THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0603

State of New Hampshire

v.

David Almeida

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
2ND CIRCUIT— DISTRICT DIVISION — LITTLETON

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

Daniel E. Will
N.H. Bar No. 12176
Solicitor General

Benjamin W. Maki
N.H. Bar No. 20117
Assistant Attorney General

Elizabeth C. Woodcock
N.H. Bar No. 18837
Assistant Attorney General

New Hampshire Department of Justice
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

(15-minute argument requested)

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II. Whether the defendant had a reasonable expectation of privacy in blood that was drawn with his consent and where he did not attempt to withdraw consent until after the blood was lawfully seized.

TEXT OF RELEVANT AUTHORITIES

STATUTES:

265-A:4 Implied Consent of Driver or Operator to Submit to Testing to Determine Alcohol Concentration.

Any person who drives, operates, or attempts to operate an OHRV, drives or attempts to drive a vehicle upon the ways of this state, or operates or attempts to operate a boat upon the public waters of the state shall be deemed to have given consent to physical tests and examinations for the purpose of determining whether such person is under the influence of intoxicating liquor or controlled drugs, prescription drugs, over-the-counter drugs, or any other chemical substances, natural or synthetic, which impair a person's ability to drive and to a chemical, infrared molecular absorption, or liquid or gas chromatograph test or tests of any or all of any combination of the following: blood, urine, or breath, for the purpose of determining the controlled drug, prescription drug, over-the-counter drug, or any other chemical substance, natural or synthetic, which impairs a person's ability to drive content of such person's blood or alcohol concentration if arrested for any offense arising out of acts alleged to have been committed while the person was driving, operating, attempting to operate, or in actual physical control of an OHRV, driving, attempting to drive, or in actual physical control of a vehicle, or operating, attempting to operate, or in actual physical control of a boat while under the influence of intoxicating liquor or controlled drugs, prescription drugs, over-the-counter drugs, or any other chemical substances, natural or synthetic, which impair a person's ability to drive or while having an alcohol concentration in excess of the statutory limits contained in RSA 265-A:2 or RSA 265-A:3. The test or tests shall be administered at the direction of a law enforcement officer, peace officer, or authorized agent having reasonable grounds to believe the person to have been driving, operating, attempting to operate, or in actual physical control of an OHRV, driving or in actual physical control of a vehicle, or operating or in actual physical control of a boat while under the influence of intoxicating liquor or controlled drugs, prescription drugs, over-the-counter drugs, or any other chemical substances,

natural or synthetic, which impair a person's ability to drive or while having an alcohol concentration of 0.08 or more, or in the case of a person under the age of 21, 0.02 or more. A copy of the report of any such test shall be furnished by the law enforcement agency to the person tested within 48 hours of receipt of the report by the agency by certified mail directed to the address shown on such person's license or other identification furnished by the person. Results of a test of the breath shall be furnished immediately in writing to the person tested by the certified breath testing operator conducting the test. When the incident involves an accident resulting in death or serious bodily injury to any person as provided in RSA 265-A:16, the prerequisites of RSA 265-A:8 shall not apply. Properly trained personnel of the United States Coast Guard may arrest and conduct tests on persons who are believed to be under the influence of intoxicating liquor or controlled drugs, prescription drugs, over-the-counter drugs, or any other chemical substances, natural or synthetic, which impair a person's ability to drive or a combination thereof, and who are in physical control of a boat operating upon the public coastal waters of this state.

Source. 2006, 260:1. 2012, 267:4, eff. Jan. 1, 2013. 2017, 78:2, eff. July 1, 2017.

329:26 Confidential Communications.

The confidential relations and communications between a physician or surgeon licensed under provisions of this chapter and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. Confidential relations and communications between a patient and any person working under the supervision of a physician or surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon. This section shall not apply to investigations and hearings conducted by the board of medicine under RSA 329, any other statutorily created health

occupational licensing or certifying board conducting licensing, certifying, or disciplinary proceedings or hearings conducted pursuant to RSA 135-C:27-54 or RSA 464-A. This section shall also not apply to the release of blood or urine samples and the results of laboratory tests for drugs or blood alcohol content taken from a person for purposes of diagnosis and treatment in connection with the incident giving rise to the investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs. The use and disclosure of such information shall be limited to the official criminal proceedings.

Source. 1969, 386:1. 1977, 417:21. 1979, 322:21. 1983, 377:11. 1986, 212:2. 1995, 286:24. 1996, 267:2. 2000, 294:4. 2008, 353:1, eff. Sept. 5, 2008.

CONSTITUTIONAL PROVISIONS:

N.H. Const. Pt. I, Art. 19

Searches and Seizures Regulated.

Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases and with the formalities, prescribed by law.

June 2, 1784; amended 1792 to change order of words.

U.S. Const. Amend IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE AND FACTS

On April 6, 2019, the defendant, Daniel Almeida, was stopped by the Bethlehem Police Department for driving under the influence (DUI) in violation of RSA 265-A:2. SBA 40.[1] The police administered a field sobriety test and placed the defendant under arrest. SBA 40. After the defendant was arrested, the police read the administrative license suspension rights to him and the defendant consented to a chemical test of his blood to determine his blood alcohol level at the time of his arrest. SBA 40. The blood sample was drawn at the Littleton Regional Hospital. SBA 40.

Two days later, the police brought the sample to the State Police Forensic Laboratory for testing. SBA 2. The laboratory "accepted the sample and logged it in according to their protocols." SBA 40.

On April 19, 2019, defense counsel sent a letter to the laboratory and counsel for the State. SBA 40. The letter was entitled "Notice of Withdrawal of Consent to Hold or Analyze Bradley Dike's [sic] Bodily Fluid Specimen and Demand for Immediate Return of Same." SBA 40. The letter informed the laboratory and the Bethlehem Police Department that the defendant had hired an agent to collect the sample from the laboratory. SBA 40; *see also* SBA 50 (letter from lawyer). Five days later, the agent appeared at the laboratory and requested the sample. SBA 41. The laboratory did not release the sample because it was "in process" according

[1] "SBA _" refers to the appendix to the State's appeal, filed with this brief, which includes the trial court's August 28, 2019 order.
"MH__" refers to the Motion Hearing held on July 30, 2019 and page number.

to their protocols. SBA 41. The next day, the defendant's blood sample was tested. SBA 41.

On June 27, 2019, the defendant filed a motion to suppress. SBA 45. The motion stated that, on April 19, 2017, defense counsel had "authorized" a representative of CG Labs, Inc. to retrieve the blood sample from the State Forensic Laboratory. SBA 46. The motion further stated that the State Laboratory did not return the blood sample and, instead, tested the sample on April 25, 2019. SBA 47. The State objected to the motion to suppress, pointing out that the defendant cited no statutory authority in the "Notice of Withdrawal of Consent." SBA 67-68. The State argued that *State v. Stanford*, 474 N.W.2d 573 (Iowa 1991), on which the defendant had relied in his motion to suppress, involved a defendant who withdrew consent before the sample had been taken. SBA 68.

On July 30, 2019, the trial court (*Mace*, J.) held a non-evidentiary hearing. MH: 1. On August 28, 2019, the trial court issued an order on August 28, 2019, granting the defendant's motion. SBA 39-44. The trial court determined that the defendant, after consenting to a blood test for the purpose of determining the concentration of alcohol in his blood at the time of his arrest for DUI, and relinquishing that blood to the police, could withdraw his consent to allowing the blood sample to be tested. SBA 39-44.

The trial court relied, in part on the United States Supreme Court's decision in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989), which addressed the warrantless seizure and testing of railroad employees' blood for purposes of detecting impairment. SBA 42. The trial court noted that the blood was drawn in order to develop additional evidence. SBA 4. Although the trial court found that the defendant had

initially consented to the blood draw, but suppressed the evidence, in part, because that consent was withdrawn "before analysis." SBA 42-43. The trial court faulted the State for failing to seek a warrant to test the blood once consent had been withdrawn. SBA 44.

The trial court compared the blood sample to a cell phone, stating that, in *Riley v. California*, 573 U.S. 373 (2014), the United States Supreme Court had determined that law enforcement needed a warrant before searching the contents of a cell phone seized incident to arrest. SBA 43-44. It noted that defendants could withdraw consent. SBA 43. The trial court noted that, without being tested, the blood itself was insufficient evidence for conviction. *See* SBA 44 ("Were the State correct, the vial itself would be sufficient evidence upon which to convict."). The trial court observed that, at the hearing, the State could not explain why it did not seek a warrant before testing the blood. SBA 44. The court concluded that, "because the State elected to proceed with a search initially authorized by consent but unequivocally withdrawn before the search itself, the State violated the Defendant's constitutional right against an unreasonable search." SBA 44.

The State filed a motion for reconsideration. SBA 59. The State argued that the defendant had no reasonable expectation of privacy in the toxicological evidence in his blood once it was drawn. SBA 60. The motion directed the court to two state court decisions that held that subsequent testing after a lawful seizure did not constitute a second search. SBA 60. On September 23, 2019, the trial court denied the State's motion for reconsideration. SBA 59.

This appeal followed.

SUMMARY OF THE ARGUMENT

I. The trial court erred in finding that testing the defendant's blood was a search. Laboratory testing of blood that has been lawfully taken is not a search. Other courts have been unwilling to adopt a "two search" test for blood, DNA, and other physical evidence that is tested after being lawfully seized. This Court should decline to adopt the trial court's approach and reverse its order.

II. The trial court erred in finding there is a reasonable expectation of privacy in a blood sample. The defendant had no reasonable expectation of privacy after his blood was taken pursuant to his consent. This is because: (1) he no longer has standing to object to the laboratory testing; (2) he cannot withdraw consent after the search was completed; (3) he abandoned the blood; and (4) he had no reasonable expectation of privacy; and (5) his demand for the blood's return was without legal authority.

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING A "TWO SEARCH" ANALYSIS IN CONCLUDING THAT LAWFULLY DRAWN BLOOD REQUIRES ADDITIONAL CONSENT BEFORE IT IS TESTED.

The trial court erred in applying a "two search" analysis. It was error to conclude that the laboratory test of the defendant's blood, after it was taken with his consent, constituted a search.

"When reviewing a trial court's rulings on a motion to suppress, [this Court will] accept the trial court's factual findings unless they lack support in the record or are clearly erroneous." *State v. Bazinet*, 170 N.H. 680, 683 (2018). This Court reviews the trial court's legal conclusions *de novo*. *Id.*

The Fourth Amendment to the United State Constitution and Part I, Article 19 of the New Hampshire Constitution, guarantee freedom from unreasonable searches and seizures. U.S. Const. Amend. IV; N.H. Const. Pt. 1, Art. 19. Whether a search or seizure implicates constitutionally protected rights depends on whether the person searched or seized has a reasonable expectation of privacy. *State v. Davis*, 161 N.H. 292, 295 (2010); *State v. Goss*, 150 N.H. 46, 48-43 (2003).

"A warrantless search implicates Part I, Article 19 only if the defendant has exhibited an actual (subjective) expectation of privacy and that expectation is one that society is prepared to recognize as reasonable." *State v. Bazinet*, 170 N.H. 680, 684 (2018). "Without an invasion of the defendant's reasonable expectation of privacy, there has been no violation of the defendant's right under Part I, Article 19." *Id*. Further, "voluntary

consent free of duress and coercion is a recognized exception to the need for both a warrant and probable cause." *State v. Watson*, 151 N.H. 537, 540 (2004).

In this case, the defendant consented to the blood draw, which was the only search conducted in this case. The trial court, nevertheless, applied a "two search" analysis, concluding that testing the lawfully seized blood constituted a second search.

Although this Court has not considered the "two search" analysis, courts that have done so have rejected it. *People v. Woodard*, 909 N.W.2d 299, 306 (Mich. 2017), *appeal denied*, 908 N.W.2d 307 (2018); *State v. Randall*, 930 N.W.2d 223, 230 (Wis. 2019); *State v. Fawcett*, 877 N.W. 2d 555, 561 (Minn. App. 2016); *State v. Riedel*, 656 N.W.2d 789, 794 (Wis. App. 2002); *State v. VanLaarhoven*, 637 N.W.2d 411, 415 (Wis. 2001). *See also Commonwealth v. Arzola*, 26 N.E.2d 185, 190-91 (Mass. 2015) (DNA testing on lawfully seized clothing is not a search); *State v. Hauge*, 79 P.3d 131, 146 (Haw. 2003) (blood lawfully drawn may be tested without a second warrant); *see also Washington v. State*, 653 So.2d 362 (Fla.Dist.Ct.App.1994) (DNA taken with consent and later tested); *Bickley v. State*, 489 S.E.2d 167, 170 (Ga. 1997) (subsequent DNA comparison not second search); *Smith v. State,* 744 N.E.2d 437, 439 (Ind.2001) (comparing DNA not a search); *Wilson v. State,* 752 A.2d 1250, 1272 (Md. 2000) (once an individual's fingerprints or DNA "are in lawful police possession," subsequent comparisons are not unlawful).

For example, in *People v. Woodard*, the Court of Appeals of Michigan found that society is not prepared to recognize a reasonable expectation of privacy in blood alcohol content of a sample voluntarily

supplied to the police. *Id*. at 393. "Absent a protected privacy interest, there is no 'search' within the meaning of the Fourth Amendment and attempts to withdraw consent after a sample has been lawfully obtained would not render blood alcohol analysis unlawful." *Id.*

Similarly, in *State v. Randall*, the Wisconsin Supreme Court found that "[a]lthough the State must comply with the Fourth Amendment in obtaining a suspect's blood sample, a defendant arrested for intoxicated driving has no privacy interest in the amount of alcohol in [his or her blood] sample." *State v. Randall*, 930 N.W.2d 223, 239 (Wis. 2019).

Although the trial court relied on *Skinner v. Railway. Labor Executives' Ass'n*, 489 U.S. 602, 607-09 (1989), that case did not address the question raised here. First, *Skinner* was a civil, not a criminal case. Second, in *Skinner* railroad employees challenged the railroad's right to draw blood and then test it to be certain that the workers were not impaired. *Id.* at 607-09. The Court stated that "[t]he ensuing chemical analysis of the sample to obtain physiological data [was] a further invasion of the tested employee's privacy interests." *Skinner*, 489 U.S. at 616. The Court found that, although the employees had a reasonable expectation of privacy in their blood, the regulation that allowed the railroad to take and test the blood was reasonable, and did not require a search warrant. *Id*. at 634.

Other courts have since distinguished *Skinner*. For example, in *Woodard*, the Court of Appeals of Michigan noted that law enforcement had not lawfully seized the blood samples in the *Skinner* case. *Woodard*, 909 N.W.2d at 306. The *Woodard* Court further pointed out that the only authority suggesting two distinct searches is that the Court referred to searches in the plural form. *Id*. (noting "that collection and subsequent

analysis of the requisite biological samples must be deemed Fourth Amendment searches") (internal quotations omitted). In other words, the *Woodard* court concluded, *Skinner* did not squarely hold that testing the blood for narcotics constituted a second search. *Id.* at 306.

A similar conclusion was reached by the Supreme Court of Wisconsin. *See Randall*, 930 N.W.2d at 230. In *Randall*, the Court pointed out that, although the *Skinner* Court used the word "searches" instead of "search," it analyzed the search and seizure issue as if it involved one search. *Id.* The Court reasoned:

> If the biological specimen testing regimen in *Skinner* involved an invasion of two distinct privacy interests, the Court would have been duty-bound to assess the constitutional fidelity of each search separately. It did not. Instead, it focused exclusively on the acquisition of the sample to be tested. After the Court satisfied itself that the government had a constitutionally-sufficient basis for obtaining the biological specimens, it declared the testing regime sound.

Id.

When the trial court in this case relied on *Skinner* to determine that testing for blood alcohol level was a second search, it took the comments in *Skinner* out of context. The *Skinner* court wrote: "In light of our society's concern for the security of one's person, it is obvious that the physical intrusion, penetrating beneath the skin, infringes an expectation of privacy." *Skinner*, 489 U.S. at 616. The excerpt on which the trial court relied found that there is a reasonable expectation of privacy in biological samples before they are lawfully seized, not after.

The trial court's reliance on *Riley v. California*, 573 U.S. 373 (2014), was similarly misplaced. In *Riley*, the police seized cell phones

incident to two separate arrests. *Id.* at 378, 381. The officers then went through the cell phones, looking for information, without the defendants' consent. The United States Supreme Court reversed on the ground that searches incident to arrest did not authorize the police to further search digital devices. *Id.* at 386.

Riley is therefore distinguishable on two grounds. First, the initial searches in *Riley* were incident to an arrest. The court observed that a search incident to arrest was an exception to the warrant requirement which rested "not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody." *Id.* at 391. While a search incident to arrest gives law enforcement the right to perform limited searches for safety, that limited right did not extend to searching a cell phone without a warrant. *Id*. at 392 ("The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search is acceptable solely because a person is in custody.").

Second, the defendants in *Riley* did not consent to the search of their cellphones. *Id.* If the defendants had consented to the search of their cellphones, the court in *Riley* would have reached a different result.

In contrast, this case involves consent given to draw blood for the purpose of subsequent testing. Neither the United States Supreme Court nor this Court has ever held that evidence taken pursuant to lawfully given consent requires a warrant to be tested. It is all the more significant that the defendant in this case not only consented, but he did not seek to withdraw

the consent for nearly two weeks, well after the blood had been drawn and taken to the laboratory for testing.

The trial court also relied on the fact that the defendant had attempted to withdraw consent before the blood was actually tested. This is because the court mistakenly relied on the "two search" analysis, reasoning that the subsequent search of a cellphone seized pursuant to an arrest was analogous. SBA 42-44. It is not. The *Riley* court took pains to distinguish cellphones from other evidence, noting that they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Riley*, 573 U.S. at 394. The fact that the phones carried a "cache of sensitive personal information," was significant to the court's analysis. *Id.* at 395. The court summarized its holding as follows: "Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 401.

This case more closely resembles *Maryland v. King*, 569 U.S. 435, 464 (2013). In *King*, the defendant argued that he should not be required to give a buccal swab for DNA and that the DNA processing was also an invasion of privacy. *Id.* at 441-42. The court agreed that taking a DNA sample was a search, although "minimal" in its intrusion. *Id.* at 461. With respect to the subsequent DNA processing, the court found that the "processing of [the defendant's] DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional." *Id.* at 464.

The blood draw was not a minimal intrusion and, absent consent, a warrant would have been required. But after that, the parallels with *King* are striking. Testing the blood sample, like processing the DNA sample, does not intrude on the defendant's expectation of privacy. It is simply running tests on the sample for which the consent to draw it was given.

This case also more closely resembles the *Woodard* and *Randall* cases, as well as the cases that reject the notion that a sample, lawfully taken, cannot be tested without a search warrant of a defendant has second thoughts. *See also Fawcett*, 877 N.W.2d at 561 ("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."); *People v. King*, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997) ("[O]nce a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample."); *see also State v. Summicht*, 2017 WL 9520961, *4 (Wis.Ct.App. Dec. 20, 2017) ("[T]he search ended upon the blood being drawn. From that point on, the evidence was lawfully seized, and the subsequent examination of seized evidence is part and parcel of the lawful search and seizure.") (unpublished)).

In short, the trial court erred in concluding that there were two separate searches. There was one search, completed with the defendant's consent. Neither state nor federal constitutional rights are implicated by the subsequent laboratory testing

II. THE DEFENDANT CONSENTED TO THE BLOOD DRAW AND HAD NO REASONABLE EXPECTATION OF PRIVACY AFTER IT WAS TAKEN BASED ON THAT CONSENT.

The defendant had no reasonable expectation of privacy after his blood was taken with his consent. This is because: (1) he no longer has standing to object to the laboratory testing; (2) he cannot withdraw consent after the search was completed; (3) he abandoned the blood; (4) his expectation of privacy while driving is diminished; and (5) his demand for return of the blood was without legal authority.

A. The defendant does not have standing to object to the laboratory's examination of the blood sample because he has no reasonable expectation of privacy.

The trial court erred by granting the defendant's motion to suppress because the defendant did not have standing to object to the search. This is because, at the time of the search, his consent vitiated his subjective expectation of privacy and he had no objectively reasonable expectation of privacy.

In considering a motion to suppress, a court must make a "preliminary inquiry" as to "whether the individual filing the motion had standing." *State v. Boyer*, 168 N.H. 553, 557 (2016). "The threshold question as to the determination of a party's standing to challenge the introduction of evidence by means of a motion to suppress is whether any rights of the moving party were violated." *Id.* The defendant has standing to seek suppression if he has a legitimate expectation of privacy in the place to be searched or the thing to be seized. *Id*.

Determining if a reasonable expectation of privacy exists requires a two-step analysis. *State v. Smith*, 169 N.H. 602, 607 (2017). This "twofold requirement" is that "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Id.* (internal quotation mark and citation omitted). This determination is made on a "case by case basis, considering the unique facts of each particular situation." *Id.*

"Withdrawing blood without a warrant and without consent is a search and seizure." *State v. Steimel*, 155 N.H. 141, 147 (2007). However, a "voluntary consent free of duress and coercion is a recognized exception to the need of both a warrant and probable cause." *State v. Sorrell*, 120 N.H. 472, 475 (1980); *see also Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) ("[I]t is no doubt reasonable for the police to conduct a search once they have been permitted to do so."). "The burden is on the State to prove, by a preponderance of the evidence, that the consent was free, knowing and voluntary." *State v. Johnson*, 150 N.H. 448, 453 (2004) (citing *State v. Patch*, 142 N.H. 453, 458 (1997). "The validity of the consent is determined by examining the totality of the circumstances." *State v. Jones*, 131 N.H. 726, 728 (1989).

On two separate occasions, this Court has examined the reasonable expectation of privacy in the context of blood draws. *See State v. Davis*, 161 N.H. 292, 295 (2010); *State v. Bazinet*, 170 N.H. 680 (2018).

In *Davis*, this Court considered the extent of the expectation of privacy in toxicology results and blood drawn by a hospital for diagnostic and treatment purposes, not at the request of law enforcement. *Davis*, 161 N.H. at 295. The police obtained toxicology results without a warrant from

a hospital where a DUI suspect was treated after crashing. *Id*. This Court concluded that:

> [S]ociety does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purpose in connection with an incident giving rise to an investigation for driving while under the influence of intoxicating liquors or controlled drugs.

Id. at 298. Because when people drive, they have a diminished expectation of privacy the defendant's expectation of privacy in his blood was likewise diminished when he drove. *Id*. at 297.

In *Bazinet*, this Court confirmed that once blood sample is lawfully drawn by a hospital, there is no reasonable expectation of privacy in the drawn blood. *Bazinet*, 170 N.H. at 686. This Court reasoned that the purpose for which the blood was drawn played an important role in determining any reasonable expectation of privacy in it. *Id*. This Court identified no reasonable expectation of privacy in the drawn blood itself. *Id*. (Stating, "Whether or not the blood alcohol test was performed by the hospital or the State on the already drawn blood sample is not material to the analysis."). Accordingly, law enforcement's use of the blood sample analysis did not constitute a warrantless search. *Id*. at 686.

Davis and *Bazinet* confirm that a person has no objectively reasonable expectation of privacy in blood once lawfully drawn. Although drawing blood is a search subject to the requirement of a search warrant or a valid exception, once the blood is drawn the expectation of privacy, at least with respect to the purpose of taking the sample, in the blood sample

is gone. *Bazinet*, 170 N.H. at 686; *Davis*, 161 N.H. at 297; *see also Woodard*, 909 N.W. 2d at 308; *Randall*, 930 N.W.2d. at 773-774.

The trial court relied on the fact that the defendant attempted to withdraw consent before the State laboratory had actually tested the blood. It found, therefore, that the defendant had exhibited a subjective expectation of privacy in the drawn blood. SBA 43. The trial court characterized the objective expectation of privacy as a "closer call," but was prepared to recognize the objectively reasonable expectation of privacy in suppressing the laboratory results. SBA 43-44.

The trial court erred. The defendant did not have a subjective expectation of privacy in the drawn blood because he assented to giving the sample, knowing what the State would do with it. *State v. Sanford*, 474 N.W.2d 573, 575 (Iowa 1991) (defendant signed implied consent form and did not "clearly inform the appropriate official that the initial consent has been limited, withdrawn or revoked"). He had no objective expectation of privacy in the drawn blood because, once drawn, it was reasonable that the State would test it. *Jacobson v. State*, ___ S.W.3d ___, 2020 WL 1949622, *4 (Tex. App. Apr. 23, 2020 ("[C]ommon sense dictates that blood drawn for a specific purpose will be analyzed for that purpose."); *see also Fawcett*, 877 N.W.2d at 561 ("[F]inding a separate Fourth Amendment event in a chemical analysis 'divide[s] [the] arrest, and the subsequent extraction and testing of [the] blood, into too many separate incidents.'") (quoting *United States v. Snyder*, 852 F.2d 471, 474 (9th Cir. 1988)).

Nor did the State's delay in testing the lawfully seized blood act to create an objective expectation of privacy in it. *See Snyder*, 852 F.2d at 474 (9th Cir. 1988) ("[T]he subsequent performance of a blood-alcohol test has

no independent significance for fourth amendment purposes, *regardless of how promptly the test is conducted*.") (citing *Schmerber v. California*, 384 U.S. 757, 768 (1966) (emphasis added)).

As such, the petitioner has no expectation of privacy in blood taken with his consent for the purpose of a police investigation. Providing the blood to the police, in this case, was comparable to dialing a phone number. The defendant knew that the blood would be tested. Having done so, he retained no reasonable expectation of privacy from tests for which the sample was given.

The defendant in this case did not have a reasonable expectation of privacy in the blood taken with his own consent. Once he had consented to the blood draw, and the blood sample was in the possession of the police, he no longer had any expectation of privacy in the evidence.

B. The defendant's attempt to withdraw consent was too late because the search was completed before he withdrew consent.

The defendant did not attempt to withdraw his consent until the search was complete. His effort to withdraw consent nearly two weeks after the blood was draw is, quite simply, too late.

"[A] consenting party can withdraw his or her consent at any time during the course of a search." *United States v. Tatman*, 397 Fed. Appx. 152, 162 (6th Cir. 2010). "[I]n order to limit, revoke or withdraw an initial grant of consent, the consenter must clearly inform the appropriate official that the initial consent has been limited, withdrawn or revoked." *State v. Stanford*, 474 N.W.2d 573, 575 (Iowa 1991); see also *United States v. Ross*,

263 F.3d 844, 846 (8th Cir. 2001) (withdrawal of consent must be an "unequivocal act or statement of withdrawal") (citation and internal quotation marks omitted).

"[W]here a suspect does not withdraw his valid consent to a search for illegal substances before they are discovered, the consent remains valid and the substances are admissible as evidence." *United States v. Williams*, 898 F.3d 323, 330 (3d Cir. 2018). *See also United States v. Mitchell*, 82 F.3d 146, 151 (7th Cir. 1996) ("[W]hen a suspect does not withdraw his valid consent to a search before the illegal weapon or substance is discovered, the consent remains valid and the seized illegal item is admissible."); *United States v. Guerrero*, 129 F.3d 611, 1997 WL 681229, *3 (5th Cir. Oct. 22, 1997) ("[E]vidence discovered during a lawful, consensual search is not suppressed retroactively when the consent is terminated.") (unpublished); *cf. United States v. Dease*, 71 M.J. 116, 120 (C.A.A.F. 2012) ("Consent ... may be withdrawn at any time, provided of course that the search has not already been conducted."); *Burton v. United State*s, 657 A.2d 741, 746 (1994) ("[C]onsent may be withdrawn *any time prior to completion of the search*.") (emphasis added)).

"Revocation of consent does not operate retroactively to invalidate the search conducted before withdrawal of consent." *Woodard*, 909 N.W.2d at 304; *see also United States v. Guzman*, 852 F.2d 1117, 1122 (9th Cir. 1988) (evidence found before revocation of consent not suppressed); *Jones v. Berry*, 722 F.2d 443, 449 n.9 (9th Cir. 1983) ("No claim can be made that items seized in the course of a consent search, if found, must be returned when consent is revoked."). "Such a rule would lead to the

implausible result that incriminating evidence seized in the course of a consent search could be retrieved by a revocation of consent." *Id.*

The blood in this case was drawn, with the defendant's consent, on April 6, 2019. SBA 40. On April 19, 2019, defense counsel filed the demand letter. SBA 50. The search by that point had been completed and his attempt, nearly two weeks later, to withdraw consent was too late. *Cf. United States v. Lattimore*, 87 F.3d 647, 652 (4th Cir. 1996) ("[I]t would be wholly inappropriate for us to ignore the undisputed—and in light of his failure to withdraw consent, dispositive—fact that [the defendant] gave a valid and voluntary oral consent to search."); *see also Summicht*, 2017 WL 62520961, *4 ("[The defendant's] attempt to revoke was simply too late. Contrary to the premise of her argument, the search does not consist of multiple parts and is not ongoing until the analysis is conducted.").

Further, the defendant sought the wrong means for return of the blood. On June 27, 2019, the defendant filed a motion to suppress evidence, stating that defense counsel had "authorized" the return of the evidence. SBA 46. This sequence of events undercuts the defendant's assertion that he withdrew consent. The appropriate process for seeking the return of evidence that has been lawfully seized is a motion for return of property. *See* RSA 596-A:6 ("All other property seized in execution of a search warrant or otherwise coming into the hands of the police shall be returned to the owner of the property, or shall be disposed of *as the court or justice orders*, which may include forfeiture and either sale or destruction as the public interest requires, in the discretion of the court or justice, and in accordance with due process of law."); *cf. In re Search Warrant for 1832 Candia Road, Manchester*, 171 N.H. 53, 55 (2018) (after property was

seized upon execution of a search warrant, the defendant filed a motion for return of property); *see also People v. King*, 663 N.Y.S.2d 610, 615 (N.Y.App.Div. 1997) ("[A] defendant does not have a right to the automatic return of property seized in any criminal case absent a proper demand or some legal action.").

If the defendant had filed a motion for return of property, the trial court could have considered whether the laboratory was required to return it. A defense attorney cannot authorize the return of lawfully seized property, but a court may. Absent an order directing the State to return the blood sample, the trial court erred in concluding that the State violated the defendant's rights when it declined to accede to a non-judicial demand for its return.

In short, having waited until the blood was lawfully drawn, taken into evidence, and sent for testing, the defendant waited too long to assert his right to withdraw consent.

C. The defendant abandoned the blood sample.

By the time that the defendant raised an objection to the use of his blood, he had abandoned any interest in the sample.

"When a person abandons a possession he or she gives up the right to be secure from unreasonable searches of that possession." *State v. Howe*, 159 N.H. 366, 372 (2009) (citing *State v. Westover*, 140 N.H. 375, 380 (1995)). "Abandonment is determined based upon evidence of a combination of act and intent." *Id.* The intent to abandon is "ascertained from what the actor said and did since intent, although subjective, is determined from objective facts at hand. Also relevant are where and for

what length of time the property is relinquished and its condition." *Id*. The determination of abandonment is a question of fact for the fact finder and this Court will uphold the finding unless clearly erroneous. *Id*.

Once a possession is relinquished into the custody of the police under circumstances that would not reasonably lend themselves to an expectation of return of the object, a defendant cannot later object to its admissibility. *State v. Jarret*, 116 N.H. 590 (1976) (hitchhiker abandoned narcotics by leaving them in the squad car); *see also State v. Howe*, 159 N.H. 366 (2009) (defendant who did not remove his property for five days after the eviction notice took effect had abandoned it).

The defendant in this case consented to the blood draw. Thirteen days passed before the defendant's lawyer attempted to withdraw his client's consent. As noted above, he did not ask a court to return the blood that had been lawfully seized. Instead, he relied on an assertion that defense counsel could authorize the return of the blood. Thereafter, when the laboratory declined to comply with defense counsel's demand, he waited until June 27, 2019, to seek any judicially authorized remedy. By that time, the blood had been tested and the defendant's interest in it had been abandoned for nearly three months. Because the defendant made no effort to reclaim his blood, any claim of temporary abandonment is unreasonable, and certainly does not support the notion the defendant retained some subjective expectation of privacy in his blood sample.

The abandonment is supported by the very nature of blood evidence itself. The condition of evidence is relevant to determining the defendant's subjective intent to abandon property. *Howe*, at 372. Blood is unique evidence. Unlike other physical evidence such as a car or a cell phone, once

blood is drawn, there is no reasonable expectation that it will be returned. And the defendant did not attempt to make the case that it should be returned by seeking judicial intervention until he filed a motion to suppress evidence nearly three months later.

On this record, the trial court committed error in suppressing the test results of lawfully seized evidence, particularly in light of the defendant's abandonment of the property.

D. The defendant had no expectation of privacy, in part, because he was driving.

The defendant also had no reasonable expectation of privacy, in part because he was driving.

In analyzing what society is prepared to recognize as reasonable expectation of privacy, this Court looks to statutes indications of societal expectations. *Bazinet*, 170 N.H. at 685. *See also* RSA 329:26 (medical record confidentiality); RSA 265-A:4 (implied consent). "Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *State v. Cora*, 170 N.H. 186, 195 (2017) (internal citation omitted).

The expectation of privacy in blood evidence and toxicology results is further diminished in an investigation into impaired driving. Citing both the exception to medical record confidentiality in RSA 329:26, and the implied consent statute, RSA 265-A:4, this Court has found that society is not prepared to accept a reasonable expectation of privacy in the blood evidence and toxicology results produced for the purposes of diagnosis and treatment arising out of an incident giving rise to an investigation into

impaired driving. *See Davis*, 161 at 298. Indeed, RSA 329:26 creates a specific exception to medical confidentiality for blood and toxicology records taken for treatment in connection with an incident giving rise to an investigation for DUI. *See* RSA 329:26 ("This section shall also not apply to the release of blood or urine samples and the results of laboratory tests for drugs or blood alcohol content taken from a person for purposes of diagnosis and treatment in connection with the incident giving rise to the investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs.").

Moreover, the implied consent law demonstrates society has a preference to access to toxicological information for those who are arrested for impaired driving and is willing to relinquish any expectation of privacy in that evidence for the detection and prosecution of impaired driving. RSA 265-A:4. *Davis*, 161 N.H. at 297; *State v. Mfataneza*, 172 N.H. 166, 169 (2019) ("The major premise of the implied consent law is that it will aid the prosecution of the guilty and the protection of the innocent.").

Although there may be some expectation of privacy in other information that drawn blood may contain, *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), there is no reasonable expectation of privacy in blood alcohol content once blood is lawfully drawn. When the trial court found otherwise, it relied, in part on the *Birchfield* decision. SBA 42. In *Birchfield,* the Court observed that a blood test gives law enforcement "a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 136 S.Ct. at 2178; *see also* SBA 42. This is certainly true, but the remark was taken out of context. The concern of the *Birchfield* court was not that the blood might

be tested. Rather it was that law enforcement could not draw the blood, absent consent, without a warrant. *Id.* at 2186 (remanding part of the three cases for determination if the defendant consented).

In this case, the defendant had consented to the blood draw and had no expectation of privacy in the blood alcohol analysis that would follow that consent. As such, the concerns expressed in *Skinner* and *Birchfield*, and relied upon by the trial court, do not apply here. The trial court erred when it concluded otherwise.

E. The State did not need a warrant.

Finally, the defendant's insistence that he had the right to have evidence legally gathered returned is without legal merit. Although the trial court did not address this assertion as it was not made in the motion to suppress, the defendant made it in his April 19, 2019 demand for the return of the blood sample. SBA 50. The demand also contained a demand that the State inform defense counsel if it "attempt[ed] to communicate with any Judge for any purpose," "including a request for a search warrant." SA: 13.

This demand was without legal authority, but may help to explain why the State did not seek a warrant. The threat of litigation was not even thinly veiled. Because the State had taken the blood with the defendant's consent, it was on solid legal ground in testing the blood, consistent with laboratory protocols. *State v. Socci*, 166 N.H. 464, 473 (2014) ("A voluntary consent free of duress and coercion is a recognized exception to the need of both a warrant and probable cause.") (quoting *State v. Johnston*, 150 N.H. 448, 453 (2004) (internal quotation marks omitted)).

Nevertheless, the trial court's reliance on the alleged failure of the State to seek a warrant, SBA 6, even if the State could not explain this alleged oversight, was without legal basis. By wrongly concluding that the testing constituted a second search, and by wrongly concluding that the defendant retained an expectation of privacy in a lawfully taken blood sample, the trial court also wrongly concluded that the State needed a warrant to perform the tests.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Honorable Court to reverse the trial court's order granting the defendant's motion to suppress.

The State certifies that the appealed decision is in writing and is appended to this brief.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

May 20, 2020

/s/Daniel E. Will
Daniel E. Will
NH Bar No. 12176
Solicitor General

/s/Benjamin W. Maki
Benjamin W. Maki
NH Bar No. 20117
Assistant Attorney General

/s/Elizabeth C. Woodcock
Elizabeth C. Woodcock
N.H. Bar No. 18837
Assistant Attorney General

New Hampshire Department of Justice
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF COMPLIANCE

I, Benjamin W. Maki, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,590 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

May 20, 2020 *<u>/s/Benjamin W. Maki</u>*
Benjamin W. Maki

CERTIFICATE OF SERVICE

I, Benjamin W. Maki, hereby certify that a copy of the State's brief shall be served on Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

May 29, 2020 */s/Benjamin W. Maki*
Benjamin W. Maki

APPENDIX TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

2nd Circuit - District Division - Littleton
134 Main St.
Littleton NH 03561

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

August 26, 2019

BETHLEHEM POLICE DEPARTMENT
ATTENTION PROSECUTOR
PO BOX 808
BETHLEHEM NH 03574

Case Name: **State v. David Almeida**
Case Number: **454-2019-CR-00158**

Enclosed is the Order issued by Judge Mace today on the Motion to Suppress in the above case.

Also enclosed is a notice of hearing for trial.

Deborah A. Nichols
Clerk of Court

(4540082)

C: Leonard D. Harden, ESQ

STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

GRAFTON COUNTY, SS. 2ND CIRCUIT – DISTRICT DIVISION – LITTLETON

STATE V. ALMEIDA
CASE NO. 454-2019-CR-00158

ORDER GRANTING MOTION TO SUPPRESS

On July 30, 2019, the State, and its counsel, Attorney Solbeck, and the Defendant, Daniel Almeida, and his counsel, Attorney Harden, appeared for a hearing on *Defendant's Motion to Suppress Blood Results: Consent Withdrawn*, dated June 27, 2019. The Defendant stands charged with violating RSA 265-A:2 for driving while under the influence of alcohol. After the Defendant's arrest, the Defendant consented to give the State a blood sample to determine his blood alcohol level. Before the State actually analyzed the Defendant's sample, the Defendant revoked his consent in writing and demanded its return in person. The State refused and analyzed the sample. For the reasons explained below, the Court: (1) finds that the Defendant had a reasonable expectation of privacy in the sample prior to its analysis; (2) the State's analysis of his blood sample constituted a search within the meaning of Part I, Article 19 of the New Hampshire Constitution; and (3) the State's search exceeded the scope of the Defendant's consent to search. Consequently, the Court GRANTS the Defendant's motion to suppress the results of the State's analysis of the sample.

Factual Background:

The undisputed facts relevant to the Defendant's motion are as follows. On April 6, 2019, the Bethlehem Police stopped the Defendant for suspicion of driving under the influence of alcohol. After administering a field sobriety test, the Bethlehem Police placed the Defendant under arrest and read him his administrative license suspension rights. The Defendant then consented to give the State a blood sample to determine his blood alcohol level at the time of his arrest. The Defendant gave his sample at Littleton Regional Hospital shortly thereafter. The Defendant did not receive any diagnosis or treatment at the hospital.

Two days later, the Bethlehem Police transported the Defendant's sample to the New Hampshire State Forensic Laboratory ("Lab"). The Lab accepted the sample and logged it in according to their protocols, and designated it "in process." On April 19, 2019, the Defendant hired counsel. On the same day, the Defendant, through counsel, sent a letter to the Lab and to Attorney Solbeck captioned "*Notice of Withdrawal of Consent to Hold or Analyze Bradley Dike's [sic] Bodily Fluid Specimens and Demand for Immediate Return of the Same.*" The State concedes receipt of the letter on or about the same day. In the letter, the Defendant informed the Lab and Attorney Solbeck that he authorized CG Labs, LLC as his agent to collect his sample from the Lab.

On April 24, 2019, John Godfrey, CG Lab, LLC's president, attempted to collect in person the Defendant's sample from the Lab. Lab personnel denied the Defendant's agent the sample because the sample was then "in process." At the hearing, the State defined "in process." In this case, "in-process" means only that the Lab had received and logged the Defendant's sample into its testing system – however tightly proscribed the manner. No analysis of the blood sample had yet taken place. The State did not actually analyze the sample for the suspected evidence until the day after the Defendant's agent sought its return.

In its objection and at the hearing, the State essentially argued that its "in process" designation means that the "search" in this case had already begun by the time it received the Defendant's letter and Mr. Godfrey's visit. Against that argument, the State readily conceded that it chose not to seek a search warrant after receiving the Defendant's letter and chose not to seek a warrant after Mr. Godfrey's visit. According to the State, the Defendant lost the right to revoke consent to search as soon as the State deemed the sample "in-process." The Court disagrees and grants the Defendant's motion.

Legal Analysis:

Part I, Article 19 of the New Hampshire Constitution protects an individual from "all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." N.H. CONST. pt. I, art. 19; *see also* U.S. CONST. Amend. 4; *cf. State v. Ball*, 124 N.H. 226, 231–233 (1983) (New Hampshire courts apply State Constitution unless the Federal Constitution offers more protection). The question of whether a search is unreasonable turns on whether an individual has an expectation of privacy in the person, houses, papers or possessions to be searched. *State v. Davis*, 161 N.H. 292, 295 (2010) (citations omitted). A warrantless search implicates the New Hampshire Constitution only if a defendant's subjective expectation of privacy is one society regards as objectively reasonable. *Id.* If a search implicates an expectation of privacy society regards as objectively reasonable, the search is of constitutional import. *Id.*

Neither party disputes that the intrusion of a needle into the Defendant's body to obtain the blood sample was a search. Nor does either dispute that the blood draw was lawfully done pursuant to the defendant's consent, a well-recognized exception to the warrant requirement. *See generally State v. Saunders*, 164 N.H. 342, 353-354 (2012). The threshold issue in this case is whether the Defendant had a reasonable expectation of privacy in his blood sample once it had been drawn to search for evidence – but drawn for no other purpose.

The Defendant argues he had a reasonable expectation of privacy in the sample even after initially consenting to a blood draw and that he maintained the right to withdraw his consent to search before the State analyzed the sample. The Defendant unequivocally demonstrated his subjective expectation of privacy in the sample through his counsel's letter and through his agent's attempt to retrieve the sample. Whether the Defendant's subjective expectation of privacy is one that society is prepared to recognize as objectively reasonable is a closer call, but one the Court recognizes as such.

There is no dispute that when the State analyzed the Defendant's sample it undertook a chemical analysis for the express purpose of developing evidence – in this case, physiological data revealing whether the Defendant had a specific blood alcohol level at the time of his arrest. As such, the analysis itself is a "further invasion" of the Defendant's expectation of privacy beyond the blood draw itself. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-617 (1989). Such an analysis can reveal deeply personal information, which fact supports a finding of a reasonable expectation of privacy in blood. The U.S. Supreme Court held in *Birchfield v. North Dakota*, — U.S. —, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), that warrantless breath testing incident to arrest was permissible, but warrantless blood testing incident to arrest was prohibited by the 4th Amendment. *Birchfield*, 136 S.Ct. at 2184. In reaching these separate conclusions, the Court emphasized the limited scope of information that could be obtained from a breath test (only the amount of alcohol in the subject's breath), *see id.* at 2177, as compared to blood, from which a wealth of additional, highly personal information is now obtained with relative ease:

> "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested."

Birchfield, 136 S.Ct. at 2178. *See also Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (State's analysis of lawfully obtained urine samples "were indisputably searches within the meaning of the 4th Amendment," citing *Skinner*, 489 U.S. at 617). The *Skinner* court thus concluded "that the collection *and subsequent analysis* of the requisite biological samples must be deemed Fourth Amendment searches." *Skinner*, 489 U.S. at 618 (emphases added). Therefore, the Defendant has an objectively reasonable expectation of privacy in his blood *and* in physiological data within it. Meaning, *both* collection *and* analysis are 4th Amendment "searches." *Id.* at 618.

This is not a case where a hospital drew blood for purposes of treatment. Were that the case, New Hampshire law would appear to foreclose a defendant's expectation of privacy in the sample itself and in a subsequent analysis. *See Davis*, 161 N.H. at 298 (". . . we conclude that society does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purposes in connection with an incident giving rise to an investigation for driving while under the influence of intoxicating liquors or controlled drugs"). *State v. Bazinet*, 170 N.H. 680, 687 (2018) explicitly highlighted the distinction between state action in drawing the blood sample and the actions of a third party, such as the hospital:

> "[W]hat is important . . . for purposes of determining whether the defendant has a reasonable expectation of privacy in the State's acquisition and testing [of a blood sample], is whether: (1) the withdrawal was done "for purposes of diagnosis and treatment in connection with the incident giving rise to the investigation for driving a motor vehicle while such person was under

> the influence of intoxicating liquors or controlled drugs," . . . and (2) whether the withdrawal involved state action."

Bazinet, 170 N.H. at 687. The defendants' expectations of privacy in *Davis* and *Bazinet* were thinned by the fact that they were drawn by a third party in the course of medical treatment and by the explicit statutory abrogation of medical privilege for samples taken during the course of treatment. *See* RSA 329:26.

The distinguishing factor in this case is that the Defendant's only interaction with the hospital was to deliver over to the State suspected evidence of a crime. The Defendant required no diagnosis or treatment nor did he receive any diagnosis or any treatment from the hospital in connection with his arrest. The Defendant's expectation of privacy in this case stood intact when he permitted the blood draw by his own consent and by his own consent only. Since analysis is a search within the meaning of the 4th Amendment as above, and therefore a search within the meaning of Part I, Article 19 of the New Hampshire Constitution, the result in this case turns on whether the State conducted the second search, the analysis, by consent. *Ball*, 124 N.H. at 231-33.

"A warrantless search is per se unreasonable and invalid unless it comes within one of a few recognized exceptions." *State v. Cora*, 170 N.H. 186, 190-191 (2017) (quotation omitted). "Absent a warrant, the burden is on the State to prove that the search was valid pursuant to one of these exceptions." *Id.* (quotation omitted). Consent to search is an exception to the above-cited rule and a justification for a warrantless search if the State proves the existence of consent. *See generally State v. Saunders*, 164 N.H. 342, 353-354 (2012); *see also generally United States v. Williams*, 898 F.3d 323, 329-330 (3rd Cir. 2018). When the State relies on consent to conduct a search, the state has no more authority to conduct the search than the scope of the consent given. *Saunders*, 164 N.H. at 354 (citations omitted). Said another way, a defendant authorizing a consent search controls its boundaries. *Williams*, 898 F.3d at 329-330. Withdrawing consent to search constitutes drawing a boundary and is therefore permitted. *Id.* The State failed to carry its burden.

As above, the Defendant consented to the initial blood draw but withdrew his consent before analysis. The Defendant's sample was on a shelf in a climate-controlled room when the Defendant's agent appeared to retrieve it. Against those facts, the State lacked the Defendant's consent and there was no exigency or any other legally cognizable exception to the warrant requirement authorizing the State to proceed with a search in a constitutional manner. Because the State elected to proceed to analyze the Defendant's sample without a warrant and without his consent, the State exceeded the boundaries of its authority and its search was unreasonable *per se*.

If the State's position were constitutionally valid, no defendant could withdraw consent to search once the State is in possession of the thing to be searched. For example, were the State in possession of a cell phone suspected of harboring evidence of a crime but lawfully obtained, no defendant could later revoke consent to search the phone and demand its return before the State searches it for evidence. This is not consistent with state or federal constitutional jurisprudence. *See, e.g., Riley v.California*, 134 S. Ct. 2473 (2014) (requiring a

warrant before search of contents of cell phone appropriately seized incident to arrest); *but cf. State v. Wheeler* (police obtained search warrant to analyze boots seized from defendant in search incident to arrest, but court noted, "[s]ince . . . the police had lawful possession of the property, article 19 requires neither further demonstration of probable cause nor the issuance of further legal process to authorize the examination or testing of such property."). Other Courts have similarly endorsed a defendant's right to withdraw consent and terminate a search prior to examination of an item lawfully taken pursuant to consent. *See, e.g., U.S. v. Casellas-Toro*, 807 F.3d 380 (1st Cir. 2015) (defendant consented to search of his car, which did not take place until 21 days later, but "the district court did not clearly err in finding that [the defendant] did not withdraw or revoke his consent," so search was not invalid).

The State appears to be arguing in this case that the evidence it suspected was suspended in the sample was in "plain view" when "in process" at the Lab. However, the State's concession that the sample had not been analyzed before it received the Defendant's withdrawal is constitutionally fatal to its argument particularly since the United States Supreme Court defines the analysis itself as a search. A vial on a shelf reveals nothing just as a cell phone sitting on a shelf reveals nothing until analyzed. Only a fully analyzed sample embodied in an admissible report becomes evidence. Were the State correct, the vial itself would be sufficient evidence upon which to convict.

At the hearing, the State was unable to articulate a valid reason why it chose not to seek a warrant despite having two separate occasions upon which to do so as above. Because the State elected to proceed with a search initially authorized by consent but unequivocally withdrawn before the search itself, the State violated the Defendant's constitutional right against an unreasonable search. The Court GRANTS *Defendant's Motion to Suppress Blood Results: Consent Withdrawn*, prayers "A" and "B" only. The Court shall set this case for trial in the ordinary course.

SO ORDERED

8/26/19
Hon. Michael C. Mace
Littleton Circuit Court

Law Office of Leonard D. Harden

104 Main Street, Suite 3, Lancaster, NH 03584
603.788.2080 Fax: 603.788.4010 email: info@lenharden.com

June 27, 2019

Darcy Stearns, Deputy Clerk
2nd Circuit - Littleton District Division
134 Main Street
Littleton, NH 03561

RE: State v. David Almeida # 454-2019-CR-00158

Dear Darcy:

Enclosed please find the Defendant's Motion to Suppress Blood Results: Consent Withdrawn for filing in the above matter. A true copy has been provided to Lise Solbeck, Esquire of the Bethlehem Police Department.

If you have any questions or concerns do not hesitate to contact me.

Very truly yours,

Leonard D. Harden

Enclosure

pc: Lise Solbeck, Esquire
David Almeida

THE STATE OF NEW HAMPSHIRE
1st Circuit District Division Littleton

Grafton, SS. 2019

STATE OF NEW HAMPSHIRE
V.
David Almeida
454-2019-CR-158

DEFENDANT'S MOTION TO SUPPRESS BLOOD RESULTS: CONSENT WITHDRAWN

NOW COMES the Defendant, David Almeida, by and through his counsel, Leonard D. Harden and moves to suppress the blood test results based on a withdrawal of consent and in support states the following:

1. The defendant is charged with DWI 1st for allegedly driving while having an alcohol concentration of 0.08 or more or while under the influence of intoxicating liquor or drugs.

2. The DWI charges are based on driving on April 6, 2019 at approximately 8:00 PM in Bethlehem, NH.

3. After submitting to field sobriety tests and being arrested, Mr. Almeida was advised of his ALS rights and at the time agreed to submit to a blood test.

4. Mr. Almeida was then taken to the Littleton Regional Hospital.

5. Upon information and belief Mr. Almeida blood was collected on April 6, 2019.

6. Mr. Almeida contacted and hired undersigned counsel on or about April 19, 2019.

7. Undersigned counsel sent a letter of representation and a letter withdrawing consent to hold, possess or analyze Mr. Almeida's bodily fluid specimens and demanded immediate return of same on April 19, 2019 at approximately 3:33 PM.. (See Attached).

8. Undersigned counsel simultaneously authorized a representative of CG Labs, Inc. to retrieve Mr. Almeida's blood sample on April 19, 2019. (See Attached).

9. The letters withdrawing consent and authorizing CG Labs, Inc were sent to email addresses for Lise Solbeck, Esquire for Bethlehem Police as prosecutor and to Timothy Pifer, NH Lab Director on April 19, 2019.

10. Upon information and belief Mr. Almeida's blood sample was transported from the Bethlehem Police by the Bethlehem Police to the NH State Forensic Lab on 4/8/19.

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

11. Mr. John Godfrey President of CG Labs, Inc. in fact went to the NH State Forensic Laboratory on April 24, 2019 and was informed by NH Lab personnel that he could not have Mr. Almeida's blood sample as it "was in process."

12. Upon information and belief Mr. Almeida's blood sample was finally analyzed on 4/25/19 by Daphne L. Stellato, Criminalist I.

13. Undersigned counsel has had his administrative assistant, Mandy Vendt, double check her email and confirmed that the emails sent to Attorney Solbeck and Timothy Pifer were received and there was no "out of office" response from either.

14. It is clear that the record shows that Mr. Almeida did withdraw his consent to enable the State of NH to hold or analyze his bodily fluid specimens and demanded the immediate return of his bodily fluid specimens prior to the testing.

15. Upon information and belief the NH State Laboratory did not even begin testing until 4/25/19 4 days after being advised of the withdrawal of consent to testing was provided.

16. "A person's urine can reveal many things about their health and related physical circumstances. A person has a privacy interest in their urine and in any such specimen given to law enforcement." Skinner v. Railway Labor Executives' Assoc., 489 US 602 (1989).

17. The only basis upon which law enforcement obtained Mr. Almeida's blood specimen was consent. There is no other statutory authority possible for the withdrawal, continued possession and ultimately analysis of the bodily fluids.

18. There is no dispute that Mr. Almeida withdrew his consent to the NH State Laboratory for them to possess or analyze his blood specimen prior to testing by the State of New Hampshire.

19. The consent underlying the search of the blood was unequivocally revoked on April 19, 2019.

20. The law is clear that "an initial voluntary grant of consent may be limited, withdrawn or revoked at any time prior to the completion of the search." State v. Stanford, 474 NW 2d 573 (Iowa).

21. When the police are relying upon consent as a basis for their warrantless search, they have no more authority than they have been given by the consent. The question of the scope of consent may be stated as how far the defendant intended the consent to extend or how the police reasonably construed his consent. State v. Pinder, 126 N.H. 220, 224, 489 A.2d 653 (1985).

22. "To determine whether a search has exceeded the scope of the permission granted, we ask whether under the circumstances surrounding the search, it was objectively reasonable for the officers conducting the search to believe that the defendant had

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

consented to it." State v. Livingston, 153 N.H. 399, 408, 897 A.2d 977 (2006). State v. Saunders, 55 A.3d 1014, 164 N.H. 342 (N.H. 2012).

23. The United States Supreme Court has recently addressed warrantless blood testing in Missouri v. McNeely 133 S.Ct. 1552 (2013) 569 U.S. 141 which effectively overruled the Court's earlier ruling in Schmerber v. California, 284 US 757 (1966) and was followed by State v. Cormier, 127 NH 253 (1985).

24. McNeely addressed the issue of "whether the natural metallization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases." The Court ruled that it does not and held consistent with general Fourth Amendment principles that exigency in this context must be determined case by case based on the totality of the circumstances.

25. This motion is also based upon the contention that any blood seized was unreasonable, without a warrant, lacking a showing of "special facts" to provide an exigency to conduct a warrantless bodily intrusion. Defendant contends that the "implied consent" doctrine does not translate into to a "consent" exception to Fourth Amendment Warrant requirement, and that any consent was coerced. Defendant also contends that the blood draw was not obtained in a "medically acceptable manner by a physician in a hospital environment". Schmerber v. California (1966) 384 U.S. 757, @ 771; Missouri v. McNeely (2013) 569 U.S. 141 (2013).

26. Equally troubling in this case is that the State was put on notice that there is a warrant procedure available where the matter could be raised before a judge to determine if the search of the blood is justified. However, the state ignored the invitation by defense counsel to apply for a warrant.

27. Upon information and belief Timothy Pifer, NH Lab Director has indicated that the NHSL would ignore withdrawal of consent on any sample sent for testing by law enforcement.

28. The NH State Laboratory is disregarding the constitutional protections of the US Constitution and the NH Constitution by conducting tests on bodily specimens after consent for possession and testing has been validly withdrawn.

WHEREFORE, the defendant respectfully prays for the following:

A. Suppress the purported blood test results;

B. Find the consent to possess and analyze was validly withdrawn;

C. Hold a hearing if necessary;

D. And such other relief as deemed just and proper.

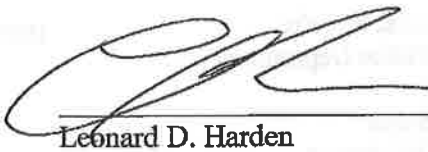
Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

Respectfully submitted,

Leonard D. Harden

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was provided this 2 day of June, 2019 to Lise Solbeck, Esquire.



Leonard D. Harden
NH Bar # 10239

So Ordered.

Presiding Justice

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

Law Office of Leonard D. Harden

104 Main Street, Suite 3 Lancaster, NH 03584
(603) 788-2080 Fax: (603) 788-4010 Email: info@lenharden.com

April 19, 2019

Timothy Pifer, Lab Director
State of New Hampshire
Forensic Laboratory
33 Hazen Drive
Concord, NH 03305

Timothy.pifer@dos.nh.gov

Lise F. Solbeck, Esquire
Bethlehem Police Department
PO Box 808
2155 Main Street
Bethlehem, NH 03574

prosecutor@bethlehemnh.org

Re. David Almeida, DOB 3/1/1967

NOTICE OF WITHDRAWAL OF CONSENT TO HOLD OR ANALYZE BRADLEY DIKE'S BODILY FLUID SPECIMENS AND DEMAND FOR IMMEDIATE RETURN OF THE SAME

Dear Director Pifer and Attorney Solbeck:

On or about April 6, 2019 David Almeida was arrested for DWI in Bethlehem, NH. Upon information and belief on that same date at the request of the police, Mr. Almeida appears to have provided a blood sample pursuant to the NH implied consent law.

Please be advised that Mr. Almeida hereby withdraws any and all consent that he may have given to have these bodily fluids withdrawn, obtained, possessed, analyzed or tested for any purpose whatsoever. He further asserts that the consent in this case was the product of coercion, misleading statements, and was not freely given. If the samples were collected pursuant to felony ALS advisement they are a warrantless search and Mr. Almeida hereby asserts a desire to have his bodily fluids returned to his agent John Godfrey of CG labs Inc. without any testing or analysis conducted by the state.

Moreover, Mr. Almeida demands that his bodily fluids and specimens (whether blood, urine, or other) be held, in good condition, until John Godfrey of CG Labs picks up the sample for the purpose of potential independent analysis Mr. Almeida may wish, or for any other purpose that he may lawfully perform.

Also, please be advised that I am his attorney of record. I demand that if you attempt to communicate with any Judge for any purpose regarding the use or disposition of Mr. Almeida's bodily fluid and specimens, including a request for a search warrant, then I demand a reasonable advance notice of the same and an opportunity to be heard before the Judge at such time of communication.

Very truly yours,

Leonard D. Harden

CG Labs, Inc. (via email)

Gmail Leonard Harden <attyharden@gmail.com>

David Almeida

1 message

Leonard Harden <info@lenharden.com> Fri, Apr 19, 2019 at 3:33 PM
To: Timothy Pifer <timothy.pifer@dos.nh.gov>, "Lise F. Solbeck" <lsolbeckhpd@haverhill-nh.com>, Jay Godfrey <chemist@cglabs.com>, "Lise F. Solbeck" <prosecutor@bethlehemnh.org>
Bcc: David Almeida <thenutty5@gmail.com>

Dear Tim and Lise,

Attached please find a letter seeking to withdraw consent to the state continuing possession of my client's bodily fluids. I have also sent a letter authorizing CG Labs to take possession of my client's bodily fluids.

Len,
Leonard D. Harden
104 Main Street, Suite #3
Lancaster, NH 03584
603.788.2080
Criminal/ DWI Lawyer

CG Labs Authorization Almeida Withdrawal Consent Almeida.pdf
57K

Law Office of Leonard D. Harden

104 Main Street, Suite 3 Lancaster, NH 03584
(603) 788-2080 Fax: (603) 788-4010 Email: info@lenharden.com

April 19, 2019

Timothy Pifer, Lab Director
State of New Hampshire
Forensic Laboratory
33 Hazen Drive
Concord, NH 03305

Timothy.pifer@dos.nh.gov

Lise F. Solbeck, Esquire
Bethlehem Police Department
PO Box 808
2155 Main Street
Bethlehem, NH 03574

prosecutor@bethlehemnh.org

Re. David Almeida, DOB 3/1/1967

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Also, please be advised that I am his attorney of record. I demand that if you attempt to communicate with any Judge for any purpose regarding the use or disposition of Mr. Almeida's bodily fluid and specimens, including a request for a search warrant, then I demand a reasonable advance notice of the same and an opportunity to be heard before the Judge at such time of communication.

Very truly yours,

Leonard D. Harden

CG Labs, Inc. (via email)

Law Office of Leonard D. Harden

104 Main Street, Suite 3, Lancaster, NH 03584
603.788.2080 Fax: 603.788.4010 email: info@lenharden.com

April 19, 2019

NH State Police Forensic Laboratory
Attn. Toxicology Group
James H. Hayes Safety Building
33 Hazen Drive
Concord, NH 03305

Re. State v. David Almeida, DOB: 3/1/1967

To Forensic Lab:

This firm represents David Almeida in connection with a sample I may want to have analyzed independently. I wish to have John J. or Judith Rutty Godfrey of CG Labs, Inc. who are employed by my firm and are hereby authorized to pick up all samples belonging to David Almeida, DOB 3/1/1967.

Very truly yours,

Leonard D. Harden

cc: David Almeida

THE STATE OF NEW HAMPSHIRE
1st Circuit District Division Littleton

Grafton, SS. 2019

STATE OF NEW HAMPSHIRE
V.
David Almeida
454-2019-CR-158

MEMORANDUM IN SUPPORT TO SUPPRESS BLOOD RESULTS: CONSENT WITHDRAWN

NOW COMES the Defendant, David Almeida, by and through his counsel, Leonard D. Harden and respectfully submits a memorandum in support of suppressing the blood test results based on a withdrawal of consent and in support states the following:

1. At issue is whether the results of the blood test violate the defendant's Fourth Amendment to the United States Constitution and Part 1, Article 19 of the NH Constitution.

2. Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment to the U.S. Constitution protect people, their possessions, and their dwellings from unreasonable searches and seizures by the State or its agents. State v. Beauchesne, 151 N.H. 803, 807 (2005); see also State v. Dellorfano, 128 N.H. 628, 632 (1986).

3. The Fourth Amendment forbids unreasonable searches and seizures. State v. Zeta Chi Fraternity, 142 NH 16 (1997) Warrantless searches are presumptively unreasonable, subject to certain carefully delineated exceptions. Id. at 21.

4. One well-established exception to the warrant requirement of the Fourth Amendment is a search conducted pursuant to consent. In consent cases, the State must prove by a preponderance of the evidence that consent was free, knowing and voluntary. See State v. Pinder, 126 N.H. 220, 223 (1985); see also Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

5. Consent can be explicitly given or implied, based on circumstances. If consent is implied it must be an "unambiguous manifestation" of consent based on the circumstances. See State v. Sawyer, 145 N.H 704, 707-08 (2001). However, facial grimaces and annoyed looks, absent some verbal protests, are not enough to demonstrate a lack of consent. State v. Tarasuik, 160 N.H. 323, 329-30 (2010).

6. In this case it is clear that the defendant has withdrawn his consent to the state possessing and testing his blood.

7. New Hampshire's definition of expectation of privacy is more protective than the federal definition. Compare State v. Goss, 150 N.H. 46, 50 (2003), with California v. Greenwood, 486 U.S. 35, 40 (1988). The definition of search is relatively simple - a

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

search is a governmental invasion of a person's privacy. State v. Baldwin, 124 N.H. 770, 774 (1984); see also Oliver v. United States, 466 U.S. 170, 177 (1984).

8. A governmental intrusion violates becomes problematic when it impinges on an individual's expectation of privacy. The expectation of privacy must have two components: (1) a subjective component - behavior or context that exhibits an actual expectation of privacy; and (2) an objective component - social acceptance of the privacy expectation as reasonable. Goss, 150 N.H at 48.

9. New Hampshire's standard of seizure is more protective than the federal standard. Compare State v. Beauchesne, 151 N.H. 803, 810 (2005) with California v. Hodari D., 499 U.S. 621, 626 (1991).

10. It is blackletter law that a person who voluntarily consents to a search may subsequently limit or withdraw consent if that limitation or withdrawal is expressed with clear and unequivocal intent. United States v.Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (quoting United States v. Gray, 369 F.3d 1024, 1026 (8th Cir. 2004)); see also United States v. Alfaro, 935 F.2d 64, 67 (5th Cir. 1991); Payton v.Commonwealth, 327 S.W.3d 468,478 (Ky. 2010).

11. Here, it is undisputed that the defendant voluntarily consented to have his blood taken and tested, his blood was taken, and before the blood was tested he clearly and unequivocally withdrew his consent to the search of his blood.

12. The narrow issue on before this Court is whether Almeida had the right to withdraw his consent to the search after his blood was taken but before it was tested.

13. It is clear that Mr. Almeida clearly, unequivocally and unambiguously revoked his consent to the state possessing and testing his blood prior to the actual testing. This resulted in the State losing its only lawful basis for the warrantless search and its subsequent testing.

14. There is no legal authority for the state to take the position that a person who consents to the taking and testing of their blood loses the right to withdraw consent before the search is completed with the testing of the blood.

15. A person has a legitimate privacy interest in the information contained in a sample of his or her blood. A staggering amount of personal information can be acquired by the analysis of a sample of blood. The presence of alcohol drugs, or other chemicals can be detected; as well as genetic information about ancestry, family connections, medical conditions, pregnancy, and genetic profiles suitable for identification purposes. For these reasons, the United States Supreme Court has recognized that the chemical analysis of a blood sample is an invasion of an individual's privacy. Skinner v. Railway Labor Executives' Assoc., 489 US 602 (1989).

16. In the 1989 case Skinner v. Railway Labor Executives' Association, The Court explained:

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
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> It is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of ... privacy interests.

17. In 2001, the United States Supreme Court decided the case of Ferguson v. City of Charleston, where warrantless drug testing was conducted on lawfully-obtained urine samples. Despite the collection of the urine itself being lawful, the Court, citing to Skinner, held that "[T]he urine tests ... were indisputably searches within the meaning of the Fourth Amendment." Ferguson v. City of Charleston, 532 US 67 (2001).

18. Ferguson went on in the majority opinion, which contains the actual holding of the case, stating that the analysis of a sample that is lawfully obtained is a Fourth-Amendment search.

19. More recently in Birchfield v. North Dakota, 136 S.Ct 2160 (2016) the Supreme Court commented on the information contained in a blood sample, as distinct from a breath sample:

> [A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested

20. Despite this caselaw, the State argues in its brief that A person has no reasonable privacy interest in the[ir] blood." The State makes no attempt to square this position with Skinner, where the United States Supreme Court specifically recognized a distinct privacy interest in the analysis of a blood sample, nor with Ferguson, where the United States Supreme Court recognized a privacy interest in lawfully-collected urine samples.

21. There is no reason why the search of a blood sample should be treated as categorically different than the search of a cell phone, an automobile, or a dwelling. Consent to an evidentiary chemical blood analysis may be withdrawn, just as one may withdraw consent to any other Fourth-Amendment search. For example, a person might consent to the search of a house but withdraw that consent before the search is completed. It would clearly be unacceptable for law enforcement officers to ignore the withdrawal of consent and remain in the house solely because of the initial consent. See e.g. United States v.Buckingham, 433 F.3d 508, 513 (6th Cir. 2006), Painter v. Robertson, 185 F.3d 557, 567 (6th Cir. 1999) (holding that upon a revocation of consent the search should be terminated instantly, and the officers should promptly depart the premises).

22. When the search at issue is the scientific analysis of blood, the duration of the search is typically stretched over days or weeks rather than the minutes or hours that might be involved in the search of a home or automobile. But the relevant time period being

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

longer or shorter does not change the basic legal principles. If the consent is withdrawn before the search is completed-whether that is several minutes or several days after consent is initially provided-any search must immediately cease. See United States v. Casellas-Toro, 807 FJd 380 (1st. Cir. 2015) (where, when the defendant's automobile was searched 21 days after he provided consent, it was held that the search was still justified by the defendant's initial and un-retracted consent).

23. The analysis of seized evidence in which a person retains a legitimate privacy interest must still be justified under the Fourth Amendment. In Riley v. California, the United States Supreme Court addressed the applicability of the warrant requirement to cell phone searches. Of course, a blood sample analysis and a cell phone search are not exactly alike. But, as the trial court noted, both a cell phone and a blood sample have vast amounts of unanalyzed personal information contained within. Riley v.California, 134 S. Ct. 2473 (2014).

24. In Riley the Court ultimately decided:

> [A] warrant is generally required before such a search. Even when a cell phone is seized incident to arrest ... Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple-get a warrant.

25. Analyzing a blood sample, like searching a cell phone, potentially presents privacy implications sufficient to require police to obtain a warrant or a warrant exception to search these items. It is irrelevant that Riley involved a search incident to arrest and Mr. Almeida initially consented to the analysis of his blood. The foundational legal principle is identical: even though a piece of evidence is already in police custody, when there is no legal basis for a search, the search is unlawful. Because the government had no legal justification for the blood analysis after Mr. Almeida withdrew his consent, it was an unlawful search, and the test results need to be suppressed.

26. In summary, the Fourth Amendment and Part 1, Article 19 protect Mr. Almeida from unreasonable searches and seizures; because no warrant or other exception to the warrant requirement existed, if Mr. Almeida's blood was collected legally, then it was collected pursuant to his voluntary consent; if Mr. Almeida provided voluntary consent to a search, then he retained the right to modify or withdraw that consent. The State apparently does not dispute that Mr. Almeida explicitly and unequivocally revoked his consent; therefore, the blood test was an unlawful search, and any results must be suppressed.

WHEREFORE, the defendant respectfully prays for the following:

A. Suppress the purported blood test results;

B. Find the consent to possess and analyze was validly withdrawn;

C. And such other relief as deemed just and proper.

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

Respectfully submitted,

_____
Leonard D. Harden

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was provided this ____ day of July, 2019 to Lise Solbeck, Esquire.

_____
Leonard D. Harden
NH Bar # 10239

Law Office of Leonard D. Harden
104 Main Street
Lancaster, NH 03584
(603) 788-2080

011326

Circuit Court Case: 454-2019-CR-00158

N.H. CIRCUIT COURT

2019 SEP 30 P 3:30

THE STATE OF NEW HAMPSHIRE

NH 2nd CIRCUIT COURT

GRAFTON, SS. LITTLETON DISTRICT

STATE OF NEW HAMPSHIRE

v.

DAVID ALMEIDA

STATE'S MOTION FOR RECONSIDERATION

NOW COMES the State of New Hampshire and moves this Honorable Court to reconsider its order granting the defendant's motion to suppress. In support of this motion, the State says the following:

1. Motions for reconsideration are governed by Rule 43 of the New Hampshire Rules of Criminal Procedure. The rule is designed to give the trial court an opportunity consider issues of fact or law that may have been overlooked or misapprehended, and gives a party an opportunity to request the trial court revisit an order armed with any clarification the party may wish to provide. N.H. R. Crim. Pro. 43.
2. The specific issue of fact or law the court ought reconsider is whether, in the context of an evidentiary blood draw, for the determination of a blood alcohol or drug concentration of a person arrested for driving under the influence, there is a

MOTION DENIED:

9/23/19
Date

Michael G. Mace, Justice

reasonable expectation of privacy in the toxicological evidence after the blood is drawn under a lawful consent search.

3. In granting the defendant's motion to suppress, this Honorable Court found that society was prepared to recognize that there is a reasonable expectation of privacy in a person's blood sample after it has been drawn for forensic testing. However, the analysis was based on factors which apply prior to the extraction of the blood sample from the body, and overlooks the grounds for why there is no objectively reasonable expectation of privacy in evidence in this specific context.
4. There is no objectively reasonable expectation of privacy in the alcohol or drug content of a DUI suspect's blood once withdrawn from a DUI suspect under the implied consent law. Although the initial drawing of a DUI defendant's blood is subject to the search warrant requirement, unless there is a valid exception, once the blood is drawn the expectation of privacy in the drug or alcohol content of the blood sample evaporates. *People v. Woodard*, 909 N.W. 2d 299 (2017), *State v. Randall*, --- N.W.2d ---(2019) 2019 WL 2750194,
5. There is a reasonable expectation of privacy in blood evidence while it is still in the body. *State v.* Bazinet, 170 N.H. 680 (2018), *State v. Davis*, 161 N.H. 292 (2010). In both *State v. Davis* and *State v. Bazinet*, the New Hampshire Supreme Court found there was no reasonable expectation of privacy in blood draw by a hospital for diagnosis and treatment without any intervention by law enforcement. In *State v. Bazinet*, the Court was clear that what was important in determining if there was a reasonable expectation of privacy in the "actual blood draw" was that

it was for the purposes of diagnosis and treatment and there was no state action. *Id.* at 686. Because there was no reasonable expectation of privacy in the blood extraction, there was also no reasonable expectation of privacy in the extracted blood. *Id.* (stating, "Whether or not the blood alcohol test was performed by the hospital or the State on the already drawn blood sample is not material to the analysis.") However, in a case where there is law enforcement intervention, there is a reasonable expectation of privacy in the blood prior to extraction. *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2178 (2016). Once blood evidence has been extracted from a DUI suspect, there is no objectively reasonable expectation of privacy in the toxicological evidence in the sample.

6. That society is not prepared to accept a reasonable expectation of privacy in a drawn blood sample is bolstered by the context in which the sample is extracted. The New Hampshire Supreme Court has recognized a societal belief that, when people drive, they encounter a diminished expectation of privacy. *State v. Bazinet*, 170 N.H. 680, 685 (2018). This diminished expectation of privacy extends to the toxicology content of a driver's blood. *Id.* In coming to this conclusion, the Court in *State v. Bazinet*, looked to the legislature as a barometer of society's expectations. The Court specifically pointed to the implied consent law and the specific provision of the physician-patient privilege statute, RSA 329:26 to support this decision. *Id.* RSA 329:26 has a broad application of confidentiality to communications between a physician and patient. However, the statute creates a specific exception for blood and toxicology records for treatment

from an incident giving rise to an investigation for DUI. RSA 329:26. This highlights the societal expectation that there is no privacy in the toxicology content of a DUI suspect blood. Moreover, the implied consent law demonstrates society has a preference to access to toxicological information for those who are arrested for impaired driving and is willing to relinquish any expectation of privacy in that evidence for the detection and prosecution of impaired driving. RSA 265-A:4.

7. Blood is a unique medium of evidence. Unlike other physical evidence such as a car or a cell phone, which may retain usefulness past forensic analysis, once blood is extracted there is no reasonable expectation that it will be returned. In fact, there is a more reasonable expectation that it will be destroyed. In effect, when a DUI suspect consents to blood being drawn, once the blood is extracted, the suspect has relinquished ownership in the blood sample. *See State v. Howe*, 159 N.H. 366 (2012), (no privacy interest in belongings left in a rented room after moving), *State v. Westover*, 140 N.H. 375 (1995) (defendant did not abandon a shirt when he dropped on the ground, without more, before going into a store).
8. Because blood is unique evidence and can contain very personal information, the burden of extracting it from the body of a suspect is rightfully high. Once blood has been extracted, a reasonable expectation of privacy analysis further limits what can be tested by law enforcement. In *Birchfield*, the Supreme Court of the United States highlighted the concern about the extent of other private information carried in a person's blood in the context of extraction. In the pre-

extraction context, the privacy interest is in the sanctity of a person's body and all it contains. In the post-extraction context, the interest is diminished. To the extent a person might have a reasonable expectation of privacy in other information that can be extracted from a blood sample, the exclusionary rule would govern its admissibility. If a reasonable expectation of privacy in the other information exists, police would be deterred from seeking it by the exclusionary rule rendering any analysis for such information useless and redressing any injury to the privacy of the subject. *State v. Canelo*, 139 N.H. 376, 387 (1995).

9. The defendant in this case did not have a reasonable expectation of privacy in the toxicological information in the blood sample collected under his own consent. Once he had consented to the blood draw, his expectation of privacy in the property diminished. The defendant's attempt to remove the blood evidence and impair its availability in an investigation of a DUI by withdrawing consent to its testing does not raise to the level of exerting an expectation of privacy that society is prepared to except as reasonable. Because there is no reasonable expectation of privacy in the toxicological evidence in the blood extracted with the defendant's consent, the State's analysis of the alcohol concentration of the blood was reasonable and no warrant was required.

WHEREFORE, the State requests that this Honorable Court:

A. Vacate this Court's order issued August 26th of this year and deny Mr. Almeida's Motion to Suppress Blood Results;

B. Grant such other relief as the Court deems just and equitable.

Respectfully submitted on this 5th day of September, 2019.

Dated: September 5th 2019

Lise F. Solbeck, Esq., Bar ID 18485
Bethlehem Prosecuting Attorney

I certify that on this date I provided a copy to the defendant via email.

Dated: September 5th 2019

Lise F. Solbeck, Esq., Bar ID 18485
Bethlehem Prosecuting Attorney

237 4th Range Road
Pembroke, NH 03275

CG Labs, LLC

Analytical Forensic Consulting

Tel: (603) 485-4154
Fax: (603) 485-4155

LABORATORY REPORT

June 4, 2019

Leonard Harden

Leonard Harden Law Offices
104 Main St.
Lancaster, NH 03584

Blood Sample of: **David Almeida**
CG Lab ID: 1904041
Delivered via: Pick Up @ NHSPFL
Received By: John Godfrey
Date Received: May 1, 2019
Time Received: 2:25 PM
Sending Lab ID#: TX19-0642
Custody Bag #: 6155753
Case #: 19BET-24-AR

Observations of the sample(s)

The integrity of the custody container:
Custody container was intact and under proper seal upon arrival at the lab.

Description of the sample tubes:
One 10 mL gray topped collection tube containing whole blood. The tube showed signs of having been opened prior to receipt. The label below that applied by the NHSPFL had been torn off and was thus illegible.

Date and time of the blood draw if the information was available from the tube(s):

Expiration Date of the collection tubes:
Unable to determine.

As of this date, the sample has not been forwarded for analytical work.

I verify that the above information is truthful.

John J. Godfrey
Sole Partner

FAX

to:

Leonard Harden
Leonard Harden Law Offices
104 Main St.
Lancaster, NH 03584

Fax #788-4010 **Phone # 788-2080**

From:
Jay Godfrey
CG Labs LLC
Phone: (603) 485-4154
Fax: (603) 485-4155

MESSAGE:

Enclosed please find the alcohol report for ***David Almeida***
Lab ID#: 1904041
If you have any questions, don't hesitate to call. The hard copy will be forwarded by US Mail.

CONFIDENTIAL

Two Pages Attached:

Circuit Court Case: 454-2019-CR-00158

THE STATE OF NEW HAMPSHIRE

NH 2nd CIRCUIT COURT

GRAFTON, SS. LITTLETON DISTRICT

STATE OF NEW HAMPSHIRE

v.

DAVID ALMEIDA

OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS BLOOD RESULTS

NOW COMES the State, by and through Bethlehem Prosecutor, Lise F. Solbeck, and responds to David Almeida's MOTION TO SUPPRESS, emailed to the State on June 27, 2019.

The State is in agreement with the representation of the facts in the Defendant's Motion paragraphs 1 – 5.

1. The State did receive an email with an attachment titled: "NOTICE OF WITHDRAWAL OF CONSENT TO HOLD OR ANALYZE BRADLEY DIKE'S BODILY FLUID SPECIMENS AND DEMAND FOR IMMEDIATE RETURN OF THE SAME." Upon reading the document, it was clear that this was referring to a Bethlehem Police Department DUI case: David Almeida.
2. As there is no statutory authority behind a "Notice of Withdrawal of Consent" as it applies to evidence gathered in a criminal case, the State neither responded to

the Notice nor returned the evidence to Mr. Almeida.

3. The blood sample was taken to the NH State Laboratory on April 8th by Officer Kelby Lewis. Based on the testimony given by Criminalist Stellato during David Almeida's Administrative License Suspension hearing (held July 18, 2019: after this motion was received), the State Lab received the evidence in a tightly proscribed manner. At the Lab, the canister containing the blood evidence is opened, the sample and paperwork is reviewed for anomalies, specific information is recorded, and it enters both the physical and procedural process systems. Thus, we learned at the hearing, after the Lab accepts a sample, it is considered "in process."
4. To support Mr. Almeida's assertion of his right to withdraw consent after the blood draw, the defendant offers *State v. Stanford,* 474 N.W.2d. 573 (Iowa). In that case, the alleged revocation happened before a urine sample was provided by the defendant to hospital staff, and the defendant argued that the hospital should not have given the specimen to the law enforcement officers pursuant the written consent given earlier. The Iowa Supreme Court found that Stanford had not explicitly revoked his consent, and therefore, the test results from the analysis of the specimen were admissible. *State v Stanford* is distinctly different than the case before us in the timing of the alleged revocation; the revocation occurred prior to Stanford's urine sample being received as evidence of a crime by the State. *Id at 576.* In the case before us, the revocation of consent was explicit, but the revocation occurred after the specimen had been received by the State as evidence. The defendant asserts that the revocation occurred prior to the search being completed, citing another Iowa Supreme Court case, *State v.*

Myer, 441 N.W. 2d. 762, 765. This case law from Iowa regarding the withdrawal of consent to search involves an investigation into tax evasion and a consent search of their tax documents. In *Myer*, unlike the case before us, no charges had been filed against the Myers at the time they revoked their consent to the search. In the present case, Almeida had been arrested and charged with the crime of Driving Under the Influence when he consented to the blood alcohol test. The blood was drawn and received by the officer as evidence of the crime. Additionally, a Preliminary Breath Test had already indicated to the defendant that the results of the blood test were going to be a Blood Alcohol Concentration in excess of .08. Both officer and defendant knew the blood sample to be evidence of the crime for which Almeida had been arrested.

5. The Defendant also questions whether the search exceeded the scope of the permission granted in light of *State v. Pinder*, 126 N.H. 220, 224. In *Pinder*, there was a consent search of a property. The question of the scope was determining exactly what Mr. Pinder had consented to law enforcement searching as there was disagreement between law enforcement and Mr. Pinder as to whether the consent was strictly to search his residence or if it included all the buildings on his property. Mr. Almeida very clearly and without hesitation consented to having his blood drawn and tested on April 6, 2019. The scope of what was being asked of him and what he consented to was clearly explained in the ALS rights form (also known as the DSMV426) that he signed which indicated that he was informed of his rights and that he agreed to the testing.
6. The defendant goes on to purport that the United States Supreme Court in its holding in *Missouri v. McNeely*, 133 S.Ct. 1552, 1568 (2013) effectively

overturned *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The *McNeely* holding that the natural metabolization of alcohol by the human body does not create a per se exigency exception to the Fourth Amendment Warrant requirement for blood tests falls short of "overturning" *Schmerber*. *Missouri v. McNeely*, 133 S.Ct. 1552, 1568 (2013).

7. The Court in *McNeely* does clarify that the 4th Amendment and privacy concerns as recognized by the Court are related to the act of the blood draw itself, "a compelled physical intrusion beneath McNeely's skin and into his veins." *Id* at 1558. Repeatedly, the Court refers to the invasion into the body as the crux of the concern, stating that while motorists have a lower expectation of privacy while driving, that "does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." *Id* at 1565. After a brief list of cases where the Court has found exceptions to the requirement for a warrant, the Court asserted that "any compelled intrusion into the human body implicates significant, constitutionally-protected privacy interest." *Id* at 1566. While the Court brought up the greater amount of information available in blood and the privacy interest in it, at no point in this decision was a privacy interest in the blood specimen itself or in the results from the State Laboratory part of the analysis. Thus, the point at which the analysis from *McNeely* would be applied to the case before us, would have been prior to the blood draw, at which point Mr. Almeida had consented and a warrant was unnecessary.
8. Looking to the Supreme Court of the United States analysis in *Birchfield*, we see that the Court found that a breath test performed without a warrant but incident to an arrest under a driving under the influence statute is permissible. "Because

breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to arrest for drunk driving." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185.

9. The Defendant also states that "any consent was coerced" and "that the blood draw was not obtained in a 'medically acceptable manner by a physician in a hospital environment.'" The defendant contends these facts without providing any facts to support the accusation that the consent given was coerced or to support the suggestion that the blood draw was performed impermissibly. Consent was evidenced by Mr. Almeida's speech, signature, and his conduct at the time of arrest; the defendant's statement regarding coercion of that consent lacks any factual support. Likewise, the quote from *Schmerber* in the defendant's motion in paragraph 25 is not a requirement laid out by the Court, but merely a statement regarding the reasonable manner by which the blood draw in that case was performed and is immediately followed by the Court clarifying, "[w]e are thus not presented with the serious questions which would arise if a search... were made by other than medical personnel or in other than a medical environment." *Id* at 771-772. Mr. Almeida's blood was drawn by medical personnel at Littleton Hospital.

10. Though far from controlling, the Wisconsin Supreme Court earlier this month wrestled with a nearly identical case to Mr. Almeida's upon appeal. *State v. Randall*, 2019 WI 80. Like Mr. Almeida, Ms. Randall's attorney sent a letter to the State and the State Lab revoking the consent to have her blood tested that she had given at the time of arrest. The letter also demanded her blood specimen be

returned or destroyed prior to its analysis. *Id* at 2. The Wisconsin Supreme Court in its lead opinion pointed to both *Skinner* and *Birchfield*, cases that the defendant presented as support for her motion to suppress, as cases where the Court analyzed of the constitutionality of warrantless blood tests but did not include in its opinions an analysis the constitutionality of the warrantless scientific testing of the specimen, only the analysis of the draw. *Id* at 12-15. "But as both *Skinner* and *Birchfield* demonstrate, the Court's analytical approach proceeds with the understanding that there is only one search, even though the government is both: (1) obtaining a biological specimen; and (2) testing the specimen for the presence of alcohol." *Id* at 12. While the Wisconsin Court does acknowledge that there is information contained in one's blood that one may want to keep private, there is no legitimate privacy interest "in shielding from the State the very evidence for which it was authorized to search." *Id.* at 14-15.

11. Lastly, defense counsel states that he invited the State to apply for a warrant. In fact, as seen in the attachments, he simply demanded that he be given reasonable advance notice of such a warrant and the opportunity to be heard before the Judge "at such time of communication." The State did not consider the "Notice" to be an invitation to seek a warrant, as warrant applications are not an adversarial procedure. Additionally, the State believed it to be an inappropriate use of this Court's time given that the evidence had been obtained by the voluntary and knowing consent of the defendant and was in the State's possession as evidence in a pending criminal case.

WHEREFORE, the State requests that this Honorable Court:

A. Deny the defendant's Motion to Suppress Blood Results.

B. Find that the "NOTICE" referred to in paragraph 1 and attached to the Defense's Motion to Suppress does not constitute a valid withdrawal of consent for the blood test requested, consented to, and drawn on April 6, 2019 from David Almeida.

C. Grant such other relief as the Court deems just and equitable.

Respectfully submitted this 26th day of July, 2019.

Dated: _____ _____

Lise F. Solbeck, Esq., Bar ID 18485

Bethlehem Prosecuting Attorney

I certify that on this date I provided a copy to the defendant via email.

Dated: _____ _____

Lise F. Solbeck, Esq., Bar ID 18485

Bethlehem Prosecuting Attorney