

NO. 90926-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSE FIGEROA MARTINES,

Respondent.

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. THE CONSTITUTION ALLOWS EXAMINATION OF A BLOOD SAMPLE LAWFULLY COLLECTED PURSUANT TO A SEARCH WARRANT IN A DRIVING WHILE INTOXICATED INVESTIGATION.....	5
2. MARTINES’S BLOOD WAS LAWFULLY EXAMINED PURSUANT TO A DULY SIGNED WARRANT	14
3. <u>SKINNER</u> UNDERCUTS RATHER THAN SUPPORTS THE DECISION OF THE COURT OF APPEALS	16
4. THE DECISION OF THE COURT OF APPEALS RAISED QUESTIONS OF IMPORT BUT THOSE QUESTIONS ARE NOT PRESENTED IN THIS CASE OR CONTROVERSY	20
5. MARTINES CITES NO AUTHORITY THAT TESTS FOR IMPAIRMENT MAY NOT INCLUDE TESTS FOR DRUGS	23
D. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arkansas v. Sanders, 442 U.S. 753,
99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)..... 23

Dodd v. Jones, 623 F.3d
(8th Cir. 2010)..... 11

Illinois v. Caballes, 543 U.S. 405,
125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)..... 25

Maryland v. King, ___ U.S. ___,
133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013)..... 22

Schmerber v. California, 384 U.S. 757,
86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)..... 6-10, 15, 18, 20

Skinner v. Ry. Labor Execs.' Assn., 489 U.S. 602,
109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).... 4, 8, 11, 16-20, 22

United States v. Edwards, 415 U.S. 800,
94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974)..... 12

United States v. Snyder, 852 F.2d 471
(9th Cir. 1988)..... 9, 10, 11, 12

Washington State:

Robinson v. City of Seattle, 102 Wn. App. 795,
10 P.3d 452 (2000)..... 16

State v. Athan, 160 Wn.2d 354,
158 P.3d 27 (2007)..... 23

State v. Baity, 140 Wn.2d 1,
991 P.2d 1151 (2000)..... 26

<u>State v. Baldwin</u> , 109 Wn. App. 516, 37 P.3d 1220 (2001).....	26
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	5
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	13
<u>State v. Curran</u> , 116 Wn.2d 174, 804 P.2d 558 (1991).....	8, 15
<u>State v. Garcia-Salgado</u> , 170 Wn.2d 176, 240 P.3d 153 (2010).....	9
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	13
<u>State v. Grenning</u> , 142 Wn. App. 518, 174 P.3d 706 (2008), <u>aff'd</u> , 169 Wn.2d 47, 234 P.3d 169 (2010).....	12
<u>State v. Houser</u> , 95 Wn.2d 143, 622 P.2d 1218 (1980).....	23
<u>State v. Judge</u> , 100 Wn.2d 706, 675 P.2d 219 (1984).....	7, 8, 15
<u>State v. Kalakosky</u> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	9
<u>State v. Kuljis</u> , 70 Wn.2d 168, 422 P.2d 480 (1967).....	7
<u>State v. Martines</u> , 151 Wn. App. 1011 (2009) (unpublished)	2
<u>State v. Martines</u> , 182 Wn. App. 519, 331 P.3d 105, <u>review granted</u> , 339 P.3d 634 (2014).....	1, 4, 11, 16, 17, 19, 20, 21
<u>State v. Meacham</u> , 93 Wn.2d 735, 612 P.2d 795 (1980).....	9, 21

<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	14
<u>State v. Rangitsch</u> , 40 Wn. App. 771, 700 P.2d 382 (1985).....	25
<u>State v. Rose</u> , 128 Wn.2d 388, 909 P.2d 280 (1996).....	5
<u>State v. Schulze</u> , 116 Wn.2d 154, 804 P.2d 566 (1991).....	24, 25
<u>State v. Surge</u> , 160 Wn.2d 65, 156 P.3d 208 (2007).....	6, 23
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	5
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	6
 <u>Other Jurisdictions:</u>	
<u>Harrison v. Commissioner of Public Safety</u> , 781 N.W.2d 918 (Minn. Ct. App. 2010).....	11
<u>Patterson v. State</u> , 744 N.E.2d 945 (Ind. Ct. App. 2001).....	14
<u>People v. King</u> , 232 A.D.2d 111 (N.Y. App. Div. 1997).....	13
<u>State v. Loveland</u> , 696 N.W.2d 164 (S.D. 2005).....	25
<u>State v. Moretti</u> , 521 A.2d 1003 (R.I. 1987).....	14
<u>State v. Petrone</u> , 161 Wis.2d 530, 468 N.W.2d 676 (1991).....	13

<u>State v. Price</u> , 270 P.3d 527 (Utah 2012)	11, 25
<u>State v. Riedel</u> , 259 Wis.2d 921, 656 N.W.2d 789 (2002)	11
<u>State v. VanLaarhoven</u> , 248 Wis.2d 881, 637 N.W.2d 411 (2001)	11
<u>State v. Wallace</u> , 910 P.2d 695 (Haw. 1996)	14
<u>Wright v. State</u> , 579 S.E.2d 214 (Ga. 2003)	13

Constitutional Provisions

Federal:

U.S. Const. amend. IV	5, 6, 10, 17, 18
-----------------------------	------------------

Washington State:

Const. art. I, § 7.....	5
-------------------------	---

Statutes

Federal:

42 U.S.C. §§ 14132, 14135a, 14132(b)(3)(A), 14135e(c) (2006).....	22
--	----

Washington State:

RCW 43.43.754	22
RCW 46.20.308	24
RCW 46.23.308	3
RCW 46.61.502	1, 2

Other Authorities

2 Wayne R. LaFave, Search and Seizure § 4.10(e) (4th ed. 2004).....	12
89 A.L.R.2d 798.....	7
Washington State Patrol, Forensic Laboratory Services Bureau, Forensic Services Guide (DNA Technology Utilized)	21

A. ISSUE PRESENTED

A trooper sought a search warrant to draw Martines's blood to examine it for evidence of the crime of Driving Under the Influence, and a magistrate approved the warrant because "there [wa]s probable cause to believe that . . . evidence of the crime(s) of: Driving While Under the Influence" would be found. Case law permits the reasonable examination of blood seized pursuant to a warrant. Did this search warrant sufficiently authorize both the seizure and the testing of Martines's blood for evidence of Driving While Under the Influence?

B. STATEMENT OF THE CASE

On June 16, 2012, Martines was driving on Highway 167 when he crashed into another car, hit the highway barrier, and rolled over. Several citizens, an off-duty officer who stopped to help, and a Washington State Patrol trooper who responded to the scene all believed that Martines was intoxicated. Martines, 182 Wn. App. 519, 522, 331 P.3d 105 (2014). The trooper prepared an affidavit alleging that there was probable cause that Martines had committed the crime of Driving Under the Influence (DUI), a violation of RCW 46.61.502. CP 95-99. The trooper explained that a sample of Martines's blood, "if extracted within a reasonable period of time after he/she last operated . . . a motor vehicle, may be tested to

determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive.” CP 97. A magistrate signed the warrant, finding that “there is probable cause to believe that . . . evidence of the crime(s) of: Driving While under the Influence, RCW 46.61.502 is concealed in, about or upon the person of Martines,” and commanding the extraction of a “sample of blood” from him. CP 100-01. Martines agrees there was probable cause to obtain a sample of his blood.

The warrant was served on Martines, a blood sample was extracted, and the blood was later tested by the Washington State Patrol Toxicology Laboratory, which determined that Martines’s blood alcohol concentration was about .061 g/100 mL, and that his blood also contained .05 mg/L of diazepam (also known as Valium) and .03 mg/L of nordiazepam, both central nervous system depressants. 3RP 40-47.

Martines was subsequently charged with one count of Felony Driving Under the Influence. CP 55.¹ He moved to suppress any evidence of drugs (but not alcohol) in his blood, on the grounds that there was inadequate probable cause that he was under the influence of drugs to warrant testing his blood for anything other than alcohol. CP 7-12

¹ Martines committed a prior vehicular assault under circumstances similar to the facts in this case. See State v. Martines, 151 Wn. App. 1011 (2009) (unpublished).

(Motion to Suppress Evidence of Drugs or Drug Testing).² The trial court ruled that the motion to suppress should be denied because the implied consent statute (RCW 46.23.308) provides that a person who drives in Washington impliedly consents to tests of breath or blood, that tests may be conducted when probable cause exists to believe the person is intoxicated, and that no special finding or evidence was needed to check for drugs in addition to alcohol. 1RP 52-54. The evidence of the alcohol and drugs in Martines's blood was admitted at trial and he was convicted as charged. 3RP 43-47.

On appeal, Martines argued for the first time that the blood test was a separate intrusion that required independent justification. Br. of Appellant at 6. It was unclear even at oral argument which theory Martines was pursuing, but he seemed to concede that alcohol testing was permissible but drug testing was not. See Petitioner's Response to Motion to Strike (filed 11/19/14). In any event, the Court of Appeals held that *any* testing of the blood sample (alcohol or drugs) required an express authorization in the warrant, that the language of the warrant was not sufficient, and that Martines's conviction must be reversed. State v.

² The motion concluded with these arguments: "Here, the police and witnesses smell and see signs of alcohol activity only. There's never any mention of drugs, no signs of drugs, and no DRE investigation. The Court should suppress any evidence of drugs, because there was no probable cause to test for drugs, only alcohol." CP 12. See also 1RP 31 ("I don't think there was probable cause to perform a drug test as opposed to just the alcohol test").

Martines, 182 Wn. App. 519, 331 P.3d 105, review granted, 339 P.3d 634 (2014). Reconsideration was denied by order of October 8, 2014.

C. **ARGUMENT**

It is not disputed that Martines flipped his car on a public highway, that there was probable cause to believe he was intoxicated, that an officer duly secured a search warrant to obtain a sample of his blood to test for intoxicants, that a magistrate signed that warrant, that blood was drawn, that the blood was tested, and that it showed Martines was under the influence of alcohol and drugs. Under longstanding precedent from the Supreme Court and from this Court, these test results were admissible to prove that Martines drove while impaired by alcohol or drugs. The warrant signed by the magistrate plainly authorized both the extraction and examination of Martines's blood.

The Court of Appeals held, however, that the search warrant was defective because, although it authorized the taking of Martines's blood, it did not expressly authorize *testing* of that blood. The court's holding stems from a misinterpretation and misapplication of Skinner v. Ry. Labor Execs.' Assn., 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). This holding was erroneous. Skinner does not require additional language in search warrants. Although the Court of Appeals apparently believed its

holding was necessary to combat misuse of biological evidence, existing law requires that blood be tested only where there is an indication that it will produce evidence of the crime. There was no evidence presented that testing of blood samples in this case or other cases requires a new rule.

1. THE CONSTITUTION ALLOWS EXAMINATION OF
A BLOOD SAMPLE LAWFULLY COLLECTED
PURSUANT TO A SEARCH WARRANT IN A
DRIVING WHILE INTOXICATED INVESTIGATION.

Article I, section 7 of the Washington Constitution prohibits government intrusion upon private affairs without authority of law. WASH. CONST. art. I, § 7. A search occurs when there is an intrusion into “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” State v. Rose, 128 Wn.2d 388, 400, 909 P.2d 280 (1996) (citations and internal quotation marks omitted). For the intrusion to constitute a search, it must be an unreasonable intrusion. State v. Boland, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990). The Fourth Amendment of the United States Constitution also prohibits unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). “A search occurs for Fourth Amendment purposes when ‘an expectation of privacy that society is prepared to consider reasonable is infringed.’” State v. Young,

123 Wn.2d 173, 189, 867 P.2d 593 (1994) (citations omitted). The Washington Constitution provides greater protection in some areas than does the federal constitution. State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007).

In the realm of driving under the influence investigations, this Court – like nearly all courts nationwide – has consistently applied the analysis used by the Supreme Court in Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Schmerber and a friend had been out drinking late at night when Schmerber’s car skidded across the road and hit a tree. Schmerber and his friend were hospitalized and police directed hospital staff to draw a sample of Schmerber’s blood over his objection. Chemical analysis of the blood indicated intoxication. He objected to this evidence at trial on numerous bases, including the argument that he had been subjected to an unreasonable search and seizure. Schmerber, 384 U.S. at 758-59. The Supreme Court ultimately held that evidence of alcohol might dissipate from Schmerber’s blood if not extracted quickly, and that this risk was an exigent circumstance that permitted a blood draw without a warrant. Schmerber, at 768-70.

The Supreme Court made it clear that reasonableness was the key: “[T]he Fourth Amendment’s proper function is to constrain, not against all intrusion as such, but *against intrusions which are not justified in the*

circumstances, or which are made in an improper manner.” Schmerber, 384 U.S. at 768. It held that there were three parts to determining the reasonableness of a blood draw under such circumstances: “First, there must be a ‘clear indication’ that in fact the desired evidence will be found. Second, the test chosen to measure defendant’s blood alcohol level must be a reasonable one. Third, the test must be performed in a reasonable manner.” Schmerber, at 770-71. These criteria presume that blood could be drawn because it would lead to evidence of intoxication. In short, Schmerber held that blood taken and tested in the DUI context is admissible if testing will show impairment.

This Court cited to Schmerber with approval seven months after it was decided, in the context of a prosecution for negligent homicide where there was probable cause to believe the defendant had been driving under the influence, and where the defendant consented to the blood draw. State v. Kuljis, 70 Wn.2d 168, 172, 422 P.2d 480 (1967). This Court noted that its holding was consistent with the long-standing rule. Kuljis, 70 Wn.2d at 172 (citing 89 A.L.R.2d 798).

This Court again relied on Schmerber in State v. Judge, 100 Wn.2d 706, 711, 675 P.2d 219 (1984). Judge had been drinking when she rammed her vehicle into four children, killing three. A sample of her blood was taken at the roadside without objection and tests showed it

contained alcohol. Judge, 100 Wn.2d at 708. This Court rejected challenges that the search violated the State or Federal Constitutions and referred to Schmerber as “the seminal case regarding the constitutionality of taking blood samples.” This Court affirmed the trial court’s ruling admitting blood test results because there was probable cause to believe Judge was intoxicated, there was a clear indication that a blood test would show intoxication, and the method of testing was reasonable. Judge, at 711-12.

Similarly, in State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991), this Court held that a compelled blood draw for evidence of DUI did not violate article I, § 7. Curran drank heavily during an extended lunch hour and then drove his car into a ditch, killing two friends in the car. He was arrested by a trooper who smelled alcohol, a paramedic drew a blood sample over Curran’s objection, and forensic examination indicated .17 percent blood alcohol. This Court noted that the Federal and State Constitutions “prohibit only unreasonable searches and seizures” and that the search was reasonable because the Schmerber criteria had been met. In support of its holding, this Court cited with approval to Skinner v. Ry. Labor Execs.’ Assn., supra.

This Court has also approved of blood draws outside the context of DUI investigations, pursuant to either search warrants or court orders. See

State v. Kalakosky, 121 Wn.2d 525, 534, 852 P.2d 1064 (1993) (warrant issued by magistrate is sufficient to draw blood; adversarial hearing is not required simply because object of search is blood) and State v. Meacham, 93 Wn.2d 735, 739, 612 P.2d 795 (1980) (court order for paternity testing). Cf. State v. Garcia-Salgado, 170 Wn.2d 176, 180, 240 P.3d 153, 154 (2010) (evidence suppressed because court order was not supported by probable cause). In none of these cases has this Court ever suggested that a search warrant must expressly authorize testing as a constitutional intrusion independent of the blood draw itself.

Similarly, foreign courts applying Schmerber in the DUI context have consistently affirmed the examination of a lawfully obtained blood sample without requiring any additional authorization specific to examination of the blood. The leading case is United States v. Snyder, 852 F.2d 471 (9th Cir. 1988). Snyder struck a military police officer with his car, he smelled strongly of alcohol, he was arrested, a sample of his blood was drawn pursuant to the exigent circumstances exception to the warrant requirement, and that sample was tested two days later, yielding evidence of impairment. Snyder, 852 F.2d at 472. Snyder argued that investigators were required to obtain a warrant to test his blood because the exigency that had authorized the blood draw – the potential for

dissipation – ceased when his blood was drawn, and thus did not exist two days later when the blood was tested. Snyder, at 473.

The Ninth Circuit Court of Appeals rejected Snyder’s argument on two bases. First, it noted that his “argument prove[d] too much” because the risk of alcohol dissipation always – including in the Schmerber case – ends after blood is drawn, yet the Supreme Court in Schmerber approved the blood test based solely on the fact that evidence of intoxication would be lost if the blood was not drawn quickly. Id. Second, the court identified as a “flaw in Snyder’s argument ... his attempt to divide his arrest, and the subsequent extraction and testing of his blood, into too many separate incidents, each to be given significance for fourth amendment purposes.” Id. The court held:

Schmerber viewed the seizure and separate search of the blood as a single event for fourth amendment purposes. ...

* * *

The only justification for the seizure of defendant’s blood was the need to obtain evidence of alcohol content. 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. Accordingly, we are bound to conclude 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. at 474.

As far as can be discerned, every court to consider this question after Snyder has followed its holding and reasoning. See, e.g., State v. Price, 270 P.3d 527 (Utah 2012) (holding, on facts nearly identical to those presented in Martines, that a suspect has no reasonable expectation of privacy in the presence of contraband in his lawfully obtained blood); Dodd v. Jones, 623 F.3d (8th Cir. 2010) (holding in a civil rights lawsuit that “the testing of Dodd’s blood required no justification beyond that which was necessary to draw the blood on the night of the accident”); Harrison v. Commissioner of Public Safety, 781 N.W.2d 918 (Minn. Ct. App. 2010) (“[W]hen the state has lawfully obtained a sample of a person’s blood . . . 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.”); State v. Riedel, 259 Wis.2d 921, 656 N.W.2d 789 (2002) (rejecting Skinner-based arguments, reasoning that “the examination of evidence seized pursuant to [a warrant] . . . is an essential part of the seizure and does not require a judicially authorized warrant” and holding that “the police were not required to obtain a warrant prior to submitting Riedel’s blood for analysis.”); State v. VanLaarhoven, 248 Wis.2d 881, 637 N.W.2d 411 (2001) (second warrant not required to examine blood ten days after it was taken by consent following DUI arrest).

These holdings logically apply existing constitutional principles. A vial of blood has no evidentiary value unless or until forensically examined. Thus, a warrant authorizing the seizure of blood as evidence of a crime necessarily anticipates that the sample will be tested. Indeed, it would seem patently unconstitutional for a magistrate to authorize a subcutaneous extraction of blood for the mere purpose of collecting and then storing the blood. For these reasons, the Snyder court was correct to conclude that the right to seize blood encompassed the right to conduct a test of that blood in the future. Snyder, at 474.

The holding in Snyder is consistent with the more general principle that investigators have broad authority to examine evidence lawfully seized pursuant to a warrant. See 2 Wayne R. LaFave, Search and Seizure § 4.10(e), at 771 (4th ed. 2004); United States v. Edwards, 415 U.S. 800, 803-06, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974) (“Indeed, it is difficult to perceive what is unreasonable about the police’s examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.”). Numerous Washington cases apply this principle across a wide spectrum of searches. See State v. Grenning, 142 Wn. App. 518, 174 P.3d 706 (2008), aff’d, 169 Wn.2d 47, 234 P.3d 169 (2010) (“it is generally understood that a lawful seizure of apparent evidence of a crime using a valid search warrant

includes a right to test or examine the seized materials to ascertain their evidentiary value.”); State v. Cheatam, 150 Wn.2d 626, 634-44, 81 P.3d 830 (2003) (concluding that an arrested defendant lost any privacy interest in his shoes once they were lawfully in police custody);³ State v. Gregory, 158 Wn.2d 759, 820-29 and n.36, 147 P.3d 1201 (2006) (DNA profile developed in one case could be used to compare to another case) (citing People v. King, 232 A.D.2d 111 (N.Y. App. Div. 1997), for the conclusion that “[p]rivacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant’s person.”)

Countless cases from other jurisdictions are in accord. Wright v. State, 579 S.E.2d 214, 222 (Ga. 2003) (determining that development of film in a camera need not be authorized by warrant, as it is “akin to a laboratory test on any lawfully seized object”); State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676, 681 (1991) (holding that police may develop film seized during execution of a search warrant because a “search warrant does not limit officers to naked-eye inspections of objects

³ A careful inspection of shoes taken from a defendant would likely include an examination for trace evidence like cloth fibers, metal particles, sole patterns, dirt, plant material. It would also likely include a search for blood stains, sweat, skin particles or other likely sources of DNA. Thus, even a seemingly benign item like a pair of shoes could lead to analysis of biological data.

lawfully seized”); Patterson v. State, 744 N.E.2d 945, 947 (Ind. Ct. App. 2001) (concluding that there is no reasonable expectation of privacy in a blood sample lawfully obtained by police); State v. Wallace, 910 P.2d 695 (Haw. 1996) (determining that the chemical testing of evidence already within police custody does not invade any legitimate expectation of privacy); State v. Moretti, 521 A.2d 1003, 1009 (R.I. 1987) (warrant was not needed to conduct laboratory testing of arson evidence seized during lawful warrantless search of fire-damaged premises because “[n]o principle of constitutional law requires any law enforcement official to obtain a warrant prior to testing any item seized during a valid search”).

2. MARTINES’S BLOOD WAS LAWFULLY EXAMINED
PURSUANT TO A DULY SIGNED WARRANT.

Search warrants are to be “interpreted in a common sense, practical manner, rather than in a hypertechnical sense.” State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). Read in a commonsense manner, the warrant in this case authorized an examination of Martines’s blood.

The affidavit in support of search warrant averred that a sample of Martines’s “blood, if extracted within a reasonable period of time after he/she last operated... a motor vehicle, may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that

may have impaired his/her ability to drive.” CP 97. There is no dispute that there was probable cause to believe that Martines was driving under the influence of alcohol, and that evidence of that crime could be found in Martines’s blood. CP 95-101; Ex. 20. The reviewing magistrate found that there was probable cause to believe that evidence of the crime of Driving Under the Influence was “concealed in, about or upon” Martines, and commanded the seizure of “a sample of blood.” CP 100-01; 2RP 129-32.⁴

This was a search warrant like thousands of others, and the Court of Appeals should have applied controlling Washington precedent and held that there was no constitutional violation. The warrant comports with Schmerber, Judge, and Curran. A law enforcement officer sought a search warrant for the express purpose of analyzing Martines’s blood for evidence of intoxicants, there was a clear indication such intoxicants would be found, an independent and neutral magistrate determined that there was probable cause to believe that Martines’s driving was impaired by intoxicants, and the test used was reasonable. Given the entire context – the trooper’s articulated purpose for obtaining Martines’s blood and the trial court’s finding that his blood may contain “evidence of the crime” of

⁴ The warrant also explicitly incorporated the affidavit but since no argument was made on this topic in the trial court, the record is silent on whether the affidavit was physically attached to the warrant. The State incorporates by reference the arguments previously made on this point. See Motion to Reconsider, at 23-25; Petition for Review, at 8-10.

Driving Under the Influence – the Court of Appeals should have held that the warrant included authorization to analyze Martines’s blood.

3. SKINNER UNDERCUTS RATHER THAN SUPPORTS THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals reversed the trial court’s denial of Martines’s suppression motion by observing that the act of seizing a blood sample is separate from the act of examining the seized substance. The court then concluded that both acts must be separately and expressly authorized in a search warrant, and that a warrant lacking such language renders a subsequent search unconstitutional. State v. Martines, 182 Wn. App. at 530. The court’s holding arose from language in Skinner v. Ry. Labor Execs.’ Assn., 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) and Robinson v. City of Seattle, 102 Wn. App. 795, 822 n.105, 10 P.3d 452 (2000). But, as discussed below, neither Skinner nor Robinson involved search warrants; the cases dealt with whether “special needs” excused failure to get a warrant. More importantly, the language demanded by the Martines decision is akin to the approach recommended by the *dissent* in Skinner—an approach necessarily rejected by the Skinner majority. Skinner undercuts rather than supports the holding in Martines.

In Skinner, the Supreme Court considered regulations promulgated by the Federal Railroad Administration (FRA) which require blood and urine tests following train accidents, and which also authorize but do not require breath and urine tests under less serious circumstances. The regulations did not require a warrant for any step in the process. The Railway Labor Executives' Association challenged the regulations, *inter alia*, as unconstitutional searches. Skinner, 489 U.S. at 607-11.

The Supreme Court affirmed the regulations. The Court first confirmed that "compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search" and that an "ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." Skinner, at 616. The Court then analyzed the regulatory scheme under the "special needs" doctrine. That doctrine permits searches without a warrant "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." Id. at 619-20. The Court concluded that obtaining a warrant would thwart the FRA's interest in ensuring the safety of railroads, and that the agency's safety goals were sufficient to overcome the railway workers' privacy interests. Id. at 620-25. The decision said nothing about the language that must appear in a search warrant.

In its analysis, the Supreme Court used interchangeably the terms for the *drawing* and *testing* of biological samples.⁵ It is clear from this usage that the Court considered the obtaining of data from a person's blood as a single concept for constitutional purposes, even though the Court recognized that drawing and analyzing were technically distinct intrusions. In fact, the Court compared the procedures in the regulations to the procedures approved in Schmerber, and referred to the "blood sample ... withdrawn from a motorist" and to "blood tests" as if they were a single constitutional interest for purposes of Fourth Amendment analysis. Id. at 625. The Court then balanced the interests in obtaining information about intoxication against the interests of avoiding a search.

The dissent, however, insisted that the Court should have treated extraction and examination as distinct for constitutional purposes. It argued that dissipation of alcohol could justify expedited extraction of blood but that

...no such exigency prevents railroad officials from securing a warrant before chemically testing the samples they obtain. Blood and urine do not spoil if properly collected and preserved, and there is no reason to doubt the ability of railroad officials to grasp the relatively simple procedure of obtaining a warrant authorizing

⁵ This treatment of the distinct intrusions as one constitutional invasion was clear throughout the opinion. See, e.g., Skinner, at 615 ("right to receive certain biological samples and test results"), 617 ("procedures...for collecting and testing urine samples"), 626-28 (referring to "testing procedures" encompassing both extraction and testing), 633 ("...since the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary...to examine the body or its fluids...").

... chemical analysis of the extracted fluids. It is therefore wholly unjustified to dispense with the warrant requirement for this final search.

Id. at 642-43 (Marshall, J. dissenting). In other words, the dissent believed that the drawing of blood was constitutionally distinct from analysis of the blood. Plainly, the Skinner majority rejected this model and treated the drawing and the testing as a single constitutional interest.

Thus, the Court of Appeals erred in presuming that Skinner assigned independent constitutional significance to the drawing versus the testing of blood. It also erred in concluding that Skinner demands that search warrants contain an independent justification to test. In short, Skinner undercuts rather than supports the reasoning in Martines.

Moreover, even if it made some sense to treat intrusion and examination of samples independently in the “special needs” analysis – because the State acts without judicial oversight – express authorization is unnecessary where a magistrate authorizes the taking of a blood sample for the clear purpose of searching for evidence of intoxication. Any additional justification in the warrant context is simply redundant because the warrant necessarily, pursuant to Schmerber, anticipates that the sample may be drawn *because* further examination will produce evidence of a crime. Additional constitutional justification in a warrant would be

superfluous. The Court of Appeals erred in reasoning from Skinner that additional language must be included in all search warrants.

4. THE DECISION OF THE COURT OF APPEALS
RAISED QUESTIONS OF IMPORT BUT THOSE
QUESTIONS ARE NOT PRESENTED IN THIS CASE
OR CONTROVERSY.

The Court of Appeals' rationale focused on the nature of blood:

“The personal information contained in blood is hidden and highly sensitive. Testing of a blood sample can reveal not only evidence of intoxication, but also evidence of disease, pregnancy, and genetic family relationships or lack thereof.” Martines, at 530. This observation is scientifically correct, and the court was legitimately concerned that such information be kept confidential. Courts should condemn examinations of blood samples that intrude without lawful authority into sensitive areas unrelated to a criminal investigation. If police or laboratory personnel had, instead of examining Martines's blood for evidence of intoxication, analyzed it for “evidence of disease, pregnancy, and genetic family relationships or lack thereof,” and if such examination was irrelevant to detecting evidence of the crime, the examination would have been beyond the authority granted by the search warrant, and unconstitutional.⁶ But

⁶ Determining relevance would be fact-specific inquiry. Although “genetic family relationships” that focus on heritage, race, or national origin would likely be wholly

here, law enforcement did no such thing. Its analysis of Martines's blood looked solely at what the issuing magistrate plainly intended: evidence of impairment relevant to the crime of Driving Under the Influence.

Moreover, the specter of inappropriate analysis, while certainly conceivable, does not loom as large as the Court of Appeals seemed to believe. In order to decipher medical, familial or disease-related information from a biological sample, an examiner would have to conduct highly detailed testing of a sample, and perhaps sequence the subject's genome. The Washington State Toxicology Laboratory and the Washington State Crime Laboratory are distinct entities with distinct capabilities and missions. See Washington State Patrol, Forensic Laboratory Services Bureau, Forensic Services Guide, pp. 25-26 (DNA Technology Utilized) and pp. 108-10.⁷ Neither, however, is equipped or authorized to conduct the testing that concerned the Court of Appeals. The Toxicology Laboratory never performs DNA analysis, it “[p]erforms toxicological examinations of blood, urine and/or other tissues collected during a death investigation; or from living individuals who were either the victim of a crime or were suspected of committing a crime in which

irrelevant in a criminal case, a “genetic family relationship” might bear on the identity of a perpetrator in a criminal case, it might be relevant in an incest prosecution, and it might be relevant in a paternity case. See, e.g., Meacham, 93 Wn.2d at 739.

⁷ http://www.wsp.wa.gov/forensics/docs/bureau/forensic_services_guide.pdf (last accessed 2/4/2015).

drugs and/or alcohol may have played a role.” Id. The Washington State Patrol Crime Laboratory’s DNA analysis is limited to developing genetic profiles from only specified forensic loci relevant to identity. Id. at 23, 25-26.⁸ Thus, although a rogue investigator bent on analyzing a suspect’s DNA for unauthorized information could certainly submit a blood sample to a private laboratory capable of sequencing the suspect’s genome, such an unscrupulous investigator will not be deterred by simply adding a few words to a search warrant.

An appellate court may surely express concerns based on hypotheticals not presented by the facts of the case before the court, but the court should not fashion a holding that substitutes hypotheticals for facts. For example, in Skinner, the Supreme Court noted that testing could be pretextual, that confidential data could be mishandled, or that testing can be unreliable, Skinner, at 621 n.5, 626 n.7 and 627 n.8, but such concerns did not alter the balance under the special needs analysis unless there was evidence of actual pretext, mishandling, or unreliability. Similarly, this Court has properly declined to craft a holding based on concerns that DNA “has the potential to reveal a vast amount of personal information” where the testing in the particular case was only for identity.

⁸ See also Maryland v. King, ___ U.S. ___, 133 S. Ct. 1958, 1979, 186 L. Ed. 2d 1 (2013). There are strict limits on use and dissemination of genetic information. RCW 43.43.754 (DNA can only be collected for CODIS for specific crimes); DNA Identification Act, 42 U.S.C. §§ 14132, 14135a, 14132(b)(3)(A), 14135e (2006).

State v. Athan, 160 Wn.2d 354, 367-68, 158 P.3d 27 (2007); Surge, 160 Wn.2d at 79 (statute authorizing the DNA typing of convicted felons did not permit disclosure of medical or similar information, and there was no indication that samples were used for an improper purpose, so no state constitutional violation).⁹

5. MARTINES CITES NO AUTHORITY THAT TESTS FOR IMPAIRMENT MAY NOT INCLUDE TESTS FOR DRUGS.

Martines argued in the trial court that although testing of his blood for alcohol was proper, testing for drugs was not. CP 12; 1RP 31-54; Br. of Appellant at 10-12. The Court of Appeals never addressed this argument, but it is meritless and should be rejected by this Court.

It is undisputed that Martines was arrested for driving while under the influence and that there was probable cause to obtain a warrant to draw his blood. RCW 46.20.308(1) provides as follows:

Any person who operates a motor vehicle within this state is deemed to have given consent ... to a test or tests of his or her breath for the purpose of determining the alcohol concentration, THC concentration, *or presence of any drug* in his or her breath if

⁹ See also State v. Houser, 95 Wn.2d 143, 160-61, 622 P.2d 1218 (1980) (“I believe the majority should be guided by the views expressed by Mr. Chief Justice Burger in his concurring opinion in Arkansas v. Sanders, 442 U.S. 753, 768, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979): ‘Our institutional practice, based on hard experience, generally has been to refrain from deciding questions not presented by the facts of a case; there are risks in formulating constitutional rules broader than required by the facts to which they are applied.’”).

arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug.

Thus, there was certainly statutory authority to test for both alcohol and drugs once there was probable cause to arrest for driving impaired, regardless of whether the officer saw evidence of both alcohol and drugs. In State v. Schulze, the defendant argued that RCW 46.20.308 did not specifically provide for a driver's deemed consent to a blood test for drug content. 116 Wn.2d 154, 804 P.2d 566 (1991). This Court held that it would be illogical to permit testing for only one substance.

If we adopted Schulze's reasoning, an absurd result would ensue: a vehicular homicide suspect who was apparently under the influence of drugs could be forced to submit to a blood test. However, this test could not be for the purpose of establishing the presence of drugs in his blood. We do not favor such absurd results. ... *See also State v. Rangitsch*, 40 Wn.App. 771, 775-76, 700 P.2d 382 (1985) (approving the taking of a blood sample from a negligent homicide defendant for the sole purpose of testing it for drugs).

Schulze, 116 Wn.2d at 164-65.

In Illinois v. Caballes, 543 U.S. 405, 408, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005), the Supreme Court held that "[t]he expectation 'that certain facts will not come to the attention of the authorities' is not the same as an interest in 'privacy that society is prepared to consider reasonable.'" The Supreme Court of South Dakota upheld a urine test that

revealed the presence of cocaine when the warrant for the urine test was based on probable cause for the possession of only marijuana. State v. Loveland, 696 N.W.2d 164, 167 (S.D. 2005). Similarly, the Utah Supreme Court rejected a defendant's claim that he could not be tested for marijuana in his blood where the officer at the scene had seen only evidence of alcohol impairment. State v. Price, 270 P.3d at 528. The court held that "once a blood sample has been legitimately seized, the individual from whom that sample was taken has no legitimate expectation of privacy in the contraband contents of his blood." Price, at 530.

These holdings are sensible. Impairment can be caused by alcohol, drugs, or a medical condition. Where there is probable cause to believe that a driver is impaired, it makes sense to authorize testing that will reveal the cause of impairment. A driver intoxicated by alcohol or drugs or a mixture of the two is guilty of driving under the influence. A driver who was the victim of a medical condition, however, might be exonerated of criminal charges based on a blood test. Since it is often impossible to specify the cause of impairment without testing, this Court should reject Martines's invitation to create a requirement that can never be met. See State v. Baity, 140 Wn.2d 1, 6, 991 P.2d 1151 (2000) (drug recognition officers may not render an opinion as to what drugs are consistent with the suspect's behavior and attributes absent compliance with a protocol; step

12 of the protocol is “toxicology analysis”); State v. Baldwin, 109 Wn. App. 516, 525, 37 P.3d 1220 (2001) (“it would be ludicrous to expect an officer...to diagnose in the field what precise drug has been ingested in a particular case).

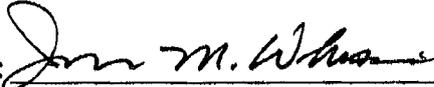
D. CONCLUSION

The warrant in this case plainly authorized both the seizure and examination of a vial of Martines’s blood. A new rule was not required to adjudicate this case or to protect the privacy interests of Washington citizens. The State respectfully asks that the decision of the Court of Appeals be reversed and that Martines’s conviction be affirmed.

DATED this 10th day of February, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the respondent, at Oliver@washapp.org, containing a copy of the Supplemental Brief of Petitioner, in State v. Jose Figueroa Martines, Cause No. 90926-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of February, 2015.

U Brame

Name:

Done in Seattle, Washington

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To: Brame, Wynne
Cc: Whisman, Jim; Oliver Davis (oliver@washapp.org); wapofficemail@washapp.org
Subject: RE: State v. Jose Figueroa Martines, Supreme Court No. 90926-1

Rec'd 2/10/2015

From: Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]
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Subject: State v. Jose Figueroa Martines, Supreme Court No. 90926-1

Please accept for filing the attached documents (Motion to File Overlength Supplemental Brief and Supplemental Brief of Petitioner) in State of Washington v. Jose Figueroa Martines, Supreme Court No. 90926-1.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at James Whisman's direction.

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