VanLaarhoven*, 248 Wis. 2d 881, ¶ 8). That is true. But under *Petrone* and *Snyder*, consent to the analysis was unnecessary for law enforcement to analyze the blood sample that they had lawfully seized. The holdings in *VanLaarhoven* and *Reidel* were not premised on the defendants' consent to the analysis of their blood samples. The holdings were based on the right of law enforcement to analyze lawfully seized evidence. If consent to analyze blood

were required, the outcome of *Reidel* would have been different. The analysis of the blood could not have been premised on the defendant's consent, because the defendant did not consent to have his blood drawn, much less to have the blood sample analyzed. *Reidel*, 259 Wis. 2d 921, ¶ 1. Instead, the analysis was based on the lawful seizure of the blood. *Id.* ¶¶ 16–17.

In *Randall*, the court of appeals also relied on this Court's decision in *Wantland* for the proposition that "so long as a search has not yet been completed, an individual has the right to withdraw consent to continuation of the search through unequivocal actions or statements." *Randall*, 2018 WL 3006260, ¶ 12 (citing *Wantland*, 355 Wis. 2d 135, ¶ 34). The court concluded that when the defendant withdrew her consent to the analysis of the blood, after the blood was seized, "the State lost its only lawful basis for the warrantless search and its subsequent testing was done in violation of Randall's Fourth Amendment rights." *Id.* ¶ 13.

The State acknowledges that a person can withdraw consent, and that withdrawal of consent must be unequivocal. *Wantland*, 355 Wis. 2d 135, ¶ 33. But *Wantland* did not hold, or even hint, that a person may withdraw consent to a search after law enforcement has lawfully seized evidence, and thereby prevent the analysis of that evidence. Under *Schmerber*, "a 'search' is completed upon the drawing of the blood." *Johnson,* 440 F.3d at 500 (citing *Schmerber*, 384 U. S. at 771); *Woodard*, 909 N.W.2d at 304, 310. And while a person may withdraw consent while the search is ongoing, a person cannot withdraw consent after the officers find the evidence. "[W]hen a suspect does not withdraw his valid consent to a search before the illegal weapon or substance is discovered, the consent remains valid and the seized illegal item is admissible." *United States v. Mitchell*, 82 F.3d 146, 151 (7th Cir. 1996).

In the context of a blood draw, a person cannot withdraw consent after the blood is drawn. "[W]ithdrawal of consent after the search has been completed does not entitle a defendant to the return of evidence seized during the course of a consent search because those items are lawfully in the possession of the police." *Woodard*, 909 N.W.2d at 309. And once a defendant consents to a search in which evidence is seized, he or she "cannot, by revoking consent, prevent the police from examining the lawfully obtained evidence." *Id.*

In explaining why it reached the opposite result of *Sumnicht*, the *Randall* court concluded that the *Sumnicht* court's reliance on two out-of-state cases, *State v. Simmons*, 605 S.E.2d 846 (Ga. Ct. App. 2004), and *Woodard*, 909 N.W.2d 299, was "misplaced." *Randall*, 2018 WL 3006260, ¶ 17. The court noted, correctly, that the *Simmons* decision concerned Georgia's implied consent law, not the Fourth Amendment. *Id.* ¶ 18. However, the holding in *Simmons*—that a person can withdraw consent to a blood draw until the blood is drawn but not after it is drawn, *Simmons*, 605 S.E.2d at 847–48—would be the same under Wisconsin's implied consent law and under the Fourth Amendment, for the reasons discussed above.

And *Woodard* is directly on point. But the court in *Randall* found *Woodard* "unpersuasive" for three reasons. The court noted that "Woodard argued that the taking and testing of blood for a chemical blood test was 'a separate and distinct search,' whereas, here, Randall argues that the taking and testing of blood comprise one single constitutional search." *Id.* ¶ 21 (citation omitted). However, as explained above, "the taking and testing of blood" is not "one single constitutional search." They are two separate events, only the former of which implicates constitutional protection as a Fourth Amendment search.

The *Randall* court also noted that *Woodard* relied on *Johnson*, 440 F.3d at 500, for the proposition that "this search

. . . is completed upon the drawing of the blood." *Randall*, 2018 WL 3006260, ¶ 22 (quoting *Woodard*, 909 N.W.2d at 304–05.) *Randall* concluded that the court erred in *Woodard* because its "adoption of the holding in *Johnson*, that the search is completed at the blood draw, appears to conflict with the court's later adoption of the holding in *VanLaarhoven*, that the taking and testing of blood comprise a single constitutional search." *Id.* (citing *Woodard*, 909 N.W.2d at 306).

But as explained above, *VanLaarhoven* did not hold that "the taking and testing of blood comprise a single constitutional search." *Randall*, 2018 WL 3006260, ¶ 22. The court in *Woodard* recognized, correctly, that *VanLaarhoven* said that "the testing of blood evidence 'is an essential part of the *seizure*.'" *Woodard*, 909 N.W.2d at 306 (citing *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16) (emphasis added.) Like *VanLaarhoven*, the court in *Woodard* recognized the distinction between the search—the blood draw—and the seizure of evidence, of which the analysis was an essential part.

Finally, the *Randall* court was "unconvinced" by *Woodard*'s reasoning that "a defendant who consents to the search in which evidence is seized cannot, by revoking consent, prevent the police from examining the lawfully obtained evidence." *Randall*, 2018 WL 3006260, ¶ 23 (quoting *Woodard*, 909 N.W.2d at 309). The court in *Randall* concluded that *Woodard*'s reasoning was contrary to the conclusion in *VanLaarhoven* that "the taking and testing of blood comprise a single constitutional search." *Id.* The court in *Randall* further concluded that *Woodard's* reasoning "would inappropriately parse that single search into two components, grant only the 'taking' component constitutional protections, and demote the 'testing' component to mere 'examination,'"

and would "strip away the attendant constitutional protections by relabeling it 'examination.'" *Id.*

Once more, *VanLaarhoven* did not conclude that the "taking and testing of blood comprise a single constitutional search." *Randall*, 2018 WL 3006260, ¶ 22. Under *VanLaarhoven* and *Reidel*, the search ends when the blood is drawn. And under *Petrone* and *Snyder*, when the blood is lawfully seized, law enforcement can analyze or "examine" it.

As the court of appeals recognized in *Sumnicht*, *Woodard* is persuasive authority. And unlike *Randall*, both the *Woodward* and *Sumnicht* courts properly applied *VanLaarhoven*.

D. Randall did not have a legitimate privacy interest in the blood sample that was lawfully seized from her that would require law enforcement to obtain a warrant to analyze the sample for the presence and quantity of alcohol and drugs.

The court of appeals did not address the issue whether Randall had a legitimate privacy interest in the blood sample that she voluntarily gave police, after law enforcement seized the evidence. The court concluded that the State forfeited the argument that Randall did not have a privacy interest in regard to the analysis of the blood. *Randall*, 2018 WL 3006260, ¶ 25. The State does not believe that it did, or could, waive the privacy interest argument in the circuit court. After all, a determination that Randall had a reasonable privacy interest in the blood that she voluntarily gave to police would be necessary for her to successfully challenge the constitutionality of the analysis of the blood sample. There can be no search in violation of the Fourth Amendment unless there is a privacy interest society would recognize as reasonable. *See Jacobsen*, 466 U.S. at 113. If there is no

privacy interest "that society is prepared to consider reasonable," *id.*, there is no search.

Moreover, both parties fully briefed the issue in the court of appeals, and the State raised the issue in the petition for review that this Court granted. The State therefore assumes that this Court will address whether Randall had a privacy interest regarding the analysis of her blood.

The circuit court relied on *Riley v. California*, as authority for the necessity of a warrant or an exception to the warrant requirement in order to analyze the blood that was lawfully seized from Randall with her consent under the implied consent law. (R. 33:59.) The court of appeals' decision did not address *Riley*. But *Riley* does not apply to the analysis of the blood in this case.

Riley concerned a search of cell phones incident to an arrest for traffic violations and an arrest for an apparent drug sale. *Riley v. California*, 134 S. Ct. 2473, 2480–82 (2014). The Supreme Court noted that the contents of a cell phone carry a significant privacy interest: "[w]ith all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Id.* at 2494–95 (citation omitted). The Court held that if police officers want to search a cell phone incident to arrest they must "get a warrant." *Id.*

Riley has no bearing on the issue in this case. In *Riley*, "the Court explicitly limited this holding to cell phones seized during searches incident to arrest." *State v. Inman*, 409 P.3d 1138, 1146 (Wash. Ct. App. 2018) (citing *Riley*, 134 S. Ct. at 2481, 2495). The Court noted that searches of cell phones may be justified by other exceptions to the warrant requirement, such as exigent circumstances. *Id.* (citing *Riley*, 134 S. Ct. at 2494).

This is a consent case, not a search incident to arrest case. And unlike the privacy interest in a cell phone, the

privacy interest in blood after it has been drawn from a person for testing under the implied consent law, with the person's consent, is insignificant. A person has no reasonable privacy interest in blood lawfully seized from her after she was arrested for OWI, when the blood is to be analyzed to determine the presence and quantity of drugs and alcohol in the blood.

In the court of appeals, Randall argued that she had a legitimate privacy interest in her blood after it was lawfully seized, and that analysis of the sample without her consent or a warrant was a Fourth Amendment violation. (Randall's Br. 9–13.) She relied on *Skinner*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *Birchfield*. The court of appeals' decision did not address Randall's arguments, or any of those cases. But none of those cases support Randall's assertion that analysis of her blood without a warrant was a Fourth Amendment violation.

In *Skinner*, the Supreme Court addressed Federal Railroad Administration regulations that required a blood test when employees were involved in a train accident. *Skinner*, 489 U. S. at 606. The Court noted that a "'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search." *Id.* at 616 (citing *Schmerber*, 384 U.S. at 757, 767–68). The Court concluded that "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *Id.* The Court added that "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." *Id.*

But while the Court noted that analysis of a blood sample "to obtain physiological data is a further invasion of the tested employee's privacy interests," the Court did not hold that the employee had a legitimate privacy interest that

could prevent the analysis of the blood samples without a warrant. *Id.*

The Wisconsin Court of Appeals has rejected the assertion that *Skinner* means that a person arrested for OWI retains a privacy interest in blood that is lawfully seized from the person when the blood is to be analyzed for the presence and quantity of drugs and alcohol. In *VanLaarhoven*, the court addressed *Skinner*, but concluded that by consenting to a blood draw under the implied consent law, VanLaarhoven waived any privacy interest in the blood sample that law enforcement seized from him. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 11. And in *Reidel*, the court concluded that *Skinner* "did not address" whether the analysis of a blood sample lawfully seized from a person arrested for OWI requires a warrant. *Reidel*, 259 Wis. 2d 921, ¶ 16 n.6.

Courts in other jurisdictions have concluded that the "further invasion" language in *Skinner* does not mean that law enforcement needs a warrant to analyze a sample it has lawfully seized. In *Loveland*, the Supreme Court of South Dakota noted that *Skinner* recognized that a urine sample "may contain vast amounts of sensitive personal information about the person they were taken from." *Loveland*, 696 N.W.2d at 166 n.1. The court said it therefore could not conclude that a person had no privacy interest in urine he had provided. *Id.* at 166. But the court concluded that once the person gave a sample, he had "no legitimate or reasonable expectation that the presence of illegal substances in that sample will remain private." *Id.*

In *Fawcett*, the Minnesota Court of Appeals addressed the "further invasion" language in *Skinner*, noting that it "arguably could compel a conclusion that a subsequent chemical analysis of blood is a distinct Fourth Amendment event." *Fawcett*, 877 N.W.2d at 560. But the court concluded that "viewing the language in the context of the entire

opinion, the language is dictum. The 'further invasion' language concerned testing for medical facts about a person unrelated to the government's investigation for alcohol or drugs." *Id.* (citing *Skinner*, 489 U.S. at 616–17). The court noted that other courts have determined that the analysis of blood lawfully seized is not a separate Fourth Amendment event. *Id.* at 561. It concluded that "[o]nce a blood sample has been lawfully removed from a person's body, a person loses an expectation of privacy in the blood sample, and a subsequent chemical analysis of the blood sample is, therefore, not a distinct Fourth Amendment event." *Id.*

In *Woodard*, the Michigan Court of Appeals noted that under *Skinner*, "'obtaining and examining' evidence may be considered a search, provided that doing so 'infringes an expectation of privacy that society is prepared to recognize as reasonable." *Woodard*, 909 N.W. 2d at 305 (quoting *Skinner*, 489 U.S. at 616). But the court recognized that "the issue in *Skinner* was a Fourth Amendment challenge to drug-testing of railroad employees, during which the Court weighed privacy interests against government interests for purposes of determining whether a 'special needs' justified compulsory collection and testing of biological fluids without a warrant." *Id.* at 306 (citing *Skinner*, 489 U. S. at 620). The court concluded that the Supreme Court in *Skinner* "was simply not considering whether the testing of a biological sample that had already been lawfully seized by law enforcement officials constituted a second and distinct 'search' with Fourth Amendment implications independent of the collection of the sample." *Id.*

The court in *Woodard* rejected the notion that the analysis of a legally seized blood sample is a Fourth Amendment search, because "society is not prepared to recognize a reasonable expectation of privacy in the alcohol content of a blood sample voluntarily given by a defendant to

the police for the purposes of blood alcohol analysis." *Id.* at 305. "Accordingly, the testing of this lawfully obtained evidence does not constitute a distinct search for Fourth Amendment purposes and any effort to withdraw consent after this evidence has been lawfully obtained cannot succeed." *Id.*

And in *Dodd*, the Eighth Circuit rejected the argument that the testing of blood that has been lawfully seized is a separate search that must be independently justified. The court noted that the "search" is completed upon the drawing of the blood. *Dodd*, 623 F.3d at 569 (citing *Johnson*, 440 F.3d at 500). It added that "the subsequent testing of that blood had 'no independent significance for Fourth Amendment purposes." *Id.* (quoting *Snyder*, 852 F.2d at 474).

Numerous other cases have similarly recognized that "expectations of privacy in lawfully seized blood samples . . . are not objectively reasonable by 'society's standards.'" *State v. Hauge*, 79 P.3d 131, 144 (Haw. 2003). In *Hauge*, the Supreme Court of Hawaii reasoned that use of Hauge's DNA in a subsequent case was lawful, reasoning that "no violation of his constitutional right to privacy occurred because the analyses did not exceed the objective for which the original warrant was sought—DNA testing for the purpose of identification." *Id.* at 145. The court noted that "a number of jurisdictions have held on analogous facts that once a blood sample and DNA profile is lawfully procured from a defendant, no privacy interest persists in either the sample or the profile." *Id.* at 144 (citing *People v. Baylor*, 118 Cal. Rptr.2d 518 (Cal. Dist. Ct. App. 2002); *Washington v. State*, 653 So.2d 362 (Fla. Dist. Ct. App.1994); *Bickley v. State*, 489 S.E.2d 167 (Ga. Ct. App. 1997); *Smith v. State*, 744 N.E.2d 437 (Ind. 2001); *Patterson v. State*, 744 N.E.2d 945 (Ind. Ct. App. 2001); *Wilson v. State*, 752 A.2d 1250 (Md. App. 2000);

People v. King, 663 N.Y.S.2d 610 (N.Y. App. Div. 1997); *State v. Barkley*, 551 S.E.2d 131 (N.C. Ct. App. 2001)).

Cases not involving arrests for OWI have similarly held that the analysis of samples that have been lawfully seized are not Fourth Amendment searches. For instance, in *Jacobsen*, the Supreme Court concluded that a federal agent's test of a white powdery substance that Federal Express employees found in an opened package was not an unlawful search or seizure under the Fourth Amendment. *Jacobsen*, 466 U.S. at 122–23. The Court held that "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." *Id.* at 123. The Court reasoned that Congress treats any interest in "'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.*

The State's research has revealed no case holding that the analysis of a lawfully drawn sample of a person's blood, breath, or urine—which is evidence of the offense for which the person was arrested—is a Fourth Amendment search, when that analysis is to determine the presence and quantity of alcohol or drugs.

In the court of appeals, Randall relied on *Ferguson*, in which the Supreme Court considered urine tests administered to pregnant women at a state hospital. *Ferguson*, 532 U.S. at 73, 76. The Court concluded that the tests "were indisputably searches within the meaning of the Fourth Amendment." *Id.* at 76. But the urine tests were not the analysis of lawfully obtained urine samples. The Court noted that the urine tests were conducted "without warrants or probable cause," and "without the informed consent of the patients." *Id.* at 76–77. The Court concluded that "the Fourth Amendment's general prohibition against nonconsensual,

warrantless, and suspicionless searches necessarily applies to such a policy." *Id.* at 85. *Ferguson* said nothing about the analysis of a sample that was lawfully seized from a person with the person's consent.

Randall also relied on *Birchfield*, in which the Supreme Court noted that "a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 136 S. Ct. at 2178. The Court added that "[e]ven if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." *Id.*

The Court in *Birchfield* was concerned with the blood draw, not with the analysis of the blood after it was lawfully seized. The Court considered the anxiety a person might feel about testing a blood sample as a reason—along with the piercing of the skin—why a blood test is more intrusive than a breath test. *Birchfield*, 136 S.Ct. at 2178. But the Court did not recognize a separate privacy interest in the analysis of a blood sample for the presence and quantity of alcohol and drugs that has been lawfully seized from a person arrested for OWI. Any possible expectation of privacy under those circumstances would not be one society would recognize as reasonable. *Loveland*, 696 N.W.2d at 166; *Fawcett*, 877 N.W.2d at 561.

Moreover, *Birchfield* did not say that the analysis of a blood sample lawfully drawn from a person arrested for OWI is a Fourth Amendment event. It did not overrule the numerous cases that have held that the analysis of a lawfully seized sample is not a separate Fourth Amendment event. *See e.g.*, *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16 (holding that "the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an

essential part of the seizure and does not require a judicially authorized warrant"); *Petrone*, 161 Wis. 2d at 545 (holding that developing lawfully seized film "did not constitute, as the defendant asserts, a separate, subsequent unauthorized search having an intrusive impact on the defendant's rights wholly independent of the execution of the search warrant"); *Snyder*, 852 F.2d at 473–74 (concluding that pursuant to *Schmerber*, when "blood is extracted incident to a valid arrest based on probable cause to believe that the suspect was driving under the influence of alcohol, the subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes, regardless of how promptly the test is conducted").

The analysis of Randall's blood in this case was not part of the initial search—the blood draw—or a separate search requiring either judicial authorization or an exception to the warrant requirement. It was part of the lawful seizure of Randall's blood. Randall had no subjective privacy interest in the blood she voluntarily gave to officers for testing to determine its concentration of alcohol and drugs in her system. Randall did not move to prevent the lab or law enforcement from using the blood for any purpose other than that for which it was drawn. And as the circuit court correctly concluded, "Ms. Randall definitely is not entitled to have the blood destroyed." (R. 33:59–60.)

Even if Randall could somehow claim that she had a subjective privacy interest in her blood after she submitted the sample, society would not recognize that interest as reasonable. Law enforcement officers lawfully seized a sample of Randall's blood under the implied consent law, so that it could determine the concentration of drugs or alcohol in her system. This is the bargain Randall struck when she drove on a Wisconsin highway, and then, after she was arrested for OWI, when she chose not to withdraw her consent, but

instead to submit to the officer's request for a sample for testing. Any privacy interest sufficient to withdraw her consent, not to the Fourth Amendment event—the extraction of her blood—but to the testing and analysis of the sample days later, is not one society would find reasonable.

In contrast, there is a legitimate governmental interest in analyzing blood that has been lawfully drawn under the implied consent law. As the Supreme Court recognized in *Birchfield*, "[t]he States and the Federal Government have a 'paramount interest . . . in preserving the safety of . . . public highways.'" *Birchfield*, 136 S. Ct. at 2178 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)). This obviously includes analyzing blood drawn from a person arrested for operating while under the influence of alcohol or drugs in order to gather evidence.

The requirement of a warrant to analyze blood for alcohol or drugs after a person has consented to the blood draw for testing and analysis would serve no real purpose. After all, as the Court recognized in *Birchfield*, "[i]n order to persuade a magistrate that there is probable cause for a search warrant, the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the motorist's blood alcohol level is over the limit." *Birchfield*, 136 S. Ct. at 2181. In a case like this one, a magistrate would have to find only that there is probable cause that blood that a person consented to give after being arrested for an OWI-related offense, based on probable cause, contains evidence of alcohol or illegal drugs. It is difficult to envision a scenario where a magistrate would not issue a warrant to analyze blood that a person gave consensually, under the implied consent law, after a proper request from a law enforcement officer.

In summary, there is a significant governmental interest in testing the blood sample that Randall gave when she consented to the implied consent procedure. And Randall had no reasonable privacy interest in the blood sample that law enforcement officers lawfully seized when it was to be analyzed only to determine the presence and quantity of alcohol and drugs in her blood when she drove on a Wisconsin highway. The Fourth Amendment therefore does not require a warrant or an exception to the warrant requirement to analyze the blood.

E. The implied consent law does not require a person to consent to the analysis of his or her blood, breath, or urine after it is lawfully seized, and does not contemplate a person withdrawing consent to analyze a sample.

When an officer places a person under arrest for an OWI-related offense and requests a sample of blood, breath, or urine under the implied consent law, the officer is required to read the Informing the Accused form to the person. Wis. Stat. § 343.305(3)(a) and (4). After the officer reads the form, the person has an opportunity to withdraw the consent she impliedly gave to provide a sample when she drove on a Wisconsin highway. By submitting to a blood draw under the implied consent law, a person affirms her consent to the implied consent procedure, including analysis of the blood. Once the person submits to the request for a sample, and provides a sample, the person has "passed on the opportunity to revoke her implied consent." *Sumnicht*, 2017 WL 6520961, ¶ 23.

The implied consent law also governs what happens after a person submits to a blood draw, including (1) the administration of a test, Wis. Stat. § 343.305(5)(a), (2) who may draw blood, Wis. Stat. § 343.305(5)(b), (3) who may

analyze samples, and (4) how the analysis is conducted, Wis. Stat. § 343.305(6). Once the person submits, what happens to the sample the person gives is governed by the statute and is entirely out of the person's hands. The statute says nothing about anyone at a laboratory determining whether a person has withdrawn consent. That is because the statute does not authorize a person who has submitted to a request for a sample to do anything after submitting, except take an alternative or additional test and challenge an administrative suspension. Wis. Stat. § 343.305(5)(a). Nothing in the statute authorizes a person who has affirmed her consent to the implied consent procedure to withdraw that consent after submitting the sample. And nothing in the statute requires a lab to have a search warrant or consent to analyze evidence in the form of a blood sample.

The statute also provides for penalties when a person withdraws his or her consent to the implied consent procedure by refusing a request for a sample. When a person "refuses to take a test," the officer is required to "immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege," and to "issue a copy of the notice of intent to revoke the privilege to the person." Wis. Stat. § 343.305(9)(a).

The refusal subsection of the statute applies when a person "refuses to take test." This cannot mean when a person "refuses to allow the lab to analyze a sample the person has given." Wis. Stat. § 343.305(9)(a). A refusal occurs when a person refuses to give a sample. The statute simply does not contemplate a refusal after the sample is drawn. It is therefore not surprising that no case in Wisconsin has addressed the possibility of a sanction for refusal after a blood sample has been drawn.

A requirement of a warrant or consent for analysis of blood samples submitted under the implied consent law would

also be contrary to the public policy behind implied consent laws. In *Birchfield*, the Court noted the large number of arrests for driving while under the influence of drugs or alcohol and concluded that requiring a warrant "in every case would impose a substantial burden but no commensurate benefit." *Birchfield*, 136 S. Ct. at 2181–82. If law enforcement were required to obtain a warrant whenever a person withdrew consent after the blood draw, but before analysis of the sample, law enforcement and judicial officials would be unnecessarily bogged down in order to protect a privacy interest that is non-existent—or at most minimal—against a legitimate and important governmental interest.

At the outset of its analysis in this case, the circuit court recognized that: "it would be one giant loophole if it was legal for defendant to avoid [the] consequences of implied consent law." (R. 33:9.) Later, the court noted that it would be "inequitable, unfair, and contrary to public policy" which calls for "the vigorous enforcement of drunk driving cases" for "a person in Ms. Randall's position to avoid the administrative consequences of a refusal by giving her consent but, then, also avoiding the criminal prosecution . . . by later withdrawing her consent and avoiding any consequences of the administrative penalties." (R. 33: 56.)

The circuit court was correct. Allowing a person who submits to the implied consent procedure to withdraw that consent after giving a sample would be contrary to both the implied consent law and public policy.

But consent or a warrant to analyze a sample that law enforcement has lawfully seized is not required by the Fourth Amendment. *VanLaarhoven*, 248 Wis. 2d 881, ¶¶ 16–17; *Reidel*, 259 Wis. 2d 921, ¶¶ 16–17; *Sumnicht*, 2017 WL 6520961, ¶¶ 21–22. And the implied consent law does not give a person who submits to a request for a sample, affirming her consent to the implied consent procedure, an opportunity to

thwart the procedure by refusing to allow analysis of the sample. Once the sample is drawn, it "is simply too late" to withdraw consent. *Sumnicht*, 2017 WL 6520961, ¶ 21.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court reverse the court of appeals' decision that affirmed the circuit court's order granting Randall's motion to suppress evidence of the results of a test of her blood.

Dated this 10th day of December, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,197 words.

Dated this 10th day of December, 2018.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 10th day of December, 2018.

MICHAEL C. SANDERS
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Jessica M. Randall
Case No. 2017AP1518-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of December, 2018.

_____

MICHAEL C. SANDERS
Assistant Attorney General

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I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

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MICHAEL C. SANDERS
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