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STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v. Appeal No.: 17 AP 1518-CR

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 DEFENDANT-RESPONDENT

Respectfully submitted,

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STATEMENT OF ISSUES

I. WAS THE STATE LABORATORY'S CHEMICAL ANALYSIS OF RANDALL'S BLOOD SAMPLE AN UNCONSTITUTIONAL SEARCH WHEN IT WAS CONDUCTED NEITHER PURSUANT TO A WARRANT NOR PURSUANT TO RANDALL'S CONSENT?

The circuit court answered "yes," and suppressed the results of the chemical analysis.

The court of appeals also answered "yes," and affirmed the circuit court.

II. WHEN RANDALL REVOKED HER CONSENT TO THE COLLECTION AND ANALYSIS OF HER BLOOD SAMPLE, INVOKED HER RIGHT TO PRIVACY, AND DEMANDED THE RETURN OR DESTRUCTION OF THE SAMPLE, WAS IT A VIOLATION OF RANDALL'S FOURTH AMENDMENT RIGHTS FOR THE STATE TO RETAIN POSSESSION OF THE SAMPLE?

This issue was not formally addressed by either the circuit court or the court of appeals, but it hinges on the same legal principles, and therefore should be decided by this Court in order to harmonize the law and avoid future litigation, pursuant to Wis. Stat. § 809.62(3)(e).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF CASE AND FACTS

Randall was arrested for allegedly operating a motor vehicle while under the influence of an intoxicant.[1] After the arresting officer read Randall the Informing the Accused form, Randall consented to the collection and analysis of her blood.[2] The blood sample was collected by a medical technician at a hospital.[3]

Two days after her arrest, Randall sent a letter to the Wisconsin State Laboratory of Hygiene "revok[ing] any previous consent that she may have provided to the collection and analysis of her blood."[4] The State concedes that Randall's letter constituted a "clear and unequivocal" attempt to withdraw her consent to search.[5] Yet the laboratory disregarded Randall's letter, analyzed the sample, and issued a report showing the results of the analysis.[6]

The Dane County District Attorney's Office charged Randall with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as a third offense.[7] Randall moved to suppress the result of the blood

[1] R. 1:2.
[2] *Id.*
[3] *Id.*
[4] R. 18:4.
[5] State's Br. at 14.
[6] R. 18:6.
[7] R. 1.

analysis, arguing that it was an unlawful search under the Fourth Amendment.[8]

The circuit court granted Randall's motion to suppress.[9] The State appealed.[10] The court of appeals held that the analysis of Randall's blood sample was a search for constitutional purposes, and that when Randall withdrew her consent to that search, "the State lost its only lawful basis for the warrantless search[.]"[11] The court of appeals affirmed the circuit court's decision.[12]

This Court granted the State's petition for review.

STANDARD OF REVIEW

The constitutionality of a search is a question of constitutional law reviewed *de novo*,[13] while findings of historical fact must be upheld unless clearly erroneous.[14]

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[8] R. 32.
[9] R. 33:61; 29.
[10] R. 31.
[11] ***State v. Randall***, 2018 WI App 45, ¶¶ 11, 13, 383 Wis. 2d 602, 918 N.W.2d 128 (unpublished).
[12] ***Id***. ¶ 27.
[13] ***State v. Guzman***, 166 Wis. 2d 577, 586, 48 N.W.2d 446 (1992).
[14] ***State v. Robinson***, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463.

ARGUMENT

I. THE STATE LABORATORY'S CHEMICAL ANALYSIS OF RANDALL'S BLOOD SAMPLE WAS AN UNCONSTITUTIONAL SEARCH BECAUSE IT WAS CONDUCTED WITH NEITHER A WARRANT NOR RANDALL'S CONSENT.

Randall was asked to consent to a chemical analysis of her blood. She initially consented but then thought better of it. The State concedes that Randall's letter was a "clear and unequivocal" attempt by Randall to revoke her consent to the analysis.[15] The State also advances no other Fourth-Amendment theory to justify the analysis of Randall's blood sample. The central question for this Court, then, is whether an individual has a privacy interest in the information contained within a biological specimen, such that the analysis of that specimen by the State must comport with the requirements of the Fourth Amendment—in other words, whether the analysis of Randall's blood sample was a "search" for constitutional purposes.

This Court should affirm the circuit court and court of appeals, hold that the analysis of a blood sample is a search, and hold that the analysis of Randall's blood sample, lacking any Fourth-Amendment justification, was unconstitutional.

[15] State's Br. at 14.

A. An individual has a reasonable expectation of privacy in the information contained within his or her blood sample.[16]

A search occurs when the government intrudes upon an individual's "reasonable expectation of privacy."[17] That which an individual holds out to the public can be accessed by the government without implicating the Fourth Amendment; that which an individual reasonably expects to be private cannot be accessed without constitutional justification.

The State does not dispute that a search occurs when the government takes a blood sample from an individual.[18] The real issue is in defining the boundaries of that search. The State contends that the only search that occurred here is the collection of the sample—the puncturing of the vein and taking of the blood.[19] But the caselaw demonstrates that the privacy interests involved in a blood test extend beyond the momentary discomfort in being pricked by a needle. With

[16] The court of appeals found that the State did not dispute at the circuit court level Randall's clearly-articulated position that individuals have a privacy interest in the analysis of their blood as distinct from the interest in the collection of the blood sample. ***Randall***, 2018 WI App 45, ¶ 25. The State cannot raise on appeal an argument that it forfeited in the circuit court; the court of appeals therefore declined to consider the merits of this argument from the State. ***Id.***; *see* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶ 15, 273 Wis. 2d 76, 681 N.W.2d 190.
[17] ***Katz v. United States***, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).
[18] State's Br. at 5.
[19] State's Br. at 2.

a broader definition of the privacy interests involved comes a broader scope of constitutional protection.

A blood sample, much like a cell phone or a computer, is a physical item that has little evidentiary value to the naked eye but that contains within it a wealth of information. The presence of alcohol, drugs, or other chemicals can be detected, as well as genetic information about ancestry, family connections, medical conditions, pregnancy, and genetic profiles suitable for identification. If, as the State maintains, an individual truly has no privacy interest in his or her blood sample after it has been turned over to the government, then he or she has no remedy if the government chooses to access any or all of this information, put in in a database, publish it, or even sell it to a third party.

In ***Birchfield v. North Dakota***, the United States Supreme Court recognized that the privacy interests involved in a blood test include both the "piercing [of] the skin" and the fact the government acquires a sample "from which it is possible to extract information[.]"[20] It reasoned:

> [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. Even if the law enforcement agency is precluded from testing the blood for

[20] ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2164 (2016).

> any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.[21]

Although ***Birchfield*** was focused on legal issues surrounding the collection of the sample, rather than the analysis, this language demonstrates an understanding that there is a legitimate expectation of privacy that extends to the information within the sample, which in turn means that the process by which the government accesses that information is a search.

Furthermore, in the 1989 case ***Skinner v. Railway Labor Executives' Association***, the Court explained:

> [I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. *The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of … privacy interests*.[22]

This holding explicitly recognizes that a person has a reasonable expectation of privacy in the "physiological data" contained within a biological sample.

For a "reasonable expectation of privacy" to exist, two factors must be satisfied: first, a subjective expectation of privacy, and second, an objective finding that that expectation of privacy is one

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[21] ***Id***. at 2178.

[22] ***Skinner v. Railway Labor Executives' Association***, 489 U.S. 602, 616 (1989) (emphasis supplied).

that society is prepared to recognize as legitimate.[23] Randall expressed her subjective expectation of privacy through her letter, and her expectation of privacy was legitimate. The legitimacy of her expectation of privacy can be determined in two ways. First and foremost, it is recognized by United States Supreme Court caselaw as being a legitimate interest. Second, the fact that the government needed her consent to access the information in the first place means that this information was not something she generally would expect the government or general public to be able to access. When the only way the government could access the information is by gaining Randall's permission, it is a reasonable conclusion that she should have been able to keep the information private by revoking her permission for the government to access it.

In summary, Randall had both a subjective and an objective expectation of privacy in the information contained within her blood sample, such that the analysis of the sample was a search. Because the analysis of Randall's blood sample was a search, it had to be justified under the Fourth Amendment. Because the government's only Fourth-Amendment justification was eliminated when Randall revoked her

[23] ***State v. Rewolinski***, 159 Wis. 2d 1, 14, 464 N.W.2d 401 (1990).

consent to testing, the search was unlawful, and both the circuit court and the court of appeals reached the correct conclusion.

B. Randall's initial consent to the analysis of her blood sample did not forever waive her right to privacy in the data contained within.

The State's brief argues that Randall's reasonable expectation of privacy is somehow diminished or even waived because she initially provided consent.[24] For example, the State argues that "[A] person *who voluntarily surrenders a blood sample* after being arrested for OWI has no reasonable expectation of privacy in the blood[.]"[25] It also argues that "[T]he privacy interest in blood *after it has been drawn from a person for testing* … is insignificant."[26] The argument seems to be that even though Randall would normally have a reasonable expectation of privacy in the information contained within her blood sample, her initial consent either waived that privacy interest forever or diminished it to the point that it is no longer enforceable, even though the government did not access the information until after she revoked her consent.

[24] State's Br. at 1.
[25] *Id*. (emphasis supplied).
[26] *Id.* at 24 (emphasis supplied).

When a person consents to a search, it is black-letter constitutional law that the consent may be limited, modified, or revoked at any time.[27] The State does not contest this general idea, but it argues that a person may not "withdraw consent to a search after law enforcement has lawfully seized evidence, and thereby prevent the analysis of that evidence."[28] The State is incorrect—the right to revoke consent would be meaningless if it did not encompass the right to stop the government from taking action.

Government agents need Fourth-Amendment justification to enter a home or other private property. Imagine that government agents were admitted to a home pursuant to the homeowner's consent. Imagine, too, that the homeowner eventually grew tired of his guests, revoked his consent, and demanded that the agents leave at once. Would the State argue that the homeowner, having initially consented to the agents entering his home, has either a permanently-diminished or non-existent expectation of privacy in his home?

Or imagine that a taxpayer consents to the government taking and reviewing his business records. Then, before the records are reviewed, he revokes his consent and demands the records be

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[27] ***State v. Matejka***, 2001 WI 5, ¶ 37, 241 Wis. 2d 52, 621 N.W.2d 891 (*citing* ***Florida v. Jimeno***, 500 U.S. 248, 252 (1991)); ***State v. Wantland***, 355 Wis. 2d 135, 152, 848 N.W.2d 810 (2014).

[28] State's Br. at 19.

returned. Would the State argue that the taxpayer no longer has an expectation of privacy in the documents simply because he initially turned them over?

In both scenarios, it is plain that *prior to the initial consent*, the individual had a legitimate expectation of privacy. The government would not be able to barge into a home or seize business records without a warrant. The only thing that has changed from the beginning to the end of the scenarios is that the individual provided consent and then revoked it. Should that make a difference, or should the individual's expectation of privacy be restored to what it was prior to the consent?

The caselaw is clear that an individual's expectation of privacy is restored when he or she revokes his or her prior consent to search. For example, in the first scenario, ***Painter v. Robertson*** observed that upon revocation of consent for government agents to be on private premises, the agents should terminate their search "instantly" and "promptly depart[] the premises[.]"[29]

The second scenario mirrors the case of ***Mason v. Pulliam***.[30] In that case, Mason consented to provide the IRS with business

[29] ***Painter v. Robertson***, 185 F.3d 557, 567 (6th Cir. 1999).
[30] ***Mason v. Pulliam***, 557 F.3d 426 (5th Cir. 1977).

records, and then revoked that consent the following week.[31] The government argued:

> [W]hen Mason voluntarily permitted Pulliam to take possession of his papers for the purpose of examining and copying, he *forever waived his Fourth Amendment rights and any underlying reasonable expectations of privacy*. The agents contend that "a reasonable expectation of privacy *can only be lost once*, and requiring the government to return the taxpayers records instantly on demand would serve only to frustrate a legitimate government investigation without in any way furthering the purposes of the Fourth Amendment."[32]

The court concluded that "This argument is erroneous."[33] It ordered the return of the documents and all copies derived from the analysis of the documents that was conducted after Mason revoked his consent.[34]

Further examples can be provided of consent being effectively revoked. In ***United States v. Bily***, the court held that when the defendant told government agents to stop their search after seizing several video recordings, the agents were not permitted to seize an additional video recording.[35] In ***United States v. Ho***, when a government agent was looking through a portfolio pursuant to the defendant's consent, the court found that the agent was not permitted

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[31] ***Id***. 557 F.3d at 427–28.
[32] ***Id***. at 428.
[33] ***Id.***
[34] ***Id.*** at 429.
[35] ***United States v. Bily***, 406 F. Supp. 726 (E.D. Pa. 1975).

to continue to examine the contents of the portfolio after the revocation of that consent.[36] In ***State v. Staatz***, the court observed that "When a police officer is in a private residence solely pursuant to a resident's consent, the officer must respect a revocation of that consent."[37]

In sum, the caselaw is consistent that the revocation of consent restores an individual's privacy interests. There is no support in the caselaw for the proposition that consenting and then retracting consent forever waives or damages one's privacy interests.

The only caveat is that, to the extent that further information is obtained, or contraband is discovered, *between* the initial consent and the revocation of consent, the police may be able to retain that evidence. Thus, the State is correct to cite ***United States v. Mitchell*** for the proposition that withdrawing consent *after* an illegal weapon or substance is discovered does not affect the admissibility of that evidence.[38] The difference is that here, as in the examples cited above, the government did not perform the search that resulted in usable evidence being discovered until after the consent was revoked. Had the laboratory analysis been performed before Randall revoked her

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[36] ***United States v. Ho***, 94 F.3d 932 (1996).
[37] ***State v. Staatz***, 978 P.2d 881, 885, 132 Idaho 693 (Ct. App. Idaho 1999).
[38] State's Br. at 19, *citing* ***United States v. Mitchell***, 82 F.3d 146, 151 (7th Cir. 1996).

consent, that analysis would have been performed pursuant to her explicit consent and unobjectionable. But when Randall revoked her consent, her expectation of privacy was restored, and the government was lawfully prohibited from performing the analysis.

To put this in another context, one might ask what would have happened if Randall had exercised another well-recognized right under Fourth-Amendment caselaw and attempted to explicitly limit her consent, rather than providing full consent and then retracting it. Assume that Randall had told the arresting officer, "I consent to you collecting a sample of my blood, but I do not consent to any chemical analysis without a warrant." Under the State's theory, would Randall's attempt to limit her consent be doomed? If providing a sample of blood waives all privacy interests in the blood sample, how could one ever exercise one's right to limit the scope of consent?

The State would have this Court nullify whole areas of Fourth-Amendment jurisprudence. Individuals have a legitimate privacy interest in the information contained within their blood; they also have the legal right to refuse consent,[39] as well as the right to limit, modify, or revoke consent once given. The State's theory is incompatible with

[39] *See* ***State v. Dalton***, 2018 WI 120, 914 N.W.2d 120.

a citizen's right to limit, modify, or revoke consent. This Court should not entertain such an argument.

C. The State's argument that the chemical analysis of Randall's blood sample is not a search because it is an "examination" of seized evidence is flawed and conflicts with binding federal precedent.

The State, relying primarily on ***State v. Petrone***, argues that the chemical analysis of Randall's blood sample was not a search because it was merely the "examination" of lawfully seized evidence.[40] The argument may be set forth as follows: (1) the initial collection of Randall's blood was lawful; (2) the government may examine lawfully-seized evidence; (3) chemical analysis is a type of examination; therefore (4) the chemical analysis of Randall's blood is not a search. There is good reason to believe that ***Petrone***'s broad endorsement of the "examination" of evidence being outside the scope of the Fourth Amendment is inconsistent with binding federal precedent; this will be discussed below. But even under ***Petrone*** as it stands, the State's argument is flawed.

[40] State's Br. at 6, *citing* ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991) (*overruled in part by* ***State v. Greve***, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479).

Petrone dealt with, among other issues, the question of whether, when a search warrant authorized the seizure of film but did not explicitly authorize the government to develop the film, the government's development of the film was lawful.[41] The Court held that no Fourth Amendment violation occurred, classifying the development of the film as an "examination" of evidence.[42] But, importantly, the Court reached this conclusion because it held that developing the film was not "a separate, subsequent unauthorized search *having an intrusive impact on the defendant's rights wholly independent* of the execution of the search warrant."[43]

The crucial element that is missing from the State's analysis is that, in ***Petrone***, the Court found that developing the film did not intrude on the defendant's privacy rights independently of the intrusion involved in the initial seizure of the film. In other words, the Court found that the defendant in ***Petrone*** did not have a reasonable expectation of privacy that was affected when the government developed the film. This holding does not mean that a citizen *cannot* have a reasonable expectation of privacy in information contained

[41] ***Id.*** 161 Wis. 2d at 537.
[42] ***Id.*** at 545.
[43] ***Id.*** (emphasis supplied).

within a lawfully-seized item—just that the defendant in ***Petrone***, under those facts, *did not* have such an expectation of privacy.

Petrone is thus distinguishable from this case in two ways. First, before Randall's blood sample was tested, she clearly asserted her right to the privacy of the information contained within it. There is nothing in the ***Petrone*** decision that indicates that the defendant attempted to assert a privacy interest in the contents of the undeveloped film after it was seized but before it was developed.

Second, as discussed above, the collection of a blood sample and the analysis of a blood sample implicate completely different privacy concerns. A person has an interest in not being poked with a needle—in not having his or her bodily integrity compromised. But a person has a further, distinct, interest in the privacy of the information contained within a biological specimen. So, in the wording of ***Petrone***, even after Randall's first privacy interest has been compromised, the analysis of the blood sample *does* have a further "intrusive impact" on Randall's privacy rights in a way that is "wholly independent" of the initial intrusion. The analysis of the blood sample is a search because it is an independent intrusion on *a different set of privacy interests* than that involved in the collection of the blood.

Furthermore, the State's broad reading of ***Petrone*** is problematic, in that it conflicts with United States Supreme Court

precedent. The "broad" reading of ***Petrone*** can be summarized, in the State's words, as follows: "[W]hen law enforcement validly seizes evidence, it is entitled to analyze it."[44] In other words, the State argues that under ***Petrone***, as long as the government's method of obtaining an item is lawful, it can always examine or analyze the item in any way whatsoever without implicating the Fourth Amendment. This is patently untrue, and, to the extent that ***Petrone*** stands for this proposition, this Court must either limit or overrule ***Petrone***.

The United States Supreme Court put the principle quite clearly in the 1984 case ***United States v. Jacobsen***: "Even when government agents may lawfully seize … a package … the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package."[45] Simply comparing this sentence to the State's reading of ***Petrone*** illustrates the incompatibility of these doctrines. Under ***Petrone***, a lawfully-seized package could be "examined" *ad nauseum* without Fourth Amendment implications. But the United States Supreme Court requires a warrant.

More recently, the United States Supreme Court decided ***Riley v. California***.[46] In ***Riley***, the defendant was placed under arrest, and,

[44] State's Br. at 6.
[45] ***United States v. Jacobsen***, 466 U.S. 109, 114 (1984).
[46] ***Riley v. California***, 134 S. Ct. 2473 (2014).

during a search incident to his arrest, a police officer seized his cell phone.[47] Rather than concluding that the police officer was entitled to thoroughly examine the defendant's lawfully-seized cell phone, the Supreme Court broke down the legal analysis into separate events—the initial seizure or collection of the phone, and the subsequent analysis of its contents.[48] The Court found that the government needed a distinct legal justification to "examine" the cell phone, because such an examination involves very different privacy rights than the mere possession of the physical object.[49] The Court bluntly concluded that before searching a cell phone seized incident to arrest, the police should "get a warrant."[50]

The conflict between ***Petrone*** and ***Riley***, like the conflict between ***Petrone*** and ***Jacobsen***, is apparent. Under the rule of ***Petrone***, there is no conceivable situation under which a law enforcement officer would be required to "get a warrant" to examine a lawfully-seized cell phone. Yet ***Riley*** is the law of the land.

There is no principled reason why the examination of a lawfully-seized package or cell phone should constitute a search while

[47] ***Id.*** at 2480.
[48] ***Id***. at 2493, 2495.
[49] ***Id***. at 2490.
[50] ***Id.*** at 2495.

the examination of a blood sample does not.[51] All are items that contain private information within them. A search is defined not by the location or type of item being searched but by the privacy interests involved. In the seminal case ***Katz v. United States***, the Court observed that "the Fourth Amendment protects people, not places."[52] Our Fourth Amendment jurisprudence is ultimately not concerned with where or in what format information may be kept, but with whether a legitimate expectation of privacy exists in the information itself.

As outlined above, Randall had a legitimate expectation of privacy in certain information. It is irrelevant that the information was contained in her blood, rather than on her cell phone or in documents in a package—it is her interest in keeping that information private that renders the government action a search. Indeed, to the extent that there is any difference in the privacy interests involved, a person's privacy interests should be at their *highest* when his or her own biological

[51] The State claims, citing to a Washington case, that ***Riley*** is "explicitly limited" to "cell phones seized during searches incident to arrest." State's Br. at 23 (internal citations omitted). While, indeed, ***Riley*** is immediately concerned with cell phones seized incident to arrest, the decision contains no "explicit limitation" that would preclude its application to other factual scenarios. While the instant case does not involve a cell phone or a search incident to arrest, the reasoning and principles involved in the ***Riley*** decision are applicable to the issues here. Inaccurately claiming that the decision contains an "explicit limitation" is not a sufficient reason to disregard binding federal precedent.

[52] ***Katz***, 389 U.S. at 351.

material is at stake. Had the police performed a warrantless examination of Randall's cell phone or a package to acquire evidence of her blood alcohol content, there would be no question that a Fourth Amendment search had occurred. Simply because the information is located within a biological specimen does not change the legal analysis.

D. It is irrelevant whether the analysis of Randall's blood sample is categorized as a second search or as a continuation of the initial search.

The Wisconsin court of appeals cases ***State v. Riedel*** and ***State v. VanLaarhoven*** stand for the general principle that the analysis of a blood sample by the government is not a "second search."[53] A dispute exists as to whether these cases truly stand for the proposition that the analysis of a blood sample is a part of the same search that begins with the collection of the blood sample, or whether these cases stand for the proposition that the analysis of the blood is not a search at all. The court of appeals in this case concluded that "***VanLaarhoven*** teaches us that there is one continuous search that begins with the taking of

[53] ***State v. Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789; ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411.

blood and continues through the testing of that blood."[54] The State strongly disagrees with this interpretation.[55]

VanLaarhoven never explicitly states that the analysis of a blood sample is a search—but it also never explicitly states that it is not a search. Its holding is simply that, because the defendant explicitly consented to the analysis of his blood sample, the police were not required to obtain a warrant prior to submitting the blood sample for testing.[56] An examination of the details of the case reveals that it is likely that the ***VanLaarhoven*** court believed that *some* Fourth-Amendment justification was necessary for the blood analysis.

In ***VanLaarhoven***, the defendant was arrested for operating while under the influence of an intoxicant, was read the implied consent form, and consented to an evidentiary chemical test of his blood.[57] Unlike Randall, he never retracted or withdrew that consent.[58] His blood was duly tested, and he then moved to suppress, arguing

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[54] ***Randall***, 2018 WI App 45, ¶ 11.

[55] State's Br. at 15–22. It should be noted that in its court of appeals briefing, the State took the opposite position, arguing that "The analysis of Randall's blood . . . was simply *part of the search to which Randall consented* when she submitted a blood sample for testing[.]" State's Ct. App. Br. at 9 (emphasis supplied). Having received an adverse decision, the State now takes a contrary position before this Court. This should not be permitted. "It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position argue on appeal that [it] was error." ***State v. Gove*** 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989).

[56] ***VanLaarhoven***, 2001 WI App 275, ¶ 1.

[57] ***Id***. ¶¶ 2, 8.

[58] ***Id***. ¶ 3.

that, despite his consent, the analysis of his blood was a second search that required a warrant.[59]

This argument was unsuccessful. The court of appeals pointed out that by agreeing to an "evidentiary chemical test," the defendant had "consented to a taking of a sample of his blood *and* the chemical analysis of that sample."[60] The court of appeals reiterated this point several times: "VanLaarhoven consented to the extraction *and* testing of his blood[.]" and "VanLaarhoven has consented to both the extraction of his blood *and* its subsequent testing."[61] It specifically noted that, by virtue of his consent, the defendant had "*waived any privacy interest* in the blood sample."[62]

This last quotation is key. If, as the State contends, no privacy interest exists in a blood sample after it has been withdrawn, then the court of appeals in ***VanLaarhoven*** could simply have said so. But instead it repeatedly pointed out that the defendant had expressly consented to blood *testing*, thereby *waiving* his right to the privacy of the information contained within the blood sample. One does not need to waive a right that one does not have. ***VanLaarhoven***, and ***Riedel***, which relies on its holding, can therefore reasonably be read, as the

[59] ***Id***.
[60] ***Id***. ¶ 8 (emphasis supplied).
[61] ***Id***. ¶¶ 10–11 (emphasis supplied).
[62] ***Id.*** ¶ 11. (emphasis supplied).

court of appeals did here, to stand for the proposition that the analysis of a blood sample is part of one continuous search that begins with the collection of blood.

The important question for Randall's case, though, is whether the analysis of a blood sample is a search at all. This issue is addressed above. If, as the State claims, the analysis is not a search, then this Court does not need to delve into the details of these court of appeals cases. If the analysis of a blood sample is a search, then it is generally irrelevant whether it is "part of" the same event as the collection of the blood sample or its own separate event—either way, a search must be justified under the Fourth Amendment.

E. "Persuasive authorities" exist on both sides of the issue, but the binding precedent favors Randall's position.

In its review of extra-jurisdictional caselaw, the State claims to have been unable to find any case holding that the analysis of a biological specimen is a Fourth-Amendment search. While this issue has not been addressed in every jurisdiction, at least two other states have concluded that the analysis of a biological specimen is a search.

In ***State v. Martinez***, the Court of Appeals of Texas explained that the law recognizes at least three distinct privacy interests involved in blood testing, each with its own Fourth-Amendment protections:

first, the collection of the blood sample; second, exercising control over and testing the sample; and third, obtaining the results of the test.[63] For this proposition, it cited to ***State v. Hardy***, a 1997 case.[64]

In ***Diaz v. Van Wie***, the Court of Appeals of Arizona also recognized that in blood-alcohol cases, the Fourth Amendment can be implicated both by the collection of the blood and by its subsequent testing.[65] Another Arizona case recognizes a similar distinction between the privacy interests involved in the collection of a DNA sample and its analysis.[66]

While it is true that some states have reached the opposite conclusion, it must be noted that some of the cases cited by the State do not stand for the propositions for which the State cites them. First, in ***State v. Loveland***, the issue was whether a urine sample could be tested for cocaine when the defendant had only consented to testing for marijuana.[67] While the analysis was ultimately upheld as a lawful search, the Supreme Court of South Dakota *declined* to find that the defendant did not have a privacy interest in the urine sample after it

[63] ***State v. Martinez***, 534 S.W.3d 97, 100 (Tex. Crim. App. 2017) (*discretionary review granted*, Jan. 24, 2018).
[64] ***State v. Hardy***, 963 S.W.2d 516, 526 (Tex. Crim. App. 1997).
[65] ***Diaz v. Van Wie***, 245 Ariz. 235, ¶¶ 7–8, 426 P.3d 1214, 1216 (App. 2018), *review denied* (Dec. 13, 2018).
[66] ***Mario W. v. Kaipio***, 230 Ariz. 122, 126–27, ¶¶ 18–19, 281 P.3d 476, 480–81 (2012).
[67] ***State v. Loveland***, 2005 SD 48, ¶ 3, 696 N.W.2d 164.

had been provided, specifically noting its concern that "such samples may contain vast amounts of sensitive personal information about the person they were taken from."[68]

Second, the State cites to the Minnesota Court of Appeals' decision in ***State v. Fawcett*** for the principle that a person has no expectation of privacy in a blood sample that has been lawfully removed from his or her body.[69] The State neglects to mention that the Supreme Court of Minnesota granted Fawcett's petition for review and specifically revisited the Minnesota Court of Appeals' statements concerning a person's expectation of privacy in blood samples.[70] This portion of the decision reads:

> Fawcett also argues that the court of appeals erred in concluding that once her blood was seized pursuant to a warrant, she no longer had an expectation of privacy in the blood. *We agree with Fawcett that she did not lose all expectation of privacy in her blood that was seized pursuant to a warrant* and that the court of appeals' rule is too broad.[71]

Thus, contrary to the State's claim, Minnesota recognizes that a person *does* maintain an expectation of privacy in a blood sample even after it has been seized.

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[68] ***Id***. ¶ 7, n.1.
[69] State's Br. at 25–26; *citing* ***State v. Fawcett***, 877 N.W.2d 555, (Minn. App. 2016).
[70] ***State v. Fawcett***, 884 N.W.2d 380 (Minn. 2016).
[71] ***Id.*** 884 N.W.2d at 384, n. 3 (emphasis supplied).

In summary, there are cases that could be cited for persuasive authority on both sides of the issue. The only cases that constitute *binding* precedent on this Court, however, are those that Randall relies on—namely, ***Skinner***, ***Birchfield***, and ***Riley***. These cases, as articulated above, compel the conclusion that individuals do have a legitimate expectation of privacy in the information contained within their blood, and that a Fourth Amendment justification is therefore needed to conduct an analysis of a blood sample.

F. The implied consent statute has nothing to do with the issues before this Court.

The State also raises several issues related to Wisconsin's implied consent statute.[72] The issues before this Court are constitutional issues, not statutory ones. The State's statutory arguments are therefore irrelevant.

The State appears to argue that Randall should not be permitted to withdraw consent to blood testing because "the statute does not *authorize*" such a course of conduct.[73] The State later reiterates that "the implied consent law does not *give* a person" an opportunity to withdraw his or her consent.[74] The State appears to be forgetting that

[72] State's Br. at 32; Wis. Stat. § 343.305.
[73] State's Br. at 33 (emphasis supplied).
[74] *Id.* at 34 (emphasis supplied).

the source of Randall's claim is not the implied consent statute; it is the Constitution.

The implied consent law does not substitute for or nullify the Fourth Amendment in operating while intoxicated cases. The Fourth Amendment, like the Constitution generally, is a *limitation* on the government's power to pass laws and take actions; a citizen does not need to wait for the government to pass a law *authorizing* or *giving* her permission to exercise her constitutional rights. And, to the extent that the implied consent statute may conflict with a citizen's exercise of his or her Fourth-Amendment rights, it is the statute that must yield, not the Constitution. The language of a statute cannot be an argument in favor of abrogating Randall's constitutional rights.

The State raised a similar argument before the court of appeals. That court held that:

> [T]he State neither cites relevant legal authority in support of this argument, nor develops or explains how statutory authorization, or lack thereof, is material to whether the results of the blood test should have been suppressed as a matter of constitutional law.[75]

The State has still not developed any argument for why the intricacies of the implied consent statute have anything to do with a question of constitutional law, or how the implied consent statute might have the

[75] ***Randall***, 2018 WI App 45, ¶ 24 (internal citations omitted).

power to nullify a constitutional right. This Court, like the court of appeals, should decline to consider this argument.

The State also raises the issue of whether Randall should be subject to civil refusal penalties under Wis. Stat. § 343.305(9).[76] The court of appeals correctly noted that this issue was not ripe for consideration.[77] The State has not attempted to impose civil refusal penalties on Randall; if it were to do so, any related legal questions could then be addressed in the appropriate forum.

But, more importantly, whether Randall may or may not be subject to civil refusal penalties has absolutely nothing to do with the constitutional issues before this Court. If she can be penalized, then she can be penalized. If she cannot, and the prosecution feels that is unfair, then it can lobby the legislature to change the statute. Neither scenario affects whether the government's analysis of Randall's blood sample was an unconstitutional search.

[76] State's Br. at 33.
[77] ***Randall***, 2018 WI App 45, ¶ 24 n.6.

II. THE STATE VIOLATED RANDALL'S FOURTH AMENDMENT RIGHTS WHEN IT RETAINED POSSESSION OF HER BLOOD SAMPLE AFTER SHE REVOKED HER CONSENT TO THE COLLECTION AND ANALYSIS OF HER BLOOD, INVOKED HER RIGHT TO PRIVACY, AND DEMANDED THE RETURN OR DESTRUCTION OF THE SAMPLE.

Randall's letter withdrawing her consent not only revoked her consent to the analysis of her blood sample; it also indicated that she "does not consent to any person or entity retaining possession of her blood sample" and "demand[ed] that it be returned to her or destroyed immediately."[78] In Randall's Response to the State's Petition for Review, Randall asked the Court to address the issue of whether she was entitled to the destruction or return of her blood sample upon her withdrawal of consent.

Randall did not raise this issue in circuit court because it would have been moot. The circuit court granted Randall the relief she sought; namely, suppression of the blood test results. However, the circuit court—essentially as an aside—commented that it did not believe Randall was entitled to the destruction of her blood.[79] The circuit court's written order contained nothing of this aside.[80] It was therefore unnecessary, and impossible, for Randall to file a cross-

[78] R. 18:4.
[79] R. 32:59–60.
[80] R. 27.

appeal on this issue, because "[a] party appeals from a written order, not a circuit court judge's reasoning."[81] "A cross-appeal is necessary only when the respondent seeks a modification of the order from which the appeal is taken."[82] Randall did not seek any modification of the circuit court's order suppressing evidence.

Despite this issue not being before the court of appeals, that court commented that "Randall did not appeal the circuit court's ruling that she has no right to have the blood destroyed[.]"[83] The circuit court did not make any such ruling, nor was it a part of the circuit court's order. This Court should therefore address this issue, both to clarify the record in this case and to avoid any unnecessary future litigation.

Turning to the merits of this issue, the same analysis that compels the conclusion that the analysis of Randall's blood was unlawful would compel the conclusion that the government's ongoing possession of the blood sample was unlawful. As explained above, when a government agent's sole basis for possessing an item is the individual's consent, and that consent is revoked, the government agent must return the item immediately, whether that be business

[81] ***State v. Pico***, 2018 WI 66, ¶ 48, n.14, 382 Wis. 2d 273, 914 N.W.2d 95.
[82] ***Id.***
[83] ***Randall***, 2018 WI App 45, ¶ 26 n.7.

records,[84] a portfolio,[85] or a vial of blood. If the government has no legal basis to hold the item other than the now-revoked consent, then it is in no different a position then it would be if it had originally seized the item without consent, and any further analysis of the item while it is unlawfully in the government's possession would be the fruits of that unlawful seizure.

CONCLUSION

Randall clearly and unequivocally invoked her right to privacy in the information contained in her blood sample and revoked her consent to any testing. Binding federal precedent holds that Randall has a legitimate expectation of privacy in the information contained within her blood sample, which means that the government's analysis of Randall's blood sample was a search. Without either a warrant or Randall's consent, that search was unconstitutional, and the results of the blood analysis were properly suppressed by the circuit court. The court of appeals properly affirmed that decision. This Court should affirm the court of appeals and should further clarify that the government cannot retain possession of a blood sample after consent to testing has been revoked.

[84] ***Mason v. Pulliam***, 557 F.3d 426 (5th Cir. 1977).
[85] ***United States v. Ho***, 94 F.3d 932 (5th Cir. 1996).

Dated at Madison, Wisconsin, _____, 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 8,147 words.

I also certify I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wisconsin Statutes section 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated _____, 2018.

Signed,

_____
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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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and
(4) 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 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 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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

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