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COURT OF CRIMINAL APPEALS
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IN THE
TEXAS COURT OF CRIMINAL APPEALS

THE STATE OF TEXAS,
PETITIONER,

v.

JUAN MARTINEZ, JR.,
RESPONDENT.

ON PDR FROM THE THIRTEENTH
COURT OF APPEALS

AMICUS CURIAE BRIEF BY DISTRICT ATTORNEY FOR THE 105TH JUDICIAL DISTRICT OF TEXAS

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STATEMENT OF COMPLIANCE WITH TEX. R. APP. P. 11

The present amicus curiae brief is filed by the District Attorney's Office for the 105th Judicial District of Texas, in accordance with the requirements of Texas Rule of Appellate Procedure 11. No fee has been paid or will be paid for the preparation of this brief. The certificate of service attached to the back page of this brief certifies that copies have been mailed to all parties.

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NO. PD-0878-17
(Appellate Court Cause No. 13-15-00592-CR)

THE STATE OF TEXAS,	§	IN THE
Petitioner,	§	
	§	
V.	§	COURT OF CRIMINAL APPEALS
	§	
JUAN MARTINEZ, JR.,	§	
Respondent.	§	OF TEXAS

AMICUS CURIEA'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

PRELIMINARY STATEMENT

The District Attorney for the 105th Judicial District of Texas has a special interest in the resolution of this case because of a similar issue now pending before the Thirteenth Court of Appeals in *Richard Hyland v. State of Texas*, No. 13-16-00596-CR (Tex. App.—Corpus Christi), in which the appellant has raised a similar challenge to the warrantless testing of a sample of blood legally within the custody of the State.

ARGUMENT

As its second reason for review, the State in the present Petition for Discretionary Review asserts summarily that:

> The State would submit that the question as to whether an individual, in the situation such as the one presented herein, maintains a "privacy interest" in the blood samples lawfully obtained by law enforcement so as to require suppression of the results of the testing of those samples without the benefit of a search warrant, is an issue which has not been, but should be decided by this Court.

(State's Petition pp. 7-8) Amicus wishes to elaborate on the importance of this issue as follows.

In *United States v. Jacobsen*, the Supreme Court concluded that the field test of a substance lawfully obtained by the police, to determine if it contained cocaine did not compromise any legitimate interest in privacy and was not a "search" within the meaning of the Fourth Amendment. 466 U.S. 109, 122-24, 104 S.Ct. 1652 (1984) (citing *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637 (1983) (similarly concluding that a sniff test by a drug dog was not a search)).

Similarly, the Texas Court of Criminal Appeals has held that an arrestee's expectation of privacy in inventoried items is "lessened or partially dissipated," such that "it is proper for police to examine and test clothing validly within their control and custody, regardless of the existence of probable cause or exigent circumstances." *Oles v. State*, 993 S.W.2d 103,

108-09 (Tex. Crim. App. 1999); *see also Threadgill v. State*, 146 S.W.3d 654, 660-61 (Tex. Crim. App. 2004) (following *Oles*).

The Texas Court of Criminal Appeals recently qualified the holding in *Oles* when the inventoried item is a cell phone, over which the Court concluded that an inmate retains a reasonable expectation of privacy "[g]iven modern technology and the incredible amount of personal information stored and accessible on a cell phone." *State v. Granville*, 423 S.W.3d 399, 417 (Tex. Crim. App. 2014). However, neither the Supreme Court nor the Texas Court of Criminal Appeals has held in a binding opinion that the analysis of blood lawfully within the possession of the State amounts to a search for Fourth Amendment purposes.

Moreover, the *Hardy* and *Huse* cases both ultimately refused to recognize a reasonable expectation of privacy in hospital blood test results generated for medical purposes following a traffic accident, such that statements in those opinions concerning the nature of unrelated state-initiated blood searches is dicta and of no binding effect. *See State v. Huse*, 491 S.W.3d 833 (Tex. Crim. App. 2016); *State v. Hardy*, 963 S.W.2d 516, 526 (Tex. Crim. App. 1997). In particular, *Huse's* citing of *Hardy* for the proposition that extraction and testing amount to "two discreet 'searches,'" relies upon language in *Hardy* attributing to *Skinner* the idea that a

subsequent analysis of seized blood constitutes a separate invasion of a societally recognized right of privacy. In *Skinner v. Railway Labor Executives' Ass'n*, the Supreme Court described the privacy concerns inherent in a blood draw and testing as follows:

> In light of our society's concern for the security of one's person, it 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 the tested employee's privacy interests.

489 U.S. 602, 616, 109 S.Ct. 1402 (1989) (citations omitted). Yet, the Supreme Court never said that the testing itself amounted to a second search, only that it implicated privacy interests. In other words, recognizing two separate privacy interests involved in the extracting and later analysis of blood is a far cry from recognizing the analysis as a separate and discreet "search" which must be supported by a separate additional warrant.

In the most recent Supreme Court case on warrantless DWI blood draws, the Court stated that "the *taking* of a blood sample or the administration of a breath test is a search." *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016) (emphasis added) (citing *Skinner,* 489 U.S. at 109 and *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826 (1966)). In distinguishing a permissible warrantless breath test from an impermissible warrantless blood draw, the Court focused almost exclusively on the degree

of physical intrusion present in each, noting that taking a blood sample requires piercing the skin and extracting a part of the subject's body. *Birchfield*, 136 S.Ct. at 2177-78. Moreover, the Court appears to use the term "blood test" to describe the extraction process rather than the laboratory analysis, as the analysis itself has nothing to do with piercing the skin or extracting the blood. *See Birchfield*, 136 S.Ct. at 2178; *see also Schmerber*, 384 U.S. at 771 (using the term "test" to describe the extraction process, not later laboratory analysis, and specifically stating "the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices."). To the extent that the later laboratory analysis tests only for alcohol content and does not involve any further physical intrusion, it seems analogous to the warrantless breath test which the *Birchfield* opinion concluded did not sufficiently implicate significant privacy concerns to be impermissible under the Fourth Amendment. 136 S.Ct. at 2178 & 2184.

In the earlier case of *Skinner*, the Supreme Court likewise implied that blood analysis procedures, like breath tests, "which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, … reveal no other facts in which the employee has a substantial privacy interest," and that such analyses do not implicate

significant privacy concerns. 489 U.S. at 626; *see also Maryland v. King*, 133 S.Ct. 1958, 1979 (2013) (noting the limited nature of the DNA testing conducted there as one factor to consider in determining the extent of the privacy interest which is being threatened and emphasizing that DNA was analyzed only for identification purposes and not for personal health information about the person in question).

A DWI blood sample analysis reveals only whether the individual does or does not have alcohol in his or her system and in what concentration, a matter about which the public has an overwhelming interest in knowing when the suspect is driving on the public roads, and over which the suspect has, at most, a minimal privacy interest.

Both the Supreme Court and the Texas Court of Criminal Appeals recognize that "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *State v. Hardy*, 963 S.W.2d 516, 525 (Tex. Crim. App. 1997) (quoting *Jacobsen,* 466 U.S. at 117). In *Hardy*, the Court of Criminal Appeals concluded that an individual's privacy interest in his blood is "frustrated" (i.e., lessened or dissipated) when such blood has lawfully come into the hands of the party testing it. 963 S.W.2d at 526 (hospital tests conducted for medical purposes).

Accordingly, when considering whether the privacy interest in information that might be obtained from a blood analysis makes the analysis itself a *separate search* from the obtaining of the specimen or merely a *consideration* that contributes to the privacy interest not to have the blood drawn in the first place, *Birchfield* and other recent cases seem to lean in favor of it being merely a consideration rather than a reason to characterize the blood analysis itself as a separate search.

Resolution of this issue is also dependent upon whether the interest being protected is more in the nature of a trespass upon the person by sticking a needle under his skin, or a privacy interest in the thing obtained by that trespass. It is clearly an issue with broad implications which will have an impact on a large number of DWI cases throughout the state.

CONCLUSION

The District Attorney's Office for the 105th Judicial District of Texas submits the foregoing Amicus Curiae Brief for the Court's consideration in the present case.

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Respectfully submitted,

/s/*Douglas K. Norman*

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RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 1,411.

/s/*Douglas K. Norman*

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Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that copies of this brief were e-served on November 8, 2017, on the attorney for Mr. Juan Martinez, Jr., Ms. Michelle Ochoa, the attorney for the State, Mr. Edward F. Shaughnessy, and the State Prosecuting Attorney.

/s/*Douglas K. Norman*

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Douglas K. Norman