

Supreme Court No. 90926-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JOSE MARTINES,

Respondent.

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SUPREME COURT  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

The Honorable Mariane C. Spearman

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RESPONDENT MARTINES' CONSOLIDATED ANSWER  
TO BRIEFS OF AMICI

---

OLIVER R. DAVIS  
Attorney for Respondent

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## A. IDENTITY OF RESPONDENT

Jose Martines is the Respondent in State v. Martines, in which this Court granted the Petitioner State of Washington's petition for review of the Court of Appeals decision holding that a search warrant which specifically granted authority of law to draw the defendant's blood following an automobile accident did not provide authority to test the blood, where testing could easily have, but plainly was not, authorized by the warrant language. The Court of Appeals declined to find a grant of authority in the warrant that had not been set forth by the issuing judge. Decision, at p. 1.

## B. AUTHORITY TO ANSWER ARGUMENTS OF *AMICI*

*Amicus* briefs have been filed by the Washington State Patrol (WSP) and the Washington Association of Prosecuting Attorneys (WAPA). This Court directed that any answer(s) to the briefing be filed by April 21, 2014. Respondent Martines provides the following consolidated answer to the *amicus* briefing.

## C. ARGUMENT

1. Under the state constitution's article 1, section 7, exceeding the authority of law granted by a search warrant cannot be excused under the rubric of 'reasonableness.' The testing of drawn blood for physiological markers is a "search" under

Article 1, section 7, because it is an intrusion into a Washingtonian's private affairs. Decision, at pp. 1, 8-11. *Amicus* WSP now contends that such testing is not a search, a matter addressed in the Respondent's supplemental brief. WSP brief, at pp. 8-10, 12-15.<sup>1</sup>

The search was not supported by authority of law, despite *amici's* alternative arguments that it was supported, because it was reasonable. Regardless of the subjective intention of the police (WSP trooper) affiant, the search warrant language that was drafted by the officer and judicially issued for drawing the blood in the instant case did not authorize any *testing* of the blood whatsoever. Warrant, at pp. 1-2 inclusive; Decision, at pp. 12.

A central theme of the *amicus* briefing is that the blood testing results obtained under color of such a warrant would be properly admissible following CrR 3.6 scrutiny, because the police acted *reasonably* in 'execution' of the warrant – the argument being that the complained-of search (blood testing) was conducted only

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<sup>1</sup> At the Court of Appeals, the Court rejected the State's similar argument that once the blood was in possession of the police and the Washington State Patrol Crime Laboratory, it could be tested for any matter at the State's discretion, because there was no expectation of privacy or intrusion into privacy and the testing of drawn blood is simply not a "search." Decision, at pp. 5-11 (rejecting State's characterization of State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), and State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007)).

for things such as alcohol markers and drug markers, both of which relate to the crime for which it is asserted that probable cause existed to search.

First, this claim fails at its inception in the instant case, because the police indeed tested the blood not just for alcohol markers, but also for *drug* markers, despite the absence of any factual circumstances supporting any assertion of probable cause for drug intoxication. Supplemental Brief of Respondent Martines, at pp. 22-25. At the Court of Appeals, the State took the position that blood testing is not a search at all, but accompanied this assertion with promises that it would never abuse that fact by conducting testing of the blood for things it ought not, such as disease or DNA, and the like. The Court of Appeals was not persuaded. Decision, at pp. 3-4.

In this Court, *amici* now resurrect the State's assurances that it will always internally restrain its resulting unfettered discretion and would never test blood in its possession for improper matters, yet *amici* fail to acknowledge that this is precisely what occurred when the blood was tested for drugs without probable cause. Additionally, *amicus* WAPA expressly goes further, arguing that a reasonableness standard is what applies, and that such standard

should be deemed flexible enough to allow blood testing for drugs whenever there is probable cause for *alcohol* testing, because the fact that a person was driving while drunk does not “preclude” the possibility that he or she was also driving while using drugs. WAPA brief, at pp. 9-10 (also reasoning that it is “not uncommon” for a person driving while alcohol impaired to have combined the alcohol use with drug use). The police did exactly what the Court of Appeals was concerned the police could do, if the Court held that blood testing is not a search, and at least one *amicus* now seeks this Court’s express endorsement of that invasion of privacy.

More general is *amici*’s contention that in search warrant cases, the test for whether a given intrusion into private affairs was permissible should be to ask whether the intrusion was a reasonable ‘execution’ of that warrant. WAPA, at p. 1 (framing issue as “[w]hether the manner of executing the search warrant in this case was reasonable?”); WSP, at p. 5 (stating that the blood testing was proper because it accorded with the Patrol’s practice and procedures, and with the governing legal standard that all searches by testing may be performed so long as they are reasonable – i.e., “related to the crime for which the warrant was issued.”).

This general contention is essentially a re-casting by *amici* of the State's failed position below, clothing the wolf ('blood testing is not a search') in the sheep's clothing of the asserted 'reasonableness' of the execution of the warrant. The arguments of *amici*, that blood drawing and blood testing should be deemed a unitary intrusion because they serve the same investigative purpose, merely serve to highlight the fact that the search warrant in this case failed to grant search authority that the drafter/affiant had in mind but did not obtain, and to accentuate the warrant's abject failure to survive even the most rudimentary particularity analysis. If the Crime Laboratory had tested the blood for markers of genetic defect, or for DNA purposes, *amici's* assertion that the same would not be a search would devolve beyond erroneous. The lack of a distinction betrays *amici's* arguments for what they are -- a contention that state law enforcement agencies in Washington may exceed the authority of law granted by search warrants whenever, on balance, it is "reasonable" to do so. This contention is at odds with this Court's state constitutional jurisprudence under Article 1, section 7.<sup>2</sup>

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<sup>2</sup> In the context of a case regarding the enforcement of laws regarding obstruction, this Court has stated:

Ultimately, the argument of *amici* is that this Court should find constructive search authority in the search warrant for the very reason that the failure of the warrant drafter (the WSP) to specify the search authority it desired was so abject and obvious of a deficiency. This is not a tenable mode of analysis for a court tasked with protecting the private affairs of Washingtonians.

The contention should be rejected. The Washington Constitution does not rest its protection of privacy on the question whether police agents conducting a warrant search acted with Fourth Amendment reasonableness. State v. Snapp, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). Rather, under Article 1, section 7, searches must be by authority of law. This means a judicial warrant, or an exception to the warrant requirement. Snapp, 174 Wn.2d at 187-88. Where, as here, no exception (from among the limited and carefully drawn set thereof) is applicable, the search conducted must have been pursuant to warrant authority, or it is an illegal search.

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The words "reasonable" and "unreasonable" do not appear in article I, section 7. State v. Eisfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008); State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007); [State v. ] Morse, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Thus even reasonable searches may contravene article I, section 7 if they are without the authority of law.

State v. Williams, 171 Wn. 2d 474, 484-85, 251 P.3d 877 (2011).

Importantly, whether assessed under the state or the federal constitutions, a judicial search warrant by definition distills the search authority sought by the affiant. Once the warrant is issued, the search authority it contains does not thereafter expand based on what the officers executing the warrant determine is additionally reasonable. The Fourth Amendment prohibits the issuance of any warrant except on probable cause, and which particularly describes the place to be searched and the persons or things to be seized. Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987); U.S. Const. amend. 14. The Washington Constitution contains a similar requirement. State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984); see Wash. Const. art 1, section 7. Evidence seized that exceeds the scope of a warrant must be excluded. State v. Kelley, 52 Wn. App. 581, 588, 762 P.2d 20 (1988).

In Kelley, officers suspected that a person was using outbuildings on his property, to conduct a marijuana growing operation. For whatever reason – the reason being entirely immaterial -- the search warrant by its language was limited to a grant of authority to search the defendant's one-story, wood framed residence, “bearing the specific address of . . .” Kelley, 52 Wn.

App. at 584. When executing the search warrant, however, the officers also searched certain of the outbuildings -- a barn and a garage -- not included in the warrant's language. The Court of Appeals upheld suppression of the evidence found in the barn and garage because the warrant did not contain any grant of authority to search any outbuildings -- even considering that the outbuildings were also at the same address specified in the warrant. Kelley, 52 Wn. App. at 586 (relying on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 394, 91 S.Ct. 1999, 2004 n. 7, 29 L.Ed.2d 619 (1971); and State v. Cockrell, 102 Wn.2d 561, 569-70, 689 P.2d 32 (1984)). Reasonableness was and is not an available cure for exceeding the scope of the warrant -- it made no matter in Kelley that it was eminently reasonable under all the facts for the officers to believe that the search conducted of the outbuildings was supported by the warrant they had applied for and obtained, or that there was indeed actual probable cause for the outbuilding search, or that the seemingly obvious purpose of the investigation and the obtaining of the warrant was to uncover a marijuana grow building. Kelley, 52 Wn. App. at 583-87.

As should be the case here, the Kelley case indicates that it is a very straightforward matter to determine whether the warrant

contains a particular grant of search authority, or does not. In the present case, the warrant's language granted authority to draw blood. If the Court of Appeals could have discerned anywhere in the warrant's language a grant of authority to test the blood, it would certainly have ruled that blood testing for alcohol was conducted with authority of law. There is no such language, and no such grant of authority. See, e.g., State v. Kelley, 52 Wn. App. at 586 ("The warrant made no mention of other buildings not attached to the house. Consequently, when the officers searched the barn and the garage, they clearly exceeded the bounds of the search warrant"); Decision, at pp. 12 ("As written, the warrant did not authorize testing at all.").

There is no amount of reasonableness on the part of the police that can legalize a search that is outside the scope of the language of a written search warrant. All of the decisions cited by *amicus* WAPA for this fanciful proposition actually involve cases where police illegally exceeded existing warrant authority, or unreasonably executed the warrant's actual grant of authority by the manner of execution. WAPA, at pp. 2-4. See Ybarra v. Illinois, 444 U.S. 85, 90-91, 100 S. Ct. 338, 62 L. Ed.2d 238 (1979) (warrant language authorized search of tavern and bartender

suspected of running drug operation; search of patron exceeded warrant's grant of authority); Wilson v. Arkansas, 514 U.S. 927, 934-35, 115 S. Ct. 1914, 131 L. Ed.2d 976 (1995) (whether there has been a violation of the common-law knock and announce rule for execution of a valid search warrant, amounting to a violation of the Fourth Amendment's reasonableness requirement, is to be determined under the totality of the circumstances); Terebesi v. Torres, 764 F.3d 217, 237-39 (2d. Cir. 2013) (finding litigable fact issue in § 1983 lawsuit as to question whether police officers executing valid search warrant employed excessive force by using stun grenades); Cameron v. Craig, 713 F.3d 1012, 1021-22 (9<sup>th</sup> Cir. 2013) (same, regarding question of number of officers and conduct of officers) (and stating that "even when supported by probable cause, a search or seizure may be invalid if carried out in an unreasonable fashion"); Muehler v. Mena, 544 U.S. 93, 98-99, 125 S. Ct. 1465, 161 L. Ed.2d 299 (2005) (police cannot use unreasonable force or detain persons unreasonably when executing valid warrant); Platteville Area Apt. Ass'n v. City of Platteville, 179 F.3d 574, 579 (7<sup>th</sup> Cir. 1979) (offering the analogy that police with valid warrant to search a home for an adult elephant can nonetheless execute that warrant unreasonably by looking for

the object of the search in a chest of drawers); Wilkerson v. State, 88 Md. App. 173, 594 A.2d 597, 605 n. 3 (1991) (same).

These cases do not stand for *amicus* WAPA's proposition that executing officers can unilaterally expand the scope of warrant authority beyond its actual judicial grant, so long as they engage in only additional *reasonable* searching.

Similarly, the argument of *amicus* WSP (for its proposition that the alcohol and drug testing conducted by the WSP Crime Laboratory was reasonable because it effected investigation of the crime under investigation) fails to recognize that searches require authority of law. The scope of authority of law that police possess is determined by the warrant itself as judicially issued, not by reference to the pre-warrant request for authority, or by the subjective, post-warrant assessments of the police as to the scope of the most effective search. WSP, at pp. 5-7 (arguing that the crime laboratory conducted forensic testing of the blood that was reasonable considering the crime under investigation). The assertion that police have been reasonably relying for years on warrant language that never properly authorized blood testing does not transform the defective warrant into one that actually contains a grant of search authority never issued by the judge.

**2. Particularity is not satisfied by a warrant that merely states that a search may be conducted for evidence of a listed crime.** The state and federal constitutions require that a search warrant must include “a particular description of the places to be searched or the items to be seized,” and the purpose for the requirement is that such places and things not be left to the discretion of those executing the warrant. Charles W. Johnson and Debra L. Stephens, Survey of Washington Search and Seizure Law: 2013 Update, 36 Seattle U. L. Rev. 1581, 1643 (2013) (hereafter “2013 Update.”).

WSP argues that the warrant in this case, which commanded the affiant to “extract a sample of blood,” was sufficiently particular because it stated that there was 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, Jose Figueroa, who is currently located within the County of King.” Search Warrant, at pp. 1-2; see WSP brief, at pp. 3, 5.

However, a search warrant whose language merely authorizes a search for “evidence of” a violation of a given criminal statute is the *archetypal* textbook example of an overbroad warrant.

Search warrants must particularly describe the things to be seized, with as much specificity as is reasonably possible in the circumstances. The particularity requirement is closely tied to the requirement of probable cause – the less precise the description of the things to be seized, the more likely it will be that the requirements of probable cause for the search warrant have not been established. 2 W. LaFare, Search and Seizure § 4.6(a), at 606-07 (4th ed. 2004).

This is constitutional criteria that went completely unmet in the present case. See Decision, at p. 12 (“Here the warrant obtained by the trooper could easily have been written to authorize testing the blood”). Generic lists of the class of items to be searched for may be acceptable – such as a shotgun and shotgun ammunition -- if specifically circumscribed by reference to the crime under investigation. 2013 Update, 36 Seattle U. L. Rev. at 1648. In this case, there was not even a generic list – the warrant did not even attempt to state that it was authorizing a search for physiological markers of alcohol, or drug intoxication, and thus left far too much open to the discretion of the executing law enforcement agency and laboratory. Particularity was abjectly not met, and the warrant, instead of granting authority, simply resulted

in a general search by law enforcement – one never authorized by the warrant's language, which was limited to the drawing of blood. State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (purposes of the particularity requirement primarily include the prevention of “general searches,” in which law enforcement searches and seizes for whatever it wishes without regard to the scope of authority granted) (citing 2 W. LaFave, Search and Seizure § 4.6(a), at 234–36 (2d ed. 1987)).

Here, even a generic listing would specify physiological markers of alcohol in the blood, or the like. No such listing, or anything of the sort, was set out in the search warrant. The core of the particularity requirement – which is intimately related to the requirement of probable cause -- is that the warrant must set forth “the most complete description that could reasonably be expected.” 2013 Update, 36 Seattle U. L. Rev. at 1648 (emphasis added.). Thus, a search warrant that merely authorized a search for “evidence of second degree assault” would be inadequately particular, because second degree assault can be committed under more than one set of facts. See State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). A search warrant that included language seemingly authorizing a search of a home, for example,

following an affidavit seeking evidence of the crime of assault with a statutory deadly weapon, would certainly not survive a particularity challenge with regard to a search by chemical testing of the pills and potions found in the homeowner's medicine cabinet, under the contention that 'second degree assault' can also be committed by poisoning. See RCW 9A.36.021(c) (assault with a deadly weapon); RCW 9A.36.021(d) (assault by administering of poison or noxious substance). The search warrant could easily have satisfied the dictates necessary to grant the authority needed for the testing search conducted, and to meet the particularity requirement, but the required language was entirely absent. Decision, at p. 12.

**3. Mr. Martines does not argue, and the Court of Appeals did not hold, that a new, additional warrant must be obtained for each stage of the testing of a blood sample.** *Amicus* WSP frames the issue presented in part as "whether a blood sample may be tested pursuant to a warrant authorizing that blood be drawn . . . or must an additional warrant be obtained for each test of the blood sample." WSP brief, at p. 3. *Amicus* WSP then goes on to describe various stages in the scientific process of testing blood for alcohol, drug, and DNA purposes, and complains that the Court of Appeals decision "clogs the courts" with a requirement that blood

testing laboratories apply for and obtain a new, additional search warrant for each chemical stage of the process, causing “starts and stops” in the testing process. WSP brief, at pp. 2-3, 15-18.

This is a classic straw man argument. Respondent Martines’ argument, and the Court of Appeals’ holding, is that the testing of blood drawn pursuant to a warrant is a search that must be authorized by that warrant, in addition to the authority granted by the warrant to draw the blood. Search warrants in DUI cases should include, in addition to language authorizing the blood draw, simple language authorizing the testing of the blood for alcohol markers, or for drug markers, or for both, depending on the testing authority warranted by the specific probable cause statement placed before the magistrate. This is easy to do. Decision, at p. 12 (“Here the warrant obtained by the trooper could easily have been written to authorize testing the blood . . . but it contained no such language”) (Emphasis added.). The argument of *amicus* WSP misstates the issue.

#### D. CONCLUSION

Based on the foregoing, the Respondent Jose Martines respectfully asks that this Court reject the arguments proffered by *amici*.

Respectfully submitted this 21st day of April, 2015.

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S/ OLIVER R. DAVIS WSBA # 24560  
Washington Appellate Project – 91052  
Attorneys for Respondent Jose  
Martines

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	
	)	NO. 90926-1
v.	)	
	)	
JOSE MARTINES,	)	
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Respondent.	)	

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[X] JAMES WHISMAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104 [paoappellateunitmail@kingcounty.gov] [Jim.Whisman@kingcounty.gov]	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL
[X] SHELLEY WILLIAMS, AAG OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188 [shelleyw1@atg.wa.gov] [cjdseaef@atg.wa.gov]	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL
[X] NANCY TALNER ACLU OF WASHINGTON 901 5 <sup>TH</sup> AVE. STE 630 SEATTLE, WA 98164 [talner@aclu-wa.org]	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL
[X] DOUGLAS KLUNDER ATTORNEY AT LAW 6940 PARSHALL PL SW SEATTLE, WA 98136 [klunder@comcast.net]	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

[X] PAMELA LOGINSKY  
WASHINGTON ASSOCIATION OF  
PROSECUTING ATTORNEYS  
206 10<sup>TH</sup> AVE. SE  
OLYMPIA, WA 98501  
[pamloginsky@waprosecutors.org]

( ) U.S. MAIL  
( ) HAND DELIVERY  
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**Washington Appellate Project**  
701 Melbourne Tower  
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Fax (206) 587-2710

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Oliver R. Davis - WSBA #24560  
Attorney for Respondent  
Phone: (206) 587-2711  
E-mail: [oliver@washapp.org](mailto:oliver@washapp.org)

By

*Maria Arranza Riley*  
**Staff Paralegal**  
**Washington Appellate Project**  
**Phone: (206) 587-2711**  
**Fax: (206) 587-2710**  
**E-mail: [maria@washapp.org](mailto:maria@washapp.org)**  
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