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Blood on Their Hands: What Minnesota Authorities Can Do with Broad Warrants for Blood Draw Testing—State v. Fawcett

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**BLOOD ON THEIR HANDS: WHAT MINNESOTA
AUTHORITIES CAN DO WITH BROAD WARRANTS FOR
BLOOD DRAW TESTING—STATE V. FAWCETT**

Matthew Porter[†]

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I. INTRODUCTION

The Fourth Amendment of the United States Constitution and article I, section 10 of the Minnesota Constitution clearly prohibit unreasonable searches and seizures.¹ In light of what can be found in a person’s blood with today’s technology, defining what constitutes an unreasonable search or unreasonable seizure in biological sample extraction has become a challenge. Particularly, medical and personal information is becoming increasingly discoverable. Such discoverability has caused federal and state courts to pause and consider what this means for an individual’s Fourth Amendment rights.

1. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10.

This Note first describes the history of United States law and Minnesota law on blood draw testing.² This Note goes on to describe Minnesota's current search and seizure limitations—namely the Particularity Clause and guidelines for warrant interpretation.³ Next, this Note explains the facts and procedural history, the majority discussion and decision, and the dissenting opinions of the Minnesota Supreme Court case *State v. Fawcett*.⁴ This Note then analyzes the majority's two main assertions:

- (1) the testing of a blood draw is a search; and
- (2) a warrant for a blood draw must particularly describe how the blood will be tested.

This Note argues that the Minnesota Supreme Court's characterization of a blood draw as a search is proper.⁵ This Note also argues that the Minnesota Supreme Court erred because the warrant at issue did not particularly describe the search of Fawcett's blood for alcohol and drugs.⁶ This Note concludes by describing how the Minnesota Supreme Court's decision in *Fawcett* (1) sheds light on how cases around the United States may be decided after the recent United States Supreme Court *Birchfield* decision, and (2) sets new precedent in Minnesota.⁷

II. HISTORY OF THE RELEVANT LAW

A. *Fourth Amendment Search and Seizure Law in Relation to Blood Draws and Analysis*

1. *Minnesota Adopted the United States Supreme Court's Definitions of "Seizure" and "Search"*

The Minnesota Supreme Court has agreed with the United States Supreme Court that a seizure has occurred "if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter."⁸ The

2. See *infra* Section II.A.

3. See *infra* Section II.B.

4. See *infra* Part III.

5. See *infra* Section IV.A.

6. See *infra* Section IV.B.

7. See *infra* Part V.

8. *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (internal citations omitted).

Minnesota Supreme Court has also agreed with the United States Supreme Court that “[a] search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”⁹

2. *In 1966, the United States Supreme Court Classified a Blood Draw as a Seizure and Blood Draw Testing as a Search in Schmerber*

In the 1966 case *Schmerber v. California*,¹⁰ the United States Supreme Court classified the administration of a blood test as both the seizure of a person and the subsequent search of that person.¹¹ The Court reasoned that since a blood draw requires piercing the skin, a blood draw is extremely personal.¹² The Court analogized that just as search warrants are required for intrusions into the extremely

9. *Harrison v. Comm’r of Pub. Safety*, 781 N.W.2d 918, 921 (Minn. Ct. App. 2010) (citing *United States v. Jacobsen*, 466 U.S. 109, 122 (1984)); *see also State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)) (explaining that constitutional protections in Minnesota are not considered until a person has “expectations of privacy that ‘society is prepared to recognize as reasonable’”).

10. 384 U.S. 757 (1966).

11. *Id.* at 767 (“It could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of ‘persons,’ and depend antecedently upon seizures of ‘persons,’ within the meaning of that Amendment.”). The Court in *Schmerber* does not clearly define what it means by “blood test.” The phrase “administration of a blood test” indicates the Court may have been referring only to the blood draw when using the term “blood test.” This interpretation is supported by the case’s issue statement: “The question is squarely presented therefore, whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.” *Id.* at 766–67. The way in which the Court identifies in this statement that the “chemical analysis” is the product of a “search and seizure” indicates three events: (1) “seizure” of the person, (2) “search” in the form of a blood draw, and (3) chemical analysis of the blood. *Schmerber* concluded that there was only one seizure and only one search because the issue of three potential Fourth Amendment events was not before it; the defense did not attempt to distinguish between the blood draw and the chemical analysis of the blood and to name the latter as a “search.” Andrei Nedelcu, *Blood and Privacy: Towards a “Testing-as-Search” Paradigm Under the Fourth Amendment*, 39 SEATTLE U. L. REV. 195, 198–99 (2015).

12. *See Schmerber*, 384 U.S. at 769–70 (“Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body’s surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.”).

personal place of a person's dwelling, search warrants should also be required for intrusions into the extremely personal place of a person's body.¹³

Nevertheless, the *Schmerber* Court also recognized an exception to the warrant requirement in emergency situations.¹⁴ The Court held that results of the blood test in *Schmerber* were admissible under this exception to the warrant requirement because the situation constituted an emergency.¹⁵ In *Schmerber*, the petitioner refused to submit to a breathalyzer test, and evidence of alcohol usage was quickly dissipating into the petitioner's blood stream.¹⁶ If the police had not taken the petitioner's blood at that moment, the Court reasoned, the evidence could have been permanently lost.¹⁷

3. *In 1988, the Ninth Circuit Interpreted Schmerber's Search and Seizure Classifications as One Fourth Amendment Event in Snyder*

Later courts have remarked that when the United States Supreme Court in *Schmerber* classified a blood draw as seizure and the blood draw's testing as a search, the Court meant that both the seizure and the search happened within one distinct Fourth Amendment event.¹⁸ In *United States v. Snyder*, a 1988 Ninth Circuit case,¹⁹ the defendant was suspected of driving under the influence of intoxicants ("DUI").²⁰ The defendant tried to use the *Schmerber* opinion to convince the court that a warrantless, emergency seizure of a person's blood in the form of a blood draw and the subsequent search of that blood in the form of chemical analysis were distinct Fourth Amendment events.²¹ The defendant explained that after a person's blood is drawn, the sample retains whatever alcohol content

13. *Id.*

14. *Id.*

15. *Id.* at 771.

16. *Id.* at 770–71. Similar to the United States Supreme Court's ruling in *Schmerber* that a warrant is not required for a blood draw due to the exigent circumstances exception to the warrant requirement, a majority of states, including Minnesota, have also ruled that an arrest is not necessary prior to the taking of a blood draw. FLEM K. WHITED III, DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 7:4 (2d ed. 2016).

17. *Schmerber*, 384 U.S. at 770–71.

18. *See infra* note 28.

19. 852 F.2d 471 (9th Cir. 1988).

20. *Id.* at 472.

21. *Id.* at 473.

was in it at the time of the draw.²² The defendant concluded that since his seized blood retained the alcohol level it had at the time of the accident, the emergency exception to the warrant requirement discussed in *Schmerber* did not apply to his case.²³ Thus, a warrant was needed to have chemically analyzed the defendant's blood.²⁴

The Ninth Circuit decided that the defendant's line of reasoning was "too much" because it broke up the DUI incident into too many independent Fourth Amendment events.²⁵ The court asserted that *Schmerber* had established that the events of the arrest, the blood draw, and the blood's testing were indivisible in the eyes

22. *Id.*

23. *Id.*

24. *Id.* ("[Defendant] points out, however, that the exigency justifying extraction of blood is eliminated once the blood is removed from the suspect's body, because any traces of alcohol in the extracted blood will be preserved indefinitely.")

25. *Id.* The *Snyder* court summarized the defendant's argument as such: "He would have us hold that his person was seized when he was arrested, his blood was seized again upon extraction at the hospital, and finally his blood was searched two days later when the blood test was conducted." *Id.* Note that in so characterizing the defendant's argument, the Ninth Circuit identifies one more potential Fourth Amendment event that the *Schmerber* Court did not identify: the seizure of blood, which is distinct from the seizure of the person. *Snyder's* seizure-seizure-search formulation, where the blood draw is the second seizure, is distinct from the Supreme Court's seizure-search-[possible second search] formulation in *Schmerber*, where the blood draw is the first search. See *supra* note 11. In characterizing the blood draw as a "seizure" instead of a "search," the Ninth Circuit in *Snyder* inadvertently introduced the idea of four possible distinct Fourth Amendment events in the process of a DUI conviction when combined with *Schmerber's* two (and possibly three) Fourth Amendment events. See *id.* These four possible Fourth Amendments are: (1) seizure of the person, (2) search of the person through the blood draw, (3) seizure of the blood through the blood draw, and, possibly, (4) analysis of the blood. The Supreme Court in *Schmerber* only addressed events (1) and (2), ignoring (4) because the defendant failed to distinguish (4) from (2). Nedelcu, *supra* note 11, at 198. The Ninth Circuit in *Snyder* only addressed events (1), (3), and (4), although they spent little time on (3), seizure of the blood through the blood draw. Part of *Snyder's* error, then, is in misunderstanding the Supreme Court's use of the term "blood test" in *Schmerber* to infer that the Court had already concluded that (4) analysis of the blood is a search. In reality, however, the Supreme Court's use of the term "blood test" in *Schmerber* was to establish that (2) the blood draw was a search (a search that possibly encompassed (4) analysis of the blood). Although there is uncertainty about how much the Supreme Court meant to connect (2) the blood draw and (4) analysis of the blood with its use of the term "blood test," it had not concluded at that time whether (4) analysis of the blood is a search that stands apart from (2) the blood draw. See *id.*

of the Fourth Amendment.²⁶ Therefore, the Ninth Circuit concluded, *Schmerber* must be interpreted in a way that classifies the seizure of a person, the seizure of his blood, and the subsequent search of that blood as one distinct Fourth Amendment event.²⁷

26. *Snyder*, 852 F.2d at 474. The proof the Ninth Circuit offered in support of its interpretation that the *Schmerber* Court meant for the DUI incident to be one indivisible Fourth Amendment event is this quote from *Schmerber*: “The questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.” *Id.* at 474 (quoting *Schmerber v. California*, 384 U.S. 757, 768 (1966)). The *Snyder* court did not specifically explain how this quote supports its conclusion that the Supreme Court in *Schmerber* saw the blood draw and the blood test as two events that are indivisible in the eyes of the Fourth Amendment. However, the *Snyder* court reasoned that since the only justification for the blood draw in *Schmerber* was to seize evidence of alcohol content, the right to search the blood was assumed when the right to seize the blood was attained. *Id.*

27. *Id.* at 473–74. (“It seems clear, however, that *Schmerber* viewed the seizure and separate search of the blood as a single event for fourth amendment purposes.”). The interpretation in *Snyder* and later courts believe the *Schmerber* Court’s adoption of joining the seizure and search of the process of a blood draw into one inseparable Fourth Amendment event has been challenged by the emergence of new DNA collection methods. See Justin A. Alfano, *Look What Katz Leaves Out: Why DNA Collection Challenges the Scope of the Fourth Amendment*, 33 HOFSTRA L. REV. 1017, 1030 (2005). Many modern DNA extraction techniques require significantly less intrusion into the human body than a blood draw requires. *Id.* at 1030–31. The Supreme Court has ruled that the testing of DNA obtained by such a minimal intrusion as a buccal swab is still a search. *Maryland v. King*, 133 S. Ct. 1958, 1968–69 (2013). Unless the Supreme Court finds that there exists a less intrusive DNA sampling technique than the taking of a buccal swab, it can be inferred that all bodily intrusions used to take DNA samples are considered searches regardless of the level of seizure preceding the search. See WAYNE R. LAFAVE, 1 SEARCH & SEIZURE § 2.6(a) (5th ed. 2016). Furthermore, DNA testing techniques are already so advanced that DNA can be taken from “abandoned samples”—everyday items like disposable cups on which suspects have left saliva or other DNA-carrying fluids. Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 WASH. L. REV. 413, 436 (2001). If testing an abandoned and unseized biological sample was still to be considered a “search,” this would, by definition, require that there was some sort of intrusion other than intrusion into a person’s body. One such intrusion that would make the testing of an unseized biological sample a search would be the test’s intrusion into an expectation of privacy regarding “private medical facts” that can be found in DNA. D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 481–82 (2001) (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989)). When such testing intrudes on an expectation of privacy regarding “private medical facts,” the testing is a search that does not need to be connected to an antecedent seizure and intrusion into a person’s body. D.H. Kaye & Michael E. Smith, *DNA Identification*

However, the Ninth Circuit in *Snyder* did not go so far as to say that the testing of the blood sample was not a search.²⁸

4. State Courts Went Beyond *Snyder* and Said Blood Tests Are Not Searches

Many state courts not only adopted the Ninth Circuit's *Snyder* interpretation of *Schmerber*—that exigent-circumstance DUI blood draws and analysis constitute one Fourth Amendment event—but also went beyond the *Snyder* decision by saying that this Fourth Amendment event terminates when the blood is drawn and that the individual loses all expectation of privacy in a blood sample once his or her blood is seized.²⁹ The state courts' holdings that there is no

Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage, 2003 Wis. L. REV. 413, 444 (2003) (“[T]he sensitive nature of some of the information locked in the helices of the DNA molecule leads us to believe that DNA sampling is a Fourth Amendment search, even if the sample is obtained noninvasively.”).

28. The Ninth Circuit concluded that “under *Schmerber*, so long as blood is extracted incident to a valid arrest based on probable cause to believe that the suspect was driving under the influence of alcohol, the subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes.” *Snyder*, 852 F.2d at 474. A footnote clarifies this statement as follows: “This assumes, of course, that ‘the test chosen to measure [the defendant’s] blood-alcohol level was a reasonable one’ and ‘was performed in a reasonable manner’ under *Schmerber*.” *Id.* at 474 n.2 (quoting *Schmerber*, 384 U.S. at 771). This footnote’s discussion of “reasonableness” in regard to the blood’s testing indicates the Ninth Circuit still considered blood testing to be a search, just not a search that is an independent Fourth Amendment event in relation to the blood draw.

29. See, e.g., *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001) (holding that the defendant had an expectation of privacy in his blood sample until his blood was drawn, as the Fourth Amendment event terminated after the draw and no new seizures or searches subsequently occurred); *Wilson v. State*, 752 A.2d 1250, 1272 (Md. Ct. Spec. App. 2000) (“Any legitimate expectation of privacy that the appellant had in his blood disappeared when that blood was validly seized.”); *People v. King*, 663 N.Y.S.2d 610, 614 (1997) (“Privacy 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.”); *State v. Barkley*, 551 S.E.2d 131, 135 (N.C. Ct. App. 2001) (“Once the blood was lawfully drawn from defendant’s body, he no longer had a possessory interest in that blood.”); *State v. Sanders*, Nos. 93-2284-CR, 93-2286-CR, 1994 WL 481723, at *5 (Wis. Ct. App. Sept. 8, 1994) (“We agree with the trial court that, once the police came into lawful possession of the blood samples, Sanders lost any expectation of privacy he may have had in them, at least insofar as testing for intoxicants—whether alcohol or drug—related-is concerned.”); see also *State v. Hauge*, 79 P.3d 131, 144 (Haw. 2003) (“[A] number of jurisdictions have held on analogous facts that once a blood sample and a DNA profile is lawfully procured

expectation of privacy in a blood sample implies that testing a blood sample is not a search; the definition of “search” requires the infringement of an expectation of privacy.³⁰

Many states agree that the analysis of blood is not a search in exigent-circumstances DUI cases, and this is in contrast to the general rule that the “collection and analysis of biological samples” is a search.³¹ The reason for this anomaly may be largely policy-based—if courts freely admit that an exigent-circumstances DUI blood draw and analysis is a search, and if the blood’s analysis can be identified as a search that is separate from the search of the blood draw, it follows that a warrant would be required for that analysis. This is the very argument the appellant in *Schmerber* made to no

from a defendant, no privacy interest persists in either the sample or the profile.”); *State v. VanLaarhoven*, 637 N.W.2d 411, 417 (Wis. Ct. App. 2001) (“*Snyder* teach[es] that the examination of evidence . . . is an essential part of the seizure and does not require a judicially authorized warrant. [*Snyder*] refuse[s] to permit a defendant to parse the lawful seizure of a blood sample into multiple components.”); *Nedelcu*, *supra* note 11, at 201 (citing WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.10(e) (5th ed. 2013)) (“[N]ational search and seizure jurisprudence is largely in agreement: No express judicial authorization is needed to analyze a suspect’s blood . . . once it has already been lawfully procured.”).

30. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (“A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”).

31. See *State v. Surge*, 94 P.3d 345, 347 (Wash. Ct. App. 2004) (observing that “[c]ourts generally agree that the collection and analysis of biological samples from an individual constitutes a search for purposes of the Fourth Amendment”), *aff’d*, 156 P.3d 208 (Wash. 2007). Many state courts have found blood sample analysis not to be a search in DUI cases mainly due to the fact that before *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), blood draws were often taken when probable cause and the exigent circumstances justification for a warrantless search existed. The justification of exigent circumstances was used because the evidence of substances in the bloodstream dissipates if the blood draw is not conducted quickly. Evidence obtained with probable cause and in exigent circumstances, taken and tested for existence of evidence of a crime, is admissible. See, e.g., *State v. Aguirre*, 295 N.W.2d 79, 81 (Minn. 1980). Thus, it seems that pre-*Birchfield* courts were more willing to acknowledge that non-blood draw biological-sample extraction techniques were searches because the collection and analysis of such samples was not time-sensitive. Pre-*Birchfield* courts were less willing to acknowledge that blood draws were searches because the collection and analysis of such samples is time-sensitive, and excessive warrant requirements in a society that was not as technologically advanced as it is today could easily result in evidence being lost in that short amount of time. See *Birchfield*, 136 S. Ct. at 2192–93 (describing recent technological advances that make requesting and issuing warrants more expeditious).

avail.³² Such a requirement would certainly burden police and judges with what states may see as a frivolous need to justify testing of samples that are already in the authorities' hands.

Minnesota does not classify the testing of a lawfully obtained blood sample as a search. In the 2010 Minnesota Court of Appeals case *Harrison v. Commissioner of Public Safety*,³³ the defendant paralleled the argument made by the defendant in *Snyder* over two decades earlier.³⁴ The defendant in *Harrison* consented to blood testing in two separate instances of DUI arrests.³⁵ He argued that the drawing of his blood and the subsequent testing of his blood sample were two distinct Fourth Amendment events.³⁶

The Minnesota Court of Appeals interpreted *Schmerber* as establishing that the exigent-circumstances exception to the warrant requirement applied to the blood's analysis for alcohol content, not just to the blood draw.³⁷ Similar to the Ninth Circuit's decision in *Snyder*, the Minnesota Court of Appeals in *Harrison* rejected the defendant's reasoning that the drawing of blood and the testing of blood are two independent Fourth Amendment events.³⁸

Moreover, the Minnesota Court of Appeals in *Harrison* adopted the reasoning of a later Ninth Circuit decision, *United States v.*

32. *Snyder*, 852 F.2d at 473.

33. *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 921 (Minn. Ct. App. 2010).

34. *See Snyder*, 852 F.2d at 472–73.

35. *Harrison*, 781 N.W.2d at 919.

36. *Id.* at 921.

37. *Id.* at 920 (citing *Schmerber v. California*, 384 U.S. 757, 770 (1966)) (“[T]he United States Supreme Court . . . [has] recognized the validity of the application of the exigent-circumstances exception to alcohol testing for impaired driving.”). The Minnesota Court of Appeals identified that the Minnesota Supreme Court came to the same conclusion in *State v. Shriner*, 751 N.W.2d 538, 549–50 (Minn. 2008). *Harrison*, 781 N.W.2d at 920. However, the reasoning of both *Schmerber* and *Shriner* that *Harrison* highlights justifies the drawing of a blood sample, not the searching of such a sample. In citing *Schmerber*, the Minnesota Court of Appeals points to this language: “[T]he delay necessary to obtain a warrant . . . threaten[s] the destruction of evidence.” *Id.* (quoting *Schmerber*, 384 U.S. at 770). In citing *Shriner*, the Minnesota Court of Appeals points to this language: “[The] rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation.” *Id.* (quoting *Shriner*, 751 N.W.2d at 549–50).

38. *Id.* at 921.

Kincade.³⁹ In *Kincade*, the Ninth Circuit's reasoning went beyond *Snyder*'s interpretation of *Schmerber* and resembled the positions of other state courts. *Harrison*, relying on *Kincade*, specified that the defendant lost all "legitimate" expectations of privacy in his blood sample⁴⁰ once the blood was drawn and that, accordingly, the testing of the defendant's blood was not a search at all.⁴¹ The Minnesota Court of Appeals' decision in *Harrison* never addressed the question of whether the blood draw and the blood's subsequent testing was part of one or two Fourth Amendment events; it simply found that the blood testing had no Fourth Amendment significance whatsoever.⁴²

39. United States v. *Kincade*, 379 F.3d 813 (9th Cir. 2004).

40. *Harrison*, 781 N.W.2d at 921 (citing *Kincade*, 379 F.3d at 837) ("We conclude that when the state has lawfully obtained a sample of a person's blood under the implied-consent law, specifically for the purpose of determining alcohol concentration, the person has lost any legitimate expectation of privacy in the alcohol concentration derived from analysis of the sample."). *Harrison*'s reliance on *Kincade* is misplaced for two reasons. First, *Kincade* was not a case in which the defendant's blood draw was justified by probable cause and exigent circumstances; *Kincade* involved the blood draw of conditionally released federal offenders under a "special need" analysis. See *Kincade*, 379 F.3d at 832. Therefore, the *Kincade* court was not faced with the task of evaluating the role of policy considerations related to exigent circumstances. Second, in *Kincade* the Ninth Circuit specifically stressed, "Let us be clear: Our holding in no way intimates that conditional releasees' diminished expectations of privacy serve to extinguish their ability to invoke the protections of the Fourth Amendment's guarantee against unreasonable searches and seizures." *Id.* at 835. This direct statement makes clear that a releasee has "diminished" (as opposed to nonexistent) expectations of privacy. See *id.* The releasee is still able to invoke Fourth Amendment protections despite the fact that the releasee is convicted. On the other hand, the defendant in *Harrison* was on trial for his drunk driving charge but had not been convicted. Thus, the Minnesota Court of Appeals' reliance on *Kincade* in *Harrison* was misplaced. The court lacked foundation for its assertion that someone who is not convicted and whose blood was lawfully obtained under implied-consent law, for the purpose of determining alcohol concentration, has no "legitimate" expectation of privacy in the results of the alcohol analysis.

41. *Harrison*, 781 N.W.2d at 921 ("A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed *Harrison* has no legitimate expectation of privacy in the alcohol concentration derived from analysis of his lawfully-obtained blood sample."). The court, generalizing this principle, announced, "Absent such a privacy interest, any testing of the blood sample for its alcohol concentration is not a search that implicates constitutional protection." *Id.*

42. By not addressing all the potential Fourth Amendment events that had occurred in the facts of the case, the Minnesota Court of Appeals' ruling in *Harrison*

5. *The United States Supreme Court Continues to Protect Privacy Expectations in Blood Samples*

Despite a massive number of state cases holding that individuals lose all expectations of privacy once their blood is drawn and that the Fourth Amendment event terminates at that moment, the United States Supreme Court has consistently recognized that at least part of an individual's expectation of privacy extends beyond the blood draw. First, in the 1989 case *Skinner v. Railway Labor Executives' Ass'n*,⁴³ decided shortly after the Ninth Circuit's *Snyder* decision, the Supreme Court held that analysis of a biological sample is a "further invasion"⁴⁴ of the privacy interests of one who has already been subjected to the government's compelled intrusion into his or her body.⁴⁵ The Court explained the extent of the

differed from the assertion of many state courts. Using *Schmerber*, those courts held that the blood draw and blood testing are part of one Fourth Amendment event. See *supra* note 29 and accompanying text.

43. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989).

44. *Id.* at 616. The Court's use of the phrase "further invasion" in *Skinner* is the extent to which the Supreme Court had until that time, and even for years after, attempted to describe the relationship between the taking of a biological sample and the biological sample's analysis. Leigh M. Harlan, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 192 (2004). The Court never elaborated on what it really meant by "further invasion." See *Skinner*, 489 U.S. at 616–17. This lack of specificity makes tracking the number of Fourth Amendment events in a DUI case during the *Schmerber* and *Skinner* era difficult and a matter of some conjecture.

45. *Skinner*, 489 U.S. at 616–17 (citing *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987)). In *Hicks*, police raided a suspect's apartment without a warrant in order to find weapons, victims, and the possible shooter related to a bullet discharged from the apartment. *Id.* at 321. When the police saw a stereo that they believed may have been stolen, they moved some items around the stereo in order to access the stereo's serial number. *Id.* The Court held that the moving of these items did not constitute a seizure because it did not "meaningfully interfere" with the respondent's possessory interests. *Id.* However, the Court held that the moving of the items was a separate search because it was an invasion of the respondent's privacy that was "unjustified by the exigent circumstance that validated the entry." *Id.* at 325. Since the police did not have a warrant for such a search, the Court affirmed the exclusion of incriminating evidence found in the course of this unconstitutional search. *Id.* at 329. Given that the Court suppressed evidence in *Hicks*, the *Skinner* Court's reliance on *Hicks* to demonstrate what a "further invasion" looks like seems odd because the Court did not suppress evidence in *Skinner*. Had the *Skinner* Court completed its analogy to *Hicks*, it would have found that the "further invasion" of a blood sample's analysis caused the results to be inadmissible, just as the "further invasion" in *Hicks* of police moving items in order to access a stereo's serial number caused evidence

invasion by noting that chemical testing of blood undisputedly “can reveal a host of private medical facts.”⁴⁶ The Court ultimately found that the “further invasion” of chemical analysis of a biological sample is not an unreasonable search.⁴⁷ Nevertheless, it is significant that the Court considered the “further invasion” of chemical analysis to be a “search” that is subject to Fourth Amendment scrutiny and distinct from the search implicated in the taking of the biological sample.⁴⁸

Much more recently, in the 2013 case *Maryland v. King*,⁴⁹ the United States Supreme Court decided that the extraction and analysis of DNA from an individual arrested on probable cause of a serious offense is a search that is part of the singular process of

to be inadmissible.

46. *Skinner*, 489 U.S. at 617. In noting the medical invasiveness of blood testing, *Skinner* picked up where *Schmerber* had left off. *Skinner* begins an ongoing judicial discussion that separates the analysis of blood with its distinct privacy concerns (for instance, medical information being exposed) from the privacy concerns inherent in the blood draw (for instance, physical intrusion into the body).

47. *Id.* at 634. Notably, *Skinner* was not a DUI case, so the Court’s conclusions in *Skinner* may not have been as binding on DUI case law as *Schmerber* was. In *Skinner*, the government was testing urine samples of railway workers in order to make sure that no railway employees were intoxicated. *Id.* at 620–21. Therefore, although the Court in *Skinner* detoured briefly into a discussion of blood draw testing, the way in which the context of *Skinner* differs from the general context of DUI case law is one reason the Wisconsin Court of Appeals, in a 1994 decision with facts nearly identical to the facts in *State v. Fawcett*, see *infra* Section III.A, decided that *Skinner* was not controlling. *State v. Sanders*, Nos. 93-2284-CR, 93-2286-CR, 1994 WL 481723, at *5 (Wis. Ct. App. 1994) (unpublished table decision).

48. *Skinner*, 489 U.S. at 616, 633–34; see also Natalie Logan, *Questions of Time, Place, and Mo(o)re: Personal Property Rights and Continued Seizure Under the DNA Act*, 92 B.U.L. REV. 733, 740 (2012) (“Once collected, the analysis of the sample constitutes a second, independent search of the seized sample.”). It has been argued that the Court’s use of the term “further invasion” in *Skinner* was not intended to make a clear distinction between the Fourth Amendment significance of a blood draw and a blood sample’s analysis since *Skinner*’s factual context did not involve blood draws and was based on the “special needs” exception to the warrant requirement instead of the “exigent circumstances” exception that is the basis of DUI blood draws and testing. Nedelcu, *supra* note 11, at 195. However, the fact that the *Skinner* Court intentionally detoured into a discussion of blood draws and relied on *Hicks*—a case that clearly exemplifies what a “further invasion” looks like in a non-biological sample case, see *supra* note 45—indicate that the Court’s use of the term “further invasion” was in fact intended to allow future courts to assign independent Fourth Amendment significance to blood sample analysis.

49. 133 S. Ct. 1958 (2013).

arrest.⁵⁰ The testing of blood samples obtained through warrantless blood draws in suspected drunk driving cases is not considered “administrative” as the DNA sample in *King* was.⁵¹ However, *King* is still important to suspected drunk driving blood draw cases because the Supreme Court interpreted the search in *King* to include both the taking and the analyzing of a suspect’s biological information.⁵² The decision in *King* that the drawing and the analysis of blood is a “search” differs from the many post-*Snyder* state cases. Since many post-*Snyder* state court cases held that testing of biological material is not a search and does not require analysis of whether the intrusion offended an individual’s reasonable expectation of privacy,⁵³ the Supreme Court’s holding in *King* clearly takes courts in a direction that favors individuals’ rights to the privacy of their own blood.

In its 2016 case *Birchfield v. North Dakota*,⁵⁴ the United States Supreme Court bolstered its *King* interpretation of what a search is. Reflecting on its *King* decision, the Court identified that the authorities’ possession of King’s DNA was a greater intrusion into the suspect’s expectation of privacy than the level of intrusion

50. *Id.* at 1965 (“[T]he Court concludes that DNA identification of arrestees is a reasonable search . . .”); *id.* at 1980 (“When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, *taking and analyzing* a cheek swab of the arrestee’s DNA . . . is reasonable under the Fourth Amendment.” (emphasis added)).

51. *Id.* at 1970.

52. *Id.* at 1980 (“[O]nce respondent’s DNA was *lawfully collected* the STR *analysis* of respondent’s DNA . . . did not amount to a significant *invasion of privacy* that would render the DNA identification impermissible under the Fourth Amendment.” (emphases added)). In its language, the Court differentiated between the DNA’s collection, which it deemed lawful, and the DNA’s analysis, which it reviewed in terms of whether the analysis was an “invasion of privacy.” Though the Court found the analysis was not a “significant invasion of privacy,” it nevertheless deemed it an “intrusion.” *Id.* Finally, the Court weighed the personal “intrusion” of the analysis against the state’s interest in using the results of the analysis. *Id.* at 1970. This identification of an “intrusion” that the state’s interest must overcome shows that the Court attributed some Fourth Amendment significance to the analysis of DNA. *See id.* at 1977. The Court did not go so far as to use *Skinner* as a conduit to classify analysis of a biological sample as a “further invasion” independent of the biological sample’s extraction. *See id.* at 1978. However, the Court still defended the individual’s reasonable expectation of privacy in the analysis of his or her biological sample, even though such expectation was lumped together with the individual’s expectation of privacy regarding extraction of his or her biological sample. *See id.* at 1979–80.

53. *See supra* note 29.

54. 136 S. Ct. 2160 (2016).

required to conduct a breath test.⁵⁵ The Court found that analysis of the DNA sample in *King* was more intrusive than breath testing in general because authorities in the *King* case could have used the DNA sample to find a “wealth of . . . highly personal information.”⁵⁶ The Court in *Birchfield* reasoned that the potential for discovery of highly personal information in *King* was significant regardless of the fact that the law did not allow authorities to use DNA evidence to extract personal and medical information from *King*.⁵⁷

Therefore, from its 1989 *Skinner* decision to its 2016 *Birchfield* decision, the United States Supreme Court has continuously categorized the analysis of biological material obtained from a suspects’ blood draw as at least a search that is part of a Fourth Amendment event and at most a Fourth Amendment event in and of itself.

B. Limitations on Search and Seizure Law

1. Minnesota Requires Warrant Affidavits and Applications to Be Particularized and Establish Probable Cause

The Minnesota Supreme Court has explained that an application for a search warrant, “interpreted in a common-sense and realistic manner, must be found to contain information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched.”⁵⁸ Further, a reviewing magistrate must determine in a “common-sense and practical manner” whether or not the submitted warrant application and affidavit give rise to the probable cause needed for the magistrate to issue the warrant.⁵⁹ In reviewing the warrant application and affidavit, the issuing magistrate must evaluate the “totality of the circumstances” available to him or her through the affidavit, not the actual circumstances known to the officer requesting the warrant.⁶⁰

55. *Id.* at 2177.

56. *Id.*

57. *Id.*

58. *State v. Gail*, 713 N.W.2d 851, 858 (Minn. 2006) (internal quotation marks omitted) (quoting *Rosillo v. State*, 278 N.W.2d 747, 748–49 (Minn. 1979)).

59. *State v. Kahn*, 555 N.W.2d 15, 17 (Minn. Ct. App. 1996) (citing *State v. Eggler*, 372 N.W.2d 12, 15 (Minn. Ct. App. 1985)).

60. *Id.* at 18 (citing *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985)).

The court recognizes that the magistrate's decision to issue a warrant is tied to the level of detail provided to him or her in the affidavit, and the decision depends on whether these details adequately describe probable cause of a nexus between the contraband, the location of the contraband, and the individual.⁶¹ Even if a magistrate's decision to issue a warrant is challenged, the reviewing court is expected to "pay great deference to the magistrate's determination."⁶² The reviewing court "may not engage in a hypertechnical examination of the affidavit."⁶³

2. *Minnesota Courts Allow Flexibility in Achieving Warrant Particularity*

Minnesota has agreed with the United States Supreme Court that a search must be limited in scope to the circumstances that gave rise to the search.⁶⁴ Further, the Particularity Clause of the Fourth Amendment limits warranted searches to the scope of the warrant.⁶⁵ A search has not gone beyond the scope of the warrant if the court considers the search's relationship to the warrant to be "reasonable."⁶⁶ Minnesota courts grant a "degree of flexibility" in determining whether such a warranted search has violated the Particularity Clause.⁶⁷ The Minnesota Supreme Court has specifically noted that "[a] warrant which describes things in broad and generic terms may be valid when the description is as specific as the

61. *Id.* at 18–19. For example, in *Kahn*, the Minnesota Court of Appeals barred evidence obtained from a search warrant that had been issued subsequent to an officer's application and affidavit listing a loose association between the contraband, its location, and the individual. *Id.* at 18. The warrant application and affidavit described an amount of cocaine that had been seized from the respondent's person, the address of where the respondent was known to have lived (at least seventy-five miles from the place the respondent was detained), and the officer's assessment that such an amount of cocaine found on respondent usually means there is a larger selling operation in progress. *Id.*

62. *Id.* (citing *Eggler*, 372 N.W.2d at 15).

63. *Id.*

64. *State v. Dickerson*, 469 N.W.2d 62 (Minn. Ct. App. 1991) (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

65. *State v. Soua Thao Yang*, 352 N.W.2d 127, 129 (Minn. Ct. App. 1984) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

66. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

67. *State v. Poole*, 499 N.W.2d 31, 34 (Minn. 1993).

circumstances and nature of the activity under investigation permit.”⁶⁸

3. *In 2016, the United States Supreme Court Recognized a Warrant Application’s Power to Inform the Warrant in Birchfield*

In *Birchfield v. North Dakota*, the United States Supreme Court evaluated three cases—two cases originating in North Dakota and one case originating in Minnesota.⁶⁹ In the Minnesota case, the defendant refused to take a warrantless breath test after having been arrested and taken to the police station.⁷⁰ The Court reasoned that in the Minnesota case (as well in as the two North Dakota cases), if the police had obtained a warrant prior to administering a breath test, “the scope of the warrant would [have simply been] a BAC test of the arrestee.”⁷¹ The Court concluded that a warrant requirement for all breath tests is unnecessary because the officers’ characterizations of facts are substantially similar across most drunk driving stops.⁷² The Court noted that if warrants were required for all breath tests, many warrants would be substantially similar to each other and would waste time recounting facts common to all DUI cases.⁷³ Because such a scripted recitation of facts from the officer to the warrant-issuing judge would be a waste of time, police are not required to burden magistrates by obtaining warrants before performing breath tests on suspected drunk drivers.⁷⁴

68. *Id.* at 34 (internal quotation marks omitted) (quoting *State v. Hannuksela*, 452 N.W.2d 668, 674 (Minn. 1990)). For example, a warrant allowing the seizure and search of the complete patient profiles of all women treated for family practice services by a doctor who was suspected of criminal sexual activity was deemed to have not been overbroad, because the extent of the doctor’s suspected criminal sexual activity was unknown. *Id.*

69. 136 S. Ct. 2160, 2162–63 (2016).

70. *Id.* at 2163.

71. *Id.* at 2181.

72. *Id.* (“In order to persuade a magistrate that there is probable cause for a search warrant, the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest.”). The Court describes how police observations of DUI suspects often rely on common themes, such as “a strong odor of alcohol, that the motorist wobbled when attempting to stand, that the motorist paused when reciting the alphabet or counting backwards, and so on.” *Id.* Despite this seeming monotony in warrant applications and affidavits, the Court points out, regarding the power of the warrant-applying officer, “A magistrate would be in a poor position to challenge such characterizations.” *Id.*

73. *Id.* at 2181–82.

74. *Id.* at 2181–82, 2184.

The Court's reasoning and conclusion in *Birchfield* regarding breath tests identify great power in Minnesota warrant applications and affidavits. By asserting that facts are substantially similar in most drunk driving stops and by asserting that the scope of the warrant in the Minnesota case would have been tied to the facts given by the detaining officer had the warrant been issued, the Court implies that a Minnesota warrant derives its authority largely from the facts of the incident as communicated by the detaining officer rather than from the judge who issues the warrant based on these facts. Thus, according to the Supreme Court, a warrant is unnecessary to verify the facts leading up to most blood draws. The warrant is only important in assessing the constitutionality of intrusions into suspects' expectations of privacy regarding blood draws and blood analyses.⁷⁵

III. STATE V. FAWCETT CASE DESCRIPTION

A. Facts and Procedural Posture

On May 24, 2014, at an intersection in Blaine, Minnesota, Debra Fawcett drove through a red light and crashed into another vehicle.⁷⁶ The collision left the driver of the other vehicle bleeding and with either a broken leg or ankle.⁷⁷ Fawcett also sustained minor injuries.⁷⁸ As Fawcett talked with an officer who arrived at the scene of the crash, the officer perceived alcohol on Fawcett's breath.⁷⁹ "Fawcett admitted [to the officer] she had consumed 'two to three beers' earlier."⁸⁰ Medical personnel arrived after this conversation and took Fawcett to Mercy Hospital.⁸¹

As Fawcett was being taken to Mercy Hospital, a police detective submitted an application for a search warrant⁸² requesting

75. This reasoning explains why the *Birchfield* Court required warrants for blood tests but not for breath tests. *Id.* at 2187.

76. *State v. Fawcett*, 884 N.W.2d 380, 382 (Minn. 2016).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Although pre-*Birchfield* Minnesota law in 2014, like the law of other states at that time, allowed police to force drivers to submit to warrantless blood draws in certain circumstances under the doctrine of "implied consent," police chose to obtain a warrant anyway in Fawcett's case. *See Birchfield*, 136 S. Ct. at 2162–63. This

permission to secure “a blood sample of [Fawcett] as evidence of the crime of criminal vehicular operation/homicide.”⁸³ Portions of the warrant application and supporting affidavit especially descriptive of Fawcett’s perceived condition of impairment were as follows:

- “Fawcett admitted to the officers that she was driving and had been drinking prior to the crash.”⁸⁴
- “From their investigation, officers formed the belief that at the time of the collision . . . Fawcett was the driver and was under the influence of alcohol.”⁸⁵
- “Fawcett admitted to responding officers that she had two or three drinks just prior to the crash, she smelled of an alcoholic beverage and it was apparent to officers on-scene that she had been drinking.”⁸⁶

The warrant application and supporting affidavit made no mention of any suspicion of the presence of drugs in Fawcett’s system.

The judge to whom the warrant application and affidavit were submitted issued a warrant allowing the police to direct a draw of Fawcett’s blood at Mercy Hospital and to send the blood to an approved lab for testing.⁸⁷ The judge reasoned that the blood “constitutes evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime.” Regarding the timeliness of the warrant’s issuance, the judge noted that “[d]ue to the dissipation of alcohol/drugs in the human body this warrant may be served at anytime during the day or night.”⁸⁸

precaution may indicate Minnesota police suspected that a *Birchfield*-like decision was imminent, and they may have wanted to justify their actions against foreseeable legal challenges.

83. *Fawcett*, 884 N.W.2d at 382. Note that although the police suspected Fawcett had committed the crime of “criminal vehicular operation/homicide,” this does not imply that Fawcett committed criminal vehicular homicide. “Criminal vehicular operation/homicide” was simply the then-current statutory language of a crime that could be committed either by criminal vehicular operation that resulted in bodily harm or by criminal vehicular operation that resulted in a death. *See* MINN. STAT. § 609.21 (2007) (renumbered MINN. STAT. §§ 609.2111–2114 on Aug. 1, 2014). There are now separate offenses for criminal vehicular homicide, MINN. STAT. § 609.2112 (2016), and criminal vehicular operation with bodily harm, § 609.2113 (2016).

84. *Fawcett*, 884 N.W.2d at 383–84.

85. *Id.*

86. *Id.* at 383.

87. *Id.*

88. *Id.*

The police went to Mercy Hospital and presented the signed warrant.⁸⁹ Fawcett completed a preliminary breath test (PBT), and a medical professional drew a sample of her blood.⁹⁰ The PBT read .000.⁹¹ Fawcett told the police that “she was depressed and was currently taking Lorazepam and Wellbutrin.”⁹² Police submitted Fawcett’s blood sample to the Bureau of Criminal Apprehension (“BCA”) to be analyzed.⁹³

On June 24, 2014, the BCA reported that it had not found any ethyl alcohol in Fawcett’s blood sample.⁹⁴ Nevertheless, the report maintained that “additional toxicology report(s) [would] follow.”⁹⁵ On September 9, 2014, the BCA reported that Fawcett’s blood “contained a metabolite of tetrahydrocannabinol (THC) and Alprazolam at the time of the accident.”⁹⁶

On October 16, 2014, the State filed a complaint charging Fawcett with criminal vehicular operation under Minnesota Statutes section 609.21, subdivision 1(2)(ii).⁹⁷ The statute reads, “A person is guilty of criminal vehicular homicide or operation . . . if the person causes injury to or the death of another as a result of operating a motor vehicle . . . in a negligent manner while under the influence of . . . a controlled substance.”⁹⁸

Fawcett motioned to suppress “all evidence of the presence of drugs.”⁹⁹ She argued that the warrant did not give the police the authority to test her blood for the presence of controlled substances.¹⁰⁰ The trial court granted Fawcett’s motion to suppress evidence of the presence of drugs in her blood.¹⁰¹ The trial court ruled that the warrant allowed authorities to draw Fawcett’s blood

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. MINN. STAT. § 609.21, subdiv. 1(2)(ii) (2012). Since the State did not charge Fawcett with criminal vehicular homicide or operation involving a combination of one or more controlled substances and alcohol according to MINN. STAT. § 609.21, subdiv. 1(2)(iii), it follows that at some point, the State realized its mistaken reliance on the idea that Fawcett was under the influence of alcohol.

99. *Fawcett*, 884 N.W.2d at 383.

100. *Id.*

101. *Id.*

and analyze it for the presence of alcohol but, after initial testing results indicated there was no alcohol in Fawcett's blood, not for the presence of drugs.¹⁰² The trial court reasoned that the testing of Fawcett's blood should have been "limited in scope to the probable cause presented in the application and affidavit, namely, a search of [Fawcett's] blood to obtain evidence of alcohol use."¹⁰³

The State appealed the trial court's suppression of the secondary testing of Fawcett's blood for drugs, arguing that the results of that test provided its sole proof that Fawcett was under the influence of a controlled substance during the crash.¹⁰⁴ The issue of whether the testing of a blood draw was an independent Fourth Amendment event was a matter of first impression for the Minnesota Court of Appeals.¹⁰⁵ The Minnesota Court of Appeals reversed the suppression order,¹⁰⁶ reasoning that no one has a reasonable expectation of privacy in a blood sample that has been lawfully taken.¹⁰⁷ The court held that because Fawcett did not have a reasonable expectation of privacy in her blood, the testing of her blood was "not a distinct Fourth Amendment event."¹⁰⁸ Fawcett subsequently petitioned to the Minnesota Supreme Court,¹⁰⁹ and the court granted review.¹¹⁰

B. The Minnesota Supreme Court's Ruling

The Minnesota Supreme Court affirmed the decision of the Minnesota Court of Appeals to reverse the suppression of the drug testing of Fawcett's blood sample.¹¹¹ Substantively, the Minnesota

102. *Id.*

103. *Id.*

104. *Id.* at 383–84.

105. *State v. Fawcett*, 877 N.W.2d 555, 559 (Minn. Ct. App. 2016) ("[T]here is no binding authority of which we are aware considering whether the chemical analysis of blood is a Fourth Amendment event distinct from the blood draw itself."), *aff'd*, 884 N.W.2d 380.

106. *Id.* at 556.

107. *Id.* at 561.

108. *Id.*

109. Petition for Further Review and Addendum, *Fawcett*, 884 N.W.2d 380 (No. A15-0938), <http://macsnc.courts.state.mn.us/ctrack/view/publicCaseMaintenance.do?csNameID=80658&csInstanceID=92541#>.

110. *Fawcett*, 884 N.W.2d at 384.

111. *Id.* at 388.

Supreme Court allowed evidence of Fawcett's drug use to be presented at Fawcett's criminal trial.¹¹²

The reasoning the Minnesota Supreme Court gave for vacating the trial court's suppression order differs dramatically from the reasoning given by the Minnesota Court of Appeals. The supreme court acknowledged that Fawcett had some expectation of privacy in her blood sample even after the blood sample was drawn.¹¹³ The supreme court dodged the issue of whether Fawcett's expectation of privacy was "reasonable" by concluding that at any rate, the warrant was valid and was sufficient to overcome any expectation of privacy, reasonable or unreasonable, that Fawcett had about her blood.¹¹⁴ The Minnesota Court of Appeals did not need to grapple with the issue of reasonableness due to its denial of the existence of any expectation of privacy Fawcett might have had in her blood.¹¹⁵

In her brief to the Minnesota Supreme Court, Fawcett argued that since the warrant application and affidavit only gave evidence of her alcohol use and did not present any evidence of the use of controlled substances, the corresponding warrant failed in two ways: the warrant did not give the police probable cause to re-search the blood for the presence of controlled substances,¹¹⁶ and it was overbroad in indiscriminately allowing all types of testing to be conducted on her blood, therefore violating the Particularity Clause of the Fourth Amendment.¹¹⁷ To bolster her argument of the warrant's overbreadth, Fawcett submitted a letter of supplemental authority to the Minnesota Supreme Court on June 27, 2016, explaining that the United States Supreme Court's June 23, 2016, decision in *Birchfield v. North Dakota* clarified that when seized through the use of a warrant, a blood sample can only be tested to the extent allowable under that warrant.¹¹⁸

112. *Id.* at 382, 388.

113. *Id.* at 384 n.3.

114. *Id.* (noting that since the warrant was found to be a valid basis for the testing, the court did not need to resolve the exact extent of the expectation of privacy Fawcett retained in her blood).

115. *See generally* State v. Fawcett, 877 N.W.2d 555 (Minn. Ct. App. 2016), *aff'd*, 884 N.W.2d 380.

116. Appellant's Brief and Addendum at 13–33, *Fawcett*, 877 N.W.2d 555 (No. A15-0938).

117. *See id.* at 33–45.

118. Appellant's Letter of Citation of Supplemental Authority at 1, *Fawcett*, 877 N.W.2d 555 (No. A15-0938) (citing *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)).

The Minnesota Supreme Court acknowledged the significance of *Birchfield* in establishing an expectation of privacy in one's blood sample, which a warrant must overcome.¹¹⁹ However, the court rejected both of appellant Fawcett's arguments regarding the insufficiency of the warrant.¹²⁰ In rejecting Fawcett's argument about the lack of probable cause, the court explained that it was upholding the probable cause standard by requiring warrant-issuing judges to have theoretically reasoned that the facts in the warrant application and affidavit provide a "fair probability that contraband or evidence of a crime will be found in a particular place."¹²¹

The Minnesota Supreme Court explained that when there is dispute as to whether there is enough probable cause to justify a search warrant, deference is given to a warrant-issuing magistrate's inferences.¹²² This deference does not extend to the applicant's interpretation of the information that he or she provided the magistrate.¹²³

The Minnesota Supreme Court reasoned that based on the totality of the facts presented in the warrant application and the affidavit, including facts describing Fawcett's crash and the police's perception of Fawcett's condition, "the issuing judge [had] a substantial basis to conclude there was a fair probability that evidence of criminal vehicular operation would be found in Fawcett's blood."¹²⁴ Specifically, the Minnesota Supreme Court concluded that the warrant-issuing judge in *Fawcett* had a substantial basis to infer that there may have been more intoxicants in Fawcett's blood than just alcohol.¹²⁵ Accordingly, the belief that the blood

119. *Fawcett*, 884 N.W.2d at 384 n.3.

120. *Id.* at 384–88.

121. *Id.* at 385 (emphasis added) (quoting *State v. Jenkins*, 782 N.W.2d 211, 223 (Minn. 2010)).

122. *Id.*

123. *Id.*; see also *Schmerber v. California*, 384 U.S. 757, 770 (1966) (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)) ("The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'").

124. *Fawcett*, 884 N.W.2d at 385.

125. The Minnesota Supreme Court did acknowledge that the warrant and supporting affidavit stated that "Fawcett was the driver and was under the influence of alcohol." *Id.* However, it seems the court wanted to downplay the affiant's strong assertion of Fawcett's impairment by alcohol by avoiding use of the word "alcohol." The court used the phrases "under the influence" and "impaired" in describing how the warrant-issuing magistrate may have interpreted the warrant application and

would contain “evidence of criminal vehicular operation” was sufficiently particular as tested from the standpoint of the warrant-issuing judge, and the judge’s decision to issue the warrant was not so unreasonable that the Minnesota Supreme Court would overturn it.¹²⁶

The Minnesota Supreme Court also rejected Fawcett’s argument that the warrant violated the Particularity Clause and was overbroad in its direction to send “Fawcett’s blood sample ‘to an approved lab for testing.’”¹²⁷ In rejecting this argument, the court reasoned that the warrant-issuing judge had properly weighed “the circumstances of the case . . . , as well as the nature of the crime under investigation and whether a more precise description [was] possible under the circumstances.”¹²⁸ The court held that the warrant was not overbroad in the particular circumstances at hand because it authorized the search of Fawcett’s blood for “evidence of the crime of criminal vehicular operation/homicide.”¹²⁹ This categorization is broader than a hypothetically similar order limiting the search of Fawcett’s blood to only signs of alcohol use. However, the court reasoned that such broadening was lawful because Minnesota law limited the search to discovery of the presence of “alcohol and/or controlled substances.”¹³⁰ Further, the court reasoned that the search was limited in that it did not authorize the testing of Fawcett’s blood for health or DNA information.¹³¹

C. *The Dissents*

Justices Stras, Lillehaug, and Hudson dissented.¹³² None of these three dissenting justices found the majority’s requirement that the warrant have probable cause and particularity for both the blood draw and the blood analysis¹³³ to be objectionable.¹³⁴ In fact, they

affidavit instead of “under the influence of *alcohol*” or “impaired by *alcohol*.” *See id.* at 386 (describing Fawcett as “under the influence” or “impaired”).

126. *Id.* at 385.

127. *Id.* at 387.

128. *Id.* (quoting *State v. Miller*, 666 N.W.2d 703, 713 (Minn. 2003)).

129. *Id.*

130. *Id.* (citing MINN. STAT. § 609.21, subdiv. 1(2) (2007)).

131. *Id.* at 387–88.

132. *Id.* at 388–91.

133. *See id.* at 384–87.

134. *See id.* at 388–91.

complimented the majority's reasoning by further explaining the need for the testing of the blood sample to be tied to the warrant.¹³⁵

The dissents simply found that the majority's conclusion, that the warrant and the application documents the warrant relied upon had facts sufficient to establish probable cause,¹³⁶ was made without proper consideration of the warrant applicant's affidavit.¹³⁷ The dissents were largely in agreement on where the majority erred.¹³⁸ Justice Stras's dissent, joined by Justices Lillehaug and Hudson as to the first two parts, contended that the warrant application only established probable cause for the presence of alcohol in Fawcett's blood, not the presence of controlled substances.¹³⁹ Justice Stras further contended, in a similar vein, that there were no direct facts to support a warrant-issuing judge's possible inference that Fawcett was intoxicated by anything other than alcohol.¹⁴⁰ Finally, Justice Stras pointed out that the affidavit's statement that police "sought evidence of the crime of criminal vehicular operation/homicide"

135. All the dissenting justices agreed with the majority's first point—that blood draws require warrants with sufficient particularity. *Id.* at 389 (Stras, J., dissenting) (citing *Horton v. California*, 496 U.S. 128, 140 (1990)) ("The permissible extent of the invasion is tied to the scope of the warrant."); *id.* at 391 (Lillehaug, J., dissenting) (joining the dissent of Justice Stras in parts I and II); *id.* (Hudson, J., dissenting) (joining the dissent of Justice Lillehaug).

136. *Id.* at 385 (majority opinion) ("[T]he issuing judge had a substantial basis to conclude there was a fair probability that evidence of intoxicants, whether alcohol, controlled substances, or a combination of alcohol and controlled substances would be found in Fawcett's blood.").

137. *Id.* at 390 (Stras, J., dissenting) ("The fact that the affidavit generally references the suspected crime [of criminal vehicular homicide or operation] is of little assistance."); *id.* at 391 (Lillehaug, J., dissenting) (joining Justice Stras and reiterating that "[t]he search-warrant application and affidavit, on their face, failed to establish probable cause for the search of appellant's blood for controlled substances"); *id.* (Hudson, J., dissenting) (joining the dissent of Justice Lillehaug).

138. *Id.* at 388–91 (Stras, J., dissenting) (organizing the dissent into three parts: (I) recollection of facts, (II) critique of unlikely inferences the majority awards the issuing judge and critique of undue expansion of probable cause, and (III) discussion of adopting the good faith exception in Minnesota); *id.* at 391 (Lillehaug, J., dissenting) (joining the dissent of Justice Stras in parts I and II but not in part III); *id.* (Hudson, J., dissenting) (joining the dissent of Justice Lillehaug). Justices Lillehaug and Hudson did not join Justice Stras in his discussion of the good faith exception to the warrant requirement because they felt that since the parties did not mention the good faith exception, the court should not address the issue. *Id.* at 391 (Lillehaug, J., dissenting).

139. *Id.* at 388 (Stras, J., dissenting).

140. *Id.* at 389–90.

was “vague and conclusory” and that such language should have been insufficient to establish a basis to issue a warrant.¹⁴¹

Justice Stras detoured into a brief discussion of the good faith exception. He explained that the Supreme Court has permitted states to accept evidence police obtained with a faulty warrant when the police believed in good faith that the warrant was valid.¹⁴² Justice Stras further explained that Minnesota has elected to apply the “good faith” exception “only when officers act pursuant to binding appellate precedent.”¹⁴³ He concluded that he would have been willing to consider adopting the good faith exception in full had the parties made arguments on this point.¹⁴⁴

IV. ANALYSIS

The Minnesota Supreme Court’s *Fawcett* decision was subject to pressure from two competing policy ideals: state concerns of enforcing justice and individuals’ privacy concerns. On the one hand, testing of blood samples is helpful to state concerns of identifying suspects pursuant to pre-trial holding and other administrative needs¹⁴⁵ and determining whether a suspected criminal was under an illegal level of substance influence at the time of the crime.¹⁴⁶ On the other hand, testing blood samples may

141. *Id.* at 390 (quoting *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998)).

142. *Id.* at 390–91.

143. *Id.* at 391 (quoting *State v. Lindquist*, 869 N.W.2d 863, 876 (Minn. 2015)). Minnesota’s partial adoption of the “good faith” warrant exception is less expansive than the Supreme Court’s adoption of the same exception. *Id.* at 391 (Lillehaug, J., dissenting). Justice Stras believes the *Fawcett* case is “so similar to *Leon*, the seminal good-faith exception case, that there is little to distinguish them.” *Id.* (Stras, J., dissenting) (citing *United States v. Leon*, 468 U.S. 897 (1984)). Yet, because the Minnesota Supreme Court did not apply the good faith exception in *Fawcett*, it had to rely on what Justice Stras considered an “unnatural stretching” of probable cause to include probable cause of drug use. *Id.*

144. *Id.* It is unclear whether Justice Stras is alone in his willingness to consider Minnesota’s full adoption of the “good faith” exception to the warrant requirement, but the rest of the justices’ responses indicate that they are unwilling to proactively rule on the “good faith” exception until the issue is raised by parties before the court. *See id.* (Lillehaug, J., dissenting); *id.* (Hudson, J., dissenting). Justice Lillehaug expressly declined to engage with Justice Stras’s exploration into the “good faith” exception for just this reason. *Id.* (Lillehaug, J., dissenting). A similar disposition of the majority justices might be inferred by the fact that they ignored the good faith exception in their opinion.

145. *See Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

146. *See Schmerber v. California*, 384 U.S. 757, 770–72 (1966) (deeming a

compromise individuals' privacy concerns because a person's blood contains a "host of private medical facts"¹⁴⁷ and a "wealth of additional, highly personal information."¹⁴⁸ The existence of a person's medical facts and personal information in his or her blood has given courts pause and reason to consider whether or not an individual has a reasonable expectation of privacy in his or her blood that must be overcome by the government's interest in the search.¹⁴⁹

In resolving the competing policy considerations of state concerns and individuals' privacy concerns, the Minnesota Supreme Court in *Fawcett* makes two major assertions:

- (1) The testing of a blood draw is a search.¹⁵⁰
- (2) A warrant for a blood draw must particularly describe how the blood will be tested.¹⁵¹

Regarding the first assertion, the court's rule that blood testing is a search raises a number of questions about the standards governing the state's intrusion into an individual's expectation of privacy.¹⁵² Chief among these questions are the following:

- (1) Is categorizing testing of a blood sample as a search in line with precedential authority?
- (2) Did the court properly identify the level of privacy expectation Fawcett had in her blood?
- (3) Did the court err by not characterizing Fawcett's seizure and subsequent blood draw and analysis as one Fourth Amendment event, as other states have classified the process of a blood draw and testing?

The following analysis shows that (1) the classification of the testing of Fawcett's blood sample as a search was proper because this framework is in line with United States Supreme Court precedent,

warrantless blood draw sufficient to convict the petitioner of drunk driving due to exigent circumstances).

147. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989).

148. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177 (2016).

149. The government's interest in conducting a search does not automatically trump any individual expectation of privacy because such an expectation of privacy is a basic right protected by the Fourth Amendment. *Schmerber*, 384 U.S. at 767 ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

150. *See infra* Section IV.A.

151. *See infra* Section IV.B.

152. *See Skinner*, 489 U.S. at 618–19 (1989) ("To hold that the Fourth Amendment is applicable to the drug and alcohol testing . . . is only to begin the inquiry into the standards governing such intrusions.").

though it departs from existing Minnesota case law and the case law of other states;¹⁵³ (2) the level of Fawcett's reasonable expectation of privacy in her blood was properly identified;¹⁵⁴ and (3) the court properly avoided categorizing the seizure and search of Fawcett's blood as one Fourth Amendment event.¹⁵⁵

Regarding the second assertion made in *Fawcett*, the court's rule that a warrant for a blood draw must particularly describe how the blood will be tested is proper in light of controlling precedent. However, the assertion invites a number of questions necessary in evaluating whether such particularity was met in Fawcett's situation. Chief among these questions are the following:

- (1) Since the Minnesota Court of Appeals' *Fawcett* decision did not address whether the items to be found in a blood draw need to be identified by a particularized warrant, was the Minnesota Supreme Court's application of the particularity requirement to the warrant for blood draw and testing proper?
- (2) From whose perspective should the content of the warrant application be interpreted?
- (3) Was the holding that the warrant was particular enough to authorize the testing of Fawcett's blood for drugs proper?

The following discussion shows that (1) application of the warrant's particularity to the blood draw and testing was proper and will likely be longstanding;¹⁵⁶ (2) the warrant's particularity should have been interpreted as from the eyes of the officer submitting the affidavit, who did not particularly describe the presence of drugs;¹⁵⁷ and (3) the ruling that the warrant was particular enough to justify the search of Fawcett's blood for the presence of drugs was improper and sets a harmful precedent.¹⁵⁸ Since the Minnesota Supreme Court's answers to (2) and (3) did not match its correct assertion in (1) that a warrant for a blood draw must particularly describe how the blood is to be tested, the Minnesota Supreme Court erred in the application of its principle.

153. See *infra* Section IV.A.1.

154. See *infra* Section IV.A.2.

155. See *infra* Section IV.A.3.

156. See *infra* Section IV.B.1.

157. See *infra* Section IV.B.2.

158. See *infra* Section IV.B.3.

A. *The Testing of a Blood Draw Is a Search*

1. *Classification of the Testing of Fawcett's Blood Sample as a Search Was Proper*

The Minnesota Supreme Court's conclusion that Fawcett's blood draw and testing was a search¹⁵⁹ is well supported by recent United States Supreme Court precedent. This Supreme Court precedent identifies two distinct ways in which a blood draw and testing intrude upon expectations of privacy, thus constituting a search.

First, a blood draw and testing intrude upon an individual's reasonable expectation of physical privacy by entering a person's body in a somewhat violent manner.¹⁶⁰ Fawcett's skin was pierced by a needle which subsequently entered her body and drew blood from her body. Through this process, Fawcett's reasonable expectation of physical privacy was intruded upon.

In 2013, the United States Supreme Court held in *Maryland v. King* that even such an unobtrusive intrusion as a buccal swab, a piece of cotton rubbed on the inside of a suspect's cheek, and the buccal swab's subsequent testing is still a search.¹⁶¹ The *King* holding is applicable to all techniques used to take biological samples that the Supreme Court has ruled on because of all such techniques, a buccal swab is arguably the least physically intrusive.¹⁶² It follows that more physically intrusive techniques, like the blood draw Fawcett was subject to, are also searches.¹⁶³

Second, in addition to a blood draw's intrusion into a person's expectation of physical privacy, the testing of the drawn blood intrudes upon an individual's expectation of medical and personal privacy. Having already established in *Skinner v. Railway Labor*

159. See *State v. Fawcett*, 884 N.W.2d 380, 387 (Minn. 2016) (“[T]he issuing judge limited the search of Fawcett’s blood.”).

160. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2163 (2016) (citing *Maryland v. King*, 133 S. Ct. 1958 (2013)) (“Our cases establish that the taking of a blood sample . . . is a search.”).

161. *King*, 133 S. Ct. at 1968–69 (“It can be agreed that using a buccal swab on the inner tissues of a person’s cheek in order to obtain DNA samples is a search.”).

162. 1 WAYNE R. LAFAVE, *SEARCH & SEIZURE* § 2.6(a) (5th ed. 2016) (pointing out that “any lingering doubts” as to whether techniques less intrusive than blood draws and testing still amounted to searches “were swept away by the Supreme Court’s decision in *Maryland v. King*”).

163. See *id.*

Executives' Ass'n that an individual's blood contains a "host of private medical facts,"¹⁶⁴ the Court in *Birchfield v. North Dakota* added that that blood contains a "wealth of additional, highly personal information."¹⁶⁵ The fact that Fawcett was a reasonable individual who knew her blood contained personal and medical information is exemplified by Fawcett's declaration to police that "she was depressed and was currently taking Lorazepam and Wellbutrin."¹⁶⁶ Fawcett may not have revealed that she suffered from such a stigmatized illness as depression had it not been for the fact that she was or was about to be subjected to testing she thought would reveal such information anyway. United States Supreme Court precedent in *Skinner* and *Birchfield* has validated that such a reasonable expectation of privacy is intruded upon when blood is tested.

The conclusion that the testing of a blood draw is a search is new precedent for the state of Minnesota.¹⁶⁷ Although the Minnesota Supreme Court did not overrule *Harrison v. Commissioner of Public Safety*,¹⁶⁸ its conclusion that testing a blood draw constitutes a search

164. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989).

165. *Birchfield*, 136 S. Ct. at 2177.

166. *State v. Fawcett*, 884 N.W.2d 380, 383 (Minn. 2016).

167. Prior to *Fawcett*, the authoritative interpretation of whether the testing of a blood sample was a search was the Minnesota Court of Appeals' 2010 *Harrison* decision, which found that such testing did not constitute a search. See *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 921 (Minn. Ct. App. 2010); *supra* note 41. Following *Harrison*, even after the United States Supreme Court released its *Maryland v. King* decision, the Minnesota Court of Appeals held in *Fawcett* that "[i]f the state lawfully obtains a blood sample for the purpose of chemical analysis, then a chemical analysis of the sample that does not offend standards of reasonableness is not a separate search requiring a warrant." *State v. Fawcett*, 877 N.W.2d 555, 561 (Minn. Ct. App. 2016), *aff'd*, 884 N.W.2d 380. Nevertheless, the Minnesota Supreme Court's decision of *Fawcett* was the first time the court addressed the issue of whether a blood sample's testing was a search. Contrary to the Minnesota Court of Appeals' *Harrison* and *Fawcett* decisions, the Minnesota Supreme Court viewed the testing of the blood draw as indeed a search. See *Fawcett*, 884 N.W.2d at 387 ("[T]he issuing judge limited the search of Fawcett's blood.").

168. Perhaps the Minnesota Supreme Court did not overturn *Harrison* because *Harrison* relied on a blood draw that was taken with probable cause and under the exigency exception to the warrant requirement. *Harrison*, 781 N.W.2d at 920–21. Since the United States Supreme Court issued its 2016 *Birchfield* decision, reliance on the exigency exception for blood draws in DUI cases is no longer available because blood draws and testing now require warrants. *Birchfield*, 136 S. Ct. at 2184–85. Because a warrant is now required in all cases, there is less policy pressure to categorize blood testing as a non-search. Since a warrant is required for blood draws and testing anyway, courts might as well concede that such blood draws and tests

is the first time since *Birchfield* that the Minnesota Supreme Court has dealt with this issue. Accordingly, the Minnesota Supreme Court's reliance in *Fawcett* on relevant and very recent United States Supreme Court precedent is proper.

2. *The Level of Fawcett's Reasonable Expectation of Privacy in Her Blood Was Properly Identified*

The Minnesota Supreme Court decided that Fawcett did not lose all expectation of privacy in her blood sample after her blood was drawn.¹⁶⁹ The court has left open for later ruling the question of exactly how much expectation of privacy an individual has in his or her blood sample once it is taken from the body.¹⁷⁰ However, since the testing of Fawcett's blood has been characterized as a search,¹⁷¹ it can be inferred by the definition of a "search"¹⁷² that Fawcett's expectation of privacy in her blood is at least reasonable.

The Minnesota Supreme Court denied the reasonableness of Fawcett's expectation of privacy in medical information that could be found in her blood because the warrant precluded using her

are searches. Denial of the fact that blood testing is a search, or at least part of a search, no longer has the policy benefit of easing law enforcement's ability to seize a suspect's blood. Thus, the habit of many states to categorize blood testing as a non-search might cease altogether. Another reason the Minnesota Supreme Court in *Fawcett* may have chosen not to overturn *Harrison* is that the Minnesota Court of Appeals said in *Harrison* that the defendant did not have a "legitimate expectation of privacy," *Harrison*, 781 N.W.2d at 921, which the Minnesota Court of Appeals equated with being a reasonable expectation of privacy. *Id.* ("[A] legitimate expectation of privacy [is] defined as 'those expectations of privacy that society is prepared to recognize as reasonable.'"). Therefore, although the court in *Harrison* concluded that the defendant was not searched, this is due to the fact that the defendant's expectation of privacy was not reasonable, not that the defendant had no expectation of privacy whatsoever. This is a much less drastic or obviously errant position than saying that the defendant was not searched at all. Accordingly, perhaps the Minnesota Supreme Court in *Fawcett* did not overturn *Harrison* because *Harrison* was not an obvious candidate for reversal.

169. *Fawcett*, 884 N.W.2d at 384 n.3.

170. *Id.* ("We need not resolve in this case the exact extent of the expectation of privacy Fawcett retained in her blood because, as explained below, we conclude that the warrant provided a valid basis for the controlled substance testing.")

171. *Id.* at 387 ("[T]he issuing judge limited the search of Fawcett's blood.")

172. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.")

blood sample for this purpose.¹⁷³ However, the United States Supreme Court noted in *Birchfield*, commenting on its *King* decision, that although the authorities in *King* were legally allowed to use the defendant's DNA only for identification purposes, the authorities *could have* obtained the defendant's personal information from the sample, albeit illegally, if they had chosen to do so.¹⁷⁴ Therefore, the Minnesota Supreme Court's denial of Fawcett's expectation of privacy in medical information that could be found in her blood does not account for the real possibility of illegal government intrusion that the United States Supreme Court is wary of. Nevertheless, the Minnesota Supreme Court's acknowledgement in *Fawcett* of general, unspecified expectations of privacy is a proper concession that the court rightfully acknowledges to have been set in motion by United States Supreme Court precedent in *Skinner* and recently in *Birchfield*.¹⁷⁵

3. *The Court Properly Avoided Categorizing Fawcett's Blood Draw and Subsequent Analysis as One Fourth Amendment Event*

The Minnesota Supreme Court's *Fawcett* decision properly changed the trajectory of blood draw testing case law by not categorizing Fawcett's blood draw and the subsequent analysis of that blood as one Fourth Amendment event. It departed from the Minnesota Court of Appeals' 2010 decision in *Harrison*, which assigned individuals no expectation of privacy in their blood samples once the blood was drawn and held that testing such samples was not

173. *Fawcett*, 884 N.W.2d at 378–88 (“Contrary to Fawcett’s assertion, the search warrant in this case did not authorize general testing of Fawcett’s blood to determine her DNA, genome, or indicators of diseases because such testing would not have revealed any evidence of criminal vehicular operation/homicide.”).

174. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177 (“Although the DNA obtained under the law at issue in that case could lawfully be used only for identification purposes, the process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained.”). Regarding the effect that this potential abuse of power has on the individual whose blood has been seized, the Court wrote, “Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.” *Id.* at 2178.

175. *Fawcett*, 884 N.W.2d at 384 n.3 (citing *Skinner* for the proposition that an individual has an expectation of privacy in the medical facts a blood test reveals, and citing *Birchfield* for the proposition that an individual has an expectation of privacy in the personal information a blood test reveals).

a search.¹⁷⁶ In its departure from *Harrison*, the Minnesota Supreme Court in *Fawcett* established that there was both a seizure and a search in the process of Fawcett's blood draw and the subsequent testing.¹⁷⁷ This acknowledgement that the process of a DUI blood draw and analysis consists of a seizure and a separate search is similar to the United States Supreme Court's ruling in *Schmerber*.¹⁷⁸

Although Fawcett's characterization of the process of a blood draw and subsequent analysis as a seizure and a search is similar to such characterization in *Schmerber*, it differs from the Ninth Circuit's interpretation of *Schmerber* in *Snyder*. In *Snyder*, the Ninth Circuit unceremoniously lumped together the seizure of a blood draw and the blood's search, labeling these as one Fourth Amendment event.¹⁷⁹ However, even though several state courts have followed *Snyder*'s interpretation of *Schmerber*,¹⁸⁰ including the Minnesota Court of Appeals in its decision of *Fawcett*,¹⁸¹ the policy reason for connecting seizure of a blood draw with its subsequent search—making it easier to seize blood with substances in it before these substances dissipate—no longer exists. After the United States

176. *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 921 (Minn. Ct. App. 2010).

177. *See Fawcett*, 884 N.W.2d at 384 (“The warrant authorized the police to seize Fawcett’s blood”); *id.* at 387 (“[T]he issuing judge limited the search of Fawcett’s blood.”).

178. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“Such testing procedures plainly constitute searches of ‘persons,’ and depend antecedently upon seizures of ‘persons,’ within the meaning of that Amendment.”).

179. *United States v. Snyder*, 852 F.2d 471, 473–74 (9th Cir. 1988) (“It seems clear, however, that *Schmerber* viewed the seizure and separate search of the blood as a single event for fourth amendment purposes.”).

180. *See supra* note 29.

181. *State v. Fawcett*, 877 N.W.2d 555, 561 (Minn. Ct. App. 2016), *aff’d*, 884 N.W.2d 380 (“Once a blood sample has been lawfully removed from a person’s body, a person loses an expectation of privacy in the blood sample, and a subsequent chemical analysis of the blood sample is, therefore, not a distinct Fourth Amendment event.”). Notice here the evolution of the standard from *Schmerber* to the Minnesota Court of Appeals’ *Fawcett* decision: *Schmerber* said there is a seizure and a search in the process of a blood draw. *Schmerber*, 384 U.S. at 767. *Snyder* said the seizure and search are both part of one Fourth Amendment event. *Snyder*, 852 F.2d at 473–74. At that point, it was much easier for the Minnesota Court of Appeals to say in *Fawcett* that when blood is removed from a person’s body, that person no longer has a reasonable expectation of privacy in his or her blood and therefore there was no “distinct Fourth Amendment event” in analyzing the blood because *Snyder* had already negated the distinctiveness of the blood’s analysis (the search) by lumping it together with the blood’s seizure.

Supreme Court's 2016 *Birchfield* decision, virtually all blood draws now need to be justified with time-consuming warrants anyway, and the exigent circumstances exception to the warrant requirement is no longer applicable to all DUI blood draw cases.¹⁸² Thus, in light of this new warrant requirement for virtually all DUI blood draw cases, states like Minnesota might as well acknowledge that blood draws and blood testing are separate Fourth Amendment events; they no longer need to worry that such a concession will increase their workload.

B. A Warrant for a Blood Draw Must Particularly Describe How the Blood Will Be Tested

1. Application of the Warrant's Particularity to the Blood Draw and Testing Was Proper and Will Likely Be Longstanding

The main reason the Minnesota Supreme Court's *Fawcett* opinion is written so differently than the Minnesota Court of Appeals' *Fawcett* opinion is that the opinions focused on different issues altogether. In the Minnesota Court of Appeals opinion, the issue of blood draws and the Particularity Clause regarding blood draws was a matter of first impression.¹⁸³ In holding that an individual does not have a reasonable expectation of privacy in his or her blood sample once Minnesota authorities have legally drawn the sample, and in holding that the subsequent testing of said sample is not a distinct Fourth Amendment event,¹⁸⁴ the Minnesota Court of Appeals shut the door on the question of particularity altogether. If there is no expectation of privacy, then there is no search. If there is no search, then there is no intrusion. If there is no intrusion, then there is no need for a warrant that would particularly describe items to be searched. The Minnesota Supreme Court re-opened this issue by acknowledging that *Fawcett* had a reasonable expectation of privacy in her blood sample.¹⁸⁵

Unlike the Minnesota Court of Appeals, the Minnesota Supreme Court had the opportunity to engage with the question of

182. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016) (“[The states] have offered no satisfactory justification for demanding [blood draws] without a warrant.”).

183. *Fawcett*, 877 N.W.2d at 559.

184. *See id.* at 561.

185. *Fawcett*, 884 N.W.2d at 384 n.3 (“We agree with *Fawcett* that she did not lose all expectation of privacy in her blood that was seized pursuant to a warrant.”).

sufficient particularity in its *Fawcett* decision because it acknowledged that the testing of a blood draw is a search that requires a warrant.¹⁸⁶ After engaging with the question of sufficient particularity in Fawcett's case, the Minnesota Supreme Court ultimately rejected Fawcett's argument that the warrant was not sufficiently particular.¹⁸⁷ It concluded that "the authorization to submit Fawcett's blood sample 'to an approved lab for testing' meets minimal constitutional standards for particularity."¹⁸⁸ Nevertheless, the court's particularity analysis regarding DUI blood draws and the court's implicit recognition of the need for sufficient particularity has tremendous implications for how Minnesota DUI cases will be decided in the future. The Minnesota Supreme Court unanimously agreed that blood draws in fact require warrants with sufficiently particular descriptions of the testing that will be conducted on the blood sample.¹⁸⁹ This suggests that the court will likely uphold a sufficient particularity requirement for blood draw warrants in future cases.¹⁹⁰

186. *See id.* at 387 ("Moreover, by expressly incorporating the warrant application and supporting affidavit into the warrant, the issuing judge limited the search of Fawcett's blood to tests that would reveal 'evidence of the crime of criminal vehicular operation/homicide.'").

187. *Id.*

188. *Id.*

189. *See id.* at 388–91.

190. Perhaps the reason the Minnesota Supreme Court was so emphatic about characterizing blood draws as searches that require particularity was because the United States Supreme Court's *Birchfield* decision, decided between the *Fawcett* decisions at the Minnesota Court of Appeals and the Minnesota Supreme Court, had significant implications for the classification of blood draw testing. The significance of *Birchfield* being decided at a point when *Fawcett* had been decided by the Minnesota Court of Appeals but not by the Minnesota Supreme Court is that this timing gives an opportunity to see the effect *Birchfield* had on similar opinions. Although decided by different judges with different concerns (the Minnesota Court of Appeals is somewhat more concerned with following precedent and the Minnesota Supreme Court is more concerned with addressing questions of importance in interpreting Minnesota's law and constitution), the facts in both *Fawcett* decisions did not change. Accordingly, when an individual's expectation of privacy in his or her blood has been recognized at the highest level, courts nationwide may become very careful about how they analyze the search of that blood, even when there is a valid warrant, in order to make sure that the warrant is sufficiently particular in describing the manner in which the blood will be searched so that the individual's expectation of privacy is not violated.

2. *The Warrant's Particularity Should Have Been Interpreted from the Eyes of the Officer Submitting the Affidavit, Who Did Not Particularly Describe the Presence of Drugs*

The United States Supreme Court's 2016 *Birchfield* decision viewed Minnesota DUI law as a series of warrants, when warrants were sought, that dealt with substantially similar sets of facts related to drunk driving.¹⁹¹ In fact, the Court found the facts in most Minnesota DUI cases to be so similar that they deemed warrants not worthwhile and, consequently, unnecessary for breath tests.¹⁹² The Court differentiated blood draws and testing from breath tests only in that blood draws are more physically intrusive in piercing the skin¹⁹³ and cause highly personal information to potentially become available to authorities.¹⁹⁴ However, although the Court in *Birchfield* held that both the piercing of the skin and the revelation of highly personal information to authorities through blood sample testing are occurrences that trigger the warrant requirement,¹⁹⁵ it remains that, like the pre-intrusion facts of blood draw drunk driving cases, the facts of breath test drunk driving cases are similar to each other. It follows that even in cases where a blood draw is sought instead of or in addition to a breath test, the facts are substantially similar from one case to the next.¹⁹⁶ Thus, warrant-issuing judges are generally not expected to read new facts into the pre-intrusion situations when analyzing DUI blood draw warrant applications.

Although the Supreme Court implicitly acknowledges that a warrant-issuing judge is not to read new facts into the DUI blood draw situation, the Minnesota Supreme Court noted in *Fawcett* that the warrant-issuing judge must still review the warrant application and draw his or her own independent inferences about the situation.¹⁹⁷ In reality, however, the warrant-issuing judge in *Fawcett* relied so heavily on the warrant application that the judge "expressly incorporate[d] the warrant application and supporting affidavit into the warrant."¹⁹⁸ As explained in the United States Supreme Court

191. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2181 (2016).

192. *See id.* at 2181–82.

193. *Id.* at 2178.

194. *Id.* at 2177.

195. *Id.* at 2184.

196. *See supra* Section II.B.3.

197. *State v. Fawcett*, 884 N.W.2d 380, 385 (Minn. 2016).

198. *Id.* at 387.

case *Groh v. Ramirez*,¹⁹⁹ a reviewing judge may consider warrant application materials that accompany and are incorporated into the warrant when construing the scope of the warrant.²⁰⁰ Accordingly, the warrant's particularity in *Fawcett* should have been interpreted from the eyes of the detective who applied for the warrant because the warrant-issuing judge knowingly deferred to the detective's application materials by incorporating these materials into the warrant. Since the warrant application materials heavily emphasized that the arresting officers thought Fawcett was drunk and made no reference to suspicion of drug use,²⁰¹ it seems clear that the officer applying for the warrant did not suspect the presence of drugs in Fawcett's blood.²⁰² It follows that since the warrant-issuing judge relied so heavily on the warrant application materials, and since the warrant applicant expressed no suspicion of Fawcett's drug use, the court should have ruled that the warrant did not describe the presence of drugs in Fawcett's blood with sufficient particularity.

3. *The Ruling that the Warrant Was Particular Enough to Justify the Search of Fawcett's Blood for the Presence of Drugs Was Improper and Sets Harmful Precedent*

One of the objectionable lessons future Minnesota courts may learn from the *Fawcett* decision is that when a Minnesota warrant is interpreted according to what the issuing judge had a substantial basis to have reasonably inferred,²⁰³ this interpretation is sufficiently

199. 540 U.S. 551 (2004).

200. *Id.* at 557–58.

201. *Fawcett*, 884 N.W.2d at 385–86.

202. In spite of the fact that the detective applying for a warrant made no mention of suspecting Fawcett of drug impairment, the Minnesota Supreme Court makes a bare assertion to the contrary in its concluding paragraph: “The detective in this case was in possession of facts that established probable cause to believe evidence of criminal vehicular operation would be found in Fawcett's blood, although he did not know whether the intoxicant was alcohol, controlled substances, or a combination of alcohol and controlled substances.” *Id.* at 387. This was the first time in the opinion that the detective's knowledge was addressed, and the court did not further discuss why it thought the detective “did not know whether the intoxicant was alcohol, controlled substances, or a combination of alcohol and controlled substances.” *See id.*

203. *Id.* (“[I]t was not unreasonable for the issuing judge to infer that Fawcett's impairment may have been caused by alcohol, controlled substances, or some combination of the two.”). The United States Supreme Court has concluded that courts can assume a judicial inference of probable cause as long as there is a “substantial basis” for that inference. *Illinois v. Gates*, 462 U.S. 213, 214 (1983).

particular in its description²⁰⁴ even when the language of the warrant application that has been incorporated into the warrant²⁰⁵ suggests a narrower interpretation.²⁰⁶ The problem with the path the Minnesota Supreme Court has chosen is in its foundation. The court relies on cases that establish the acceptability of judicial inference when there is a “substantial basis” for probable cause.²⁰⁷ However, these cases do not involve judicial deference to warrant application materials through the materials’ incorporation into the warrant.²⁰⁸ The court attempted to connect the deference it gives to potential judicial inferences with an inference that the warrant applicant—a detective—might have made about the presence of drugs in Fawcett’s blood. This grasp at a link between the warrant-issuing judge’s potential inference and the warrant applicant’s potential inference seems strained and was not well elaborated.²⁰⁹

204. Courts are more inclined to find sufficient particularity in a judge’s warrant under the policy that “because the prime function of the warrant requirement is to secure ‘an independent assessment of the inferences to be drawn from the available evidence,’ it is axiomatic that an issuing judge is not bound by the inferences drawn by the officers.” *Fawcett*, 884 N.W.2d at 385 (citing *State v. Nolting*, 254 N.W.2d 340, 343 (Minn. 1977)).

205. *Id.* at 383.

206. *See, e.g., id.* at 385 (“We acknowledge that the warrant application and supporting affidavit states that ‘From their investigation, officers formed the belief that at the time of the collision . . . Fawcett was the driver and was under the influence of alcohol.’”).

207. *State v. McCloskey*, 453 N.W.2d 700, 703 (Minn. 1990) (citing *Gates*, 462 U.S. at 238–39) (“In reviewing the magistrate’s determination the reviewing court must give deference to the magistrate’s determination of probable cause and should uphold the determination if there was a ‘substantial basis’ for the magistrate’s determination.”).

208. *See id.* (citing *Gates* and exhibiting no incorporation of warrant application materials into the warrant); *see also Gates*, 462 U.S. at 236–39 (citing *Jones* and exhibiting no incorporation of warrant application materials into the warrant); *Jones v. United States*, 362 U.S. 257, 269–72 (1960) (creating the “substantial basis” standard, where judicial inference of probable cause is valid if there is a “substantial basis” for it, but exhibiting no incorporation of warrant application materials into the warrant).

209. *Fawcett*, 884 N.W.2d at 387 (“[T]he detective in this case was in possession of facts that established probable cause to believe evidence of criminal vehicular operation would be found in Fawcett’s blood, although he did not know whether the intoxicant was alcohol, controlled substances, or a combination of alcohol and controlled substances.”). As discussed *supra* note 202, this assertion of the detective’s potential inference of the presence of alcohol in Fawcett’s blood is not well reasoned, making any potential link between the inferences of the judge and the inferences of the detective even more strained.

The Minnesota Supreme Court's deference to potential judicial inference when the warrant-issuing judge defers to warrant application materials²¹⁰ is harmful. This deference weakens the constitutional safeguard of particularity in that what constitutes the requisite probable cause has been significantly broadened. Police officers can now make generalized statements about an individual's signs of impairment without having to specify whether the impairment is caused by alcohol or drugs.²¹¹ Officers' ability to more vaguely classify the facts of a traffic stop as evidence of general illegal impairment unduly empowers police to more easily obtain a warrant and cause an individual's expectation of privacy to be intruded upon through a blood draw and blood testing for an unknown type of intoxicant.²¹² The broader the search in such fishing expeditions, the greater the intrusion into the individual's expectations of medical and personal privacy.

The Minnesota Supreme Court should reverse its holding so that Minnesota police can no longer secure warrants in DUI traffic stops based on broad hunches that require no further specificity than that the individual is suspected of some type of nebulous impairment. With nothing but bare hunches, police can too easily obtain warrants for blood draws without taking time to critically articulate exactly why the blood draw is needed. *Fawcett's* problematic increase in the accessibility of blood draws is an unnecessary infringement on the privacy expectations of individuals because sensitive medical and personal information can be easily

210. The Minnesota Supreme Court in *Fawcett* said that it “defer[s] to the issuing magistrate.” *Fawcett*, 884 N.W.2d at 387. However, the case also makes clear that the warrant-issuing judge was deferring to the warrant application by the fact that the judge incorporated the warrant application into the warrant by reference. *Id.* at 383.

211. *Search Warrant that Permitted Search of Defendant's Blood for Alcohol or Controlled Substances Was Sufficiently Particular*, L. OFFICER'S BULL., Sept. 25, 2015, at 9 (“A search warrant that permitted the search of a defendant's blood for alcohol and other controlled substances satisfied the particularity requirement of the Fourth Amendment.”). Knowledge of the *Fawcett* finding is made readily available to all subscribing police forces by this brief synopsis of the Minnesota Supreme Court's holding in *Fawcett*, which was written as a guide for the benefit of police officers. *See id.*

212. Perhaps a policy of police efficiency is at play. It may be that the Minnesota Supreme Court wanted to enable police officers to more easily obtain evidence of impairment since, after the recent *Birchfield* decision, officers' jobs have become more difficult, as they now need a warrant before they can take a blood draw. *See supra* note 75.

found in the blood.²¹³ The constitutional safeguard of particularity would be properly respected and the individual's right against unreasonable searches would be better protected through a reversal of *Fawcett*.

V. CONCLUSION

The Minnesota Supreme Court's decision in *Fawcett* plays a key role in evolving national jurisprudence on blood draw testing. First, it reaffirms the individual's expectation of privacy in his or her blood. This finding rightly follows the trajectory set by the United States Supreme Court in *Skinner* and more recently in *Birchfield*.

Further, the Minnesota Supreme Court's *Fawcett* opinion marks the first case the court has decided on the issue of blood draws since the United States Supreme Court's *Birchfield* decision. The *Fawcett* decision not only carries its own authority as precedent set for the state, but it may also become an authoritative reference for how courts across the nation utilize *Birchfield*. Since the Minnesota Supreme Court has chosen to interpret *Birchfield* as a reinstatement of reasonable expectations of privacy in an individual's blood sample,²¹⁴ individuals' rights will enjoy greater protection. Magistrates' decisions to issue warrants will be analyzed to determine their authority to allow blood draws and to allow searches of individuals' blood samples. This recognition of an individual's expectation of privacy in his or her blood is contrary to the findings of many other states²¹⁵ and turns Minnesota itself in a new direction.

However, the Minnesota Supreme Court's *Fawcett* decision has also set problematic precedent in the area of warrant interpretation. By upholding the importance of a warrant-issuing judge's independent analysis²¹⁶ when the warrant-issuing judge himself deferred to the applying detective's judgment by incorporating the warrant application materials into the warrant, the court has created a bizarre result. The way in which the *Fawcett* decision handled

213. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177 (2016); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989).

214. *Fawcett*, 884 N.W.2d at 384 n.3.

215. See *supra* note 29.

216. *Fawcett*, 884 N.W.2d at 385 (quoting *State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1990)) ("We defer to the issuing magistrate, recognizing that 'doubtful or marginal cases should be largely determined by the preference to be accorded to warrants.'").

warrant scrutiny generally²¹⁷ will likely empower warrant-issuing judges to draft broader warrants in the future without fearing that warrants will be nullified for lack of particularity or overbreadth. When writing their applications and affidavits for search warrants, police will likely feel less pressure to describe all items they may expect to find in a search. They will have the advantage of knowing that warrants will be broadly interpreted to include a wide range of inferences that an issuing judge might have made, even if these inferences go well beyond the actual language of the warrants. Minnesota would benefit if a future Minnesota Supreme Court case re-visiting *Fawcett* would overturn its holding on warrant interpretation while upholding the expectation of privacy *Fawcett* acknowledges individuals have in their blood.

217. Future Minnesota cases may cite to *Fawcett* as a case that has expanded the degree of deference given to warrant-issuing magistrates, noting that the court interpreted the warrant to allow a search for alcohol and drugs even when the application and affidavit had only mentioned that officers believed Fawcett was under the “influence of alcohol.” *Id.* at 385.

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