No. 19-156

IN THE

SUPREME COURT OF THE UNITED STATES

DIEGO BALDEMAR ISLAS,

PETITIONER,

V.

THE STATE OF TEXAS,

RESPONDENT,

On Petition for a Writ of Certiorari to the Court of Appeals for the Fourteenth District of Texas

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's petition for a writ of certiorari sets out the following questions presented:

(1) Whether *Franks v. Delaware* prohibits misleading omissions of fact from search warrant affidavits.

(2) Whether *Schmerber v. California* requires a magistrate to decide whether a blood draw would be reasonable under the circumstances when determining whether probable cause exists to issue a warrant to collect an individual's blood sample.

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OPINION BELOW

The Court of Appeals for the Fourteenth District of Texas affirmed Petitioner's intoxication manslaughter conviction in a published opinion. *Islas v. State*, 562 S.W.3d 191 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd). The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review on February 27, 2019, without issuing an opinion. Petitioner filed a motion for rehearing, which was denied without opinion by the Texas Court of Criminal Appeals on May 8, 2019.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

At approximately 1:00 a.m. on New Year's Day 2014, Petitioner ran a red light and struck another ve-

hicle. The force of the impact killed the backseat passenger of the other vehicle and caused serious bodily injury to the driver.

Petitioner was transported to Memorial Hermann Hospital, where his blood was drawn three times. At 2:40 a.m., Petitioner's blood was drawn by hospital personnel for medical purposes. Petitioner refused to submit a voluntary blood specimen to law enforcement. Officer Perales of the Houston Police Department's DWI Task Force instructed hospital personnel to collect a mandatory blood draw at 2:59 a.m.[1]

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[1] "A peace officer *shall require* the taking of a specimen of the person's breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily: (1) the person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident: (A) any individual has died or will die; (B) an individual other than the person has suffered serious bodily injury; or (C) an individual other than the

After the mandatory blood draw, Officer Perales sought a search warrant authorizing a blood draw from Petitioner. Officer Perales submitted a sworn affidavit to a Harris County magistrate stating his belief that Petitioner had been unlawfully operating a motor vehicle in a public place while intoxicated, and that a blood sample would provide evidence of Petitioner's state of intoxication. Officer Perales swore to various facts in support of this belief, including that: a witness had observed Petitioner run a red light and strike another vehicle, resulting in a fatality; Petitioner had a distinct odor of alcohol on his person and breath; Petitioner exhibited slurred speech and cyclic mood swings; Petitioner admitted to drinking one eight-ounce beverage that contained Jack Daniels alcohol and Coke at 12:20 a.m.; Petitioner exhibited six

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person has suffered bodily injury and been transported to a hospital or other medical facility for medical treatment…" TEX. TRANSP. CODE § 724.012(b) (emphasis added).

out of six possible clues of intoxication during the horizontal gaze nystagmus test; and Petitioner refused to provide a sample of his breath or blood. Officer Perales's affidavit omitted any reference to the fact that a mandatory blood draw had already been conducted.

At 4:07 a.m. the magistrate determined probable cause existed to believe that evidence of alcohol would be found in Petitioner's blood and issued a search warrant based on the facts in the affidavit. At 5:24 a.m., Petitioner's blood was drawn pursuant to the warrant.

Toxicology results for the blood sample taken pursuant to the warrant showed that Petitioner had a blood alcohol concentration of 0.075. Retrograde extrapolation from this result revealed that Petitioner's blood alcohol concentration at the time of the offense was between 0.08 and 0.14.

II. PROCEDURAL BACKGROUND

Petitioner was charged with intoxication manslaughter. Prior to trial, Petitioner moved to suppress all three blood draws. The trial court suppressed the medical blood draw and the mandatory blood draw, but ruled that the blood draw taken pursuant to the search warrant was admissible. In support of its ruling, the trial court made the following pertinent conclusions of law:

> The fact that a warrantless blood draw had already been obtained was not a material fact that needed to be included in the affidavit for the second legal blood draw.
>
> If the fact that a warrantless blood draw had already been performed had been included in the affidavit for the second legal blood draw it would have had no legal bearing on the Magistrate's decision as to whether to issue the warrant in this case.

See Islas, 562 S.W.3d at 195.

After the motion to suppress was denied, Petitioner pled guilty to the charged offense and was sentenced by the trial court to ten years' imprisonment in

the Institutional Division of the Texas Department of Criminal Justice.

Petitioner challenged the trial court's ruling on appeal, arguing that the subsequent blood draw should have been suppressed because the affidavit in support of the search warrant omitted the fact that a prior mandatory blood draw had been conducted. Petitioner argued that it is unreasonable *per se* to obtain a warrant for a subsequent blood draw without first showing that an initial blood draw was inadequate or ineffective. Petitioner also asserted that it is the duty of the magistrate not only to determine whether probable cause exists to believe that evidence of intoxication will be found in a suspect's blood, but also to determine "whether there [was] probable cause that the search to be performed would be reasonable under the totality of the circumstances — what *Schmerber* [*v. California*] referred to as whether the intrusion was

justified in the circumstances." *See Islas*, 562 S.W.3d at 198.

Petitioner argued that the prior warrantless blood draw would have undermined probable cause to issue a warrant for an additional blood draw; therefore, the omission of this fact from the warrant affidavit was done in a deliberate attempt to mislead the magistrate.

The Fourteenth Court of Appeals affirmed the judgment of conviction in a published opinion filed on October 23, 2018, and held that: (1) the role of the magistrate here was to determine whether there was a "fair probability" to believe that an illegal concentration of blood alcohol would be found in Petitioner's blood; (2) the fact that Petitioner's blood had already been drawn without a warrant was immaterial to the magistrate's probable-cause determination; (3) this Court's holding in *Schmerber v. California*, 384 U.S. 757 (1966), does not suggest that the reasonableness

of a search is an element of probable cause to be determined by a magistrate prior to issuing a search warrant; (4) the reasonableness of a search is not a factor to be considered in a *Franks v. Delaware*, 438 U.S. 154 (1978), analysis; and (5) a subsequent blood draw is not automatically rendered unreasonable absent facts showing that the first blood draw was inadequate or ineffective. *See Islas*, 562 S.W.3d at 197-200.

The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review on February 27, 2019. *See* Petitioner's Appendix B. Petitioner then filed a motion for rehearing, which was denied by the Texas Court of Criminal Appeals on May 8, 2019. *See* Petitioner's Appendix C. Petitioner filed a petition for a writ of certiorari to the Court of Appeals for the Fourteenth District of Texas in this Court on July 30, 2019.

REASONS TO DENY THE PETITION

The trial court denied Petitioner's motion to suppress the results of a blood test which revealed that he was driving while intoxicated when he caused a traffic accident resulting in a fatality. Petitioner challenged the trial court's ruling on appeal, but the Fourteenth Court of Appeals rejected the novel theory advanced by Petitioner that the reasonableness of a blood draw is an element of probable cause which must be determined by a magistrate prior to issuing a search warrant. The appellate court likewise declined Petitioner's related argument that the officer seeking the warrant to collect a sample of his blood committed a *Franks* violation by omitting from the supporting affidavit a fact which was pertinent to probable cause, namely, that law enforcement had collected a blood sample without a warrant. Petitioner now seeks review from this Court on the following two questions: (i) whether *Franks* prohibits misleading omissions of

fact from search warrant affidavits; and (ii) whether *Schmerber* requires a magistrate to decide whether a blood draw would be reasonable under the circumstances when determining whether probable cause exists to issue a warrant to collect an individual's blood sample. Neither of Petitioner's questions for review present a compelling reason for this Court to exercise its judicial discretion.

I. PETITIONER LACKS STANDING TO CHALLENGE THE LOWER COURT'S EXTENSION OF *FRANKS V. DELAWARE* TO MATERIAL OMISSIONS.

Article III, section 2, of the United States Constitution limits the exercise of judicial power to "cases" and "controversies." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239 (1937). To invoke the jurisdiction of the federal courts, a litigant "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S.

95, 101 (1983). The party invoking federal jurisdiction cannot meet this burden without establishing that he suffered an actual "injury in fact," and that it is "likely" that this injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Petitioner seeks this Court's review of an alleged conflict among the state courts despite having already obtained a favorable ruling in the court below that *Franks* extends to material omissions of fact. Considering that this issue was not decided adversely to Petitioner, Petitioner has not suffered a rectifiable injury, and therefore lacks Article III standing. *See Parr v. United States*, 351 U.S. 513, 516 (1956) ("Only one injured by the judgment sought to be reviewed" has standing to appeal).

II. THE RESOLUTION OF PETITIONER'S FIRST QUESTION PRESENTED IS IRRELEVANT TO THE ULTIMATE OUTCOME OF THE CASE.

Certiorari should be denied because a resolution as to whether *Franks* extends to material omissions of fact would not alter the result reached by the lower court. The Fourteenth Court of Appeals determined that the information omitted from the warrant affidavit was immaterial to the magistrate's probable-cause determination. *See Islas*, 562 S.W.3d at 197. Thus, irrespective of whether *Franks* applies to material omission, Petitioner failed to establish a *Franks* violation and the outcome of the case would remain the same. *See Sommerville v. United States*, 376 U.S. 909 (1964) (denying certiorari where outcome would be the same under either state or federal law).

III. NO CONFLICT EXISTS IN THE COURTS BELOW REGARDING THE APPLICATION OF *FRANKS V. DELAWARE* TO MATERIAL OMISSIONS OF FACT FROM A WARRANT AFFIDAVIT.

In *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), this Court decided that if a defendant estab-

lishes by a preponderance of the evidence that an affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in a search warrant affidavit, and the false statement was material to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. Petitioner contends that certiorari is necessary to resolve an underlying conflict among state courts as to whether *Franks v. Delaware* applies strictly to affirmative misrepresentations, or whether it also includes misleading omissions of fact from an affidavit.

Petitioner acknowledges that all federal circuit courts have uniformly applied a *Franks* analysis to material omissions of fact, and that the majority of state courts have likewise held that *Franks* applies to misleading omissions of fact from warrant affidavits.

But Petitioner avers that five state courts of last resort—Arizona, Hawaii, Iowa, North Carolina, and Oklahoma—have reached the contradictory conclusion that *Franks* applies only to fabrications, not omissions.[2]

The cases cited by Petitioner are not in direct conflict with the majority of states. In *State v. Via*,

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[2] Petitioner also alleges that several states, including Mississippi, New Hampshire, New York, Ohio, Oregon, Pennsylvania, Texas, Wisconsin, and Wyoming, have not yet ruled on the applicability of *Franks* to material omissions of fact. (Pet. 4). In actuality, most of these states have either suggested or held outright that material omissions of fact can violate *Franks v. Delaware*. *See State v. Grimshaw*, 515 A.2d 1201, 1204 (N.H. 1986) (holding that the warrant affidavit was not insufficient to establish probable cause where it did not contain material misstatements *or omissions*); *State v. Dibble*, 979 N.E.2d 247, 252 (Ohio 2012) (holding that omissions from a search-warrant affidavit constitute "false statements" for purposes of *Franks v. Delaware* if "designed to mislead, or . . . made in reckless disregard of whether they would mislead, the magistrate."); *Pennsylvania v. Burno*, 154 A.3d 764, 782 (Pa. 2017) (applying a *Franks* analysis to factual omissions from a search warrant affidavit); *Renteria v. State*, 206 S.W.3d 689, 704 (Tex. Crim. App. 2006) (assuming that *Franks* applies to omissions from a warrant affidavit); *State v. Mann*, 367 N.W.2d 209, 213 (Wis. 1985) (holding that the *Franks* rule includes more than false statements in a warrant affidavit, but also omitted facts that are material to a determination of probable cause).

704 P.2d 238 (Ariz. 1985), the police omitted a fact from an affidavit used to obtain a temporary detention order, but the omitted fact would only have strengthened the required showing of "reasonable cause" required under Arizona law. Citing to *Franks v. Delaware*, the Supreme Court of Arizona reasoned that such an omission was not fatal:

> Although we do not condone the practice of omitting facts from an affidavit, neither do we believe this constitutes reversible error *where the omitted facts could only have strengthened the required showing*, and the facts otherwise included satisfied the applicable standard.

Via, 146 Ariz. at 114 (emphasis added). Nothing in the Court's opinion suggests that a *Franks* analysis does not encompass misleading omissions of facts from a warrant affidavit; to the contrary, the Court implied that an omission of fact which undermines reasonable cause may, in fact, be problematic under *Franks v. Delaware*.

The Arizona Supreme Court has also seemingly extended a *Franks* inquiry to misleading omissions of fact in other cases. *See State v. Nordstrom*, 25 P.3d 717, 733 (Ariz. 2001) (holding that the omission of certain information from a warrant affidavit was not "misleading" for purposes of a *Franks* analysis because it was not significant to the finding of probable cause), *abrogated on other grounds by State v. Ferrero*, 274 P.3d 509 (Ariz. 2012); *State v. Buccini*, 810 P.2d 178, 182-83 (Ariz. 1991) (observing that, where falsehoods in a warrant affidavit or omissions therefore were "deliberate or reckless," the court was required to redraft the affidavit by deleting the falsehoods and adding the omitted material facts before addressing whether there was probable cause to issue the warrant); *State v. Carter*, 700 P.2d 488, 496 (Ariz. 1985) (same).

Hawaii has not explicitly restricted the *Franks* doctrine to affirmative misrepresentations in a warrant affidavit. In *State v. Sepa*, 808 P.2d 848, 850 (Haw. 1991), the Supreme Court of Hawaii considered whether an affidavit was sufficient to establish probable cause when it contained both misleading factual statements and omitted facts. The Supreme Court did not reach the issue of whether the omitted facts were immaterial because it was apparent that the material misleading statements in the affidavit required that the warrant be quashed. This holding does not preclude the application of a *Franks* analysis to material omissions of fact.

The Iowa Supreme Court case cited by Petitioner, *State v. Luter*, 346 N.W. 802, 808 (Iowa 1984), simply does not address whether the omission of facts from a warrant affidavit violates *Franks v. Delaware*. However, the Supreme Court of Iowa has consistently

held that a *Franks* analysis applies to material omissions of fact from the warrant affidavit. *See State v. Poulin*, 620 N.W.2d 287, 289 (Iowa 2000) (observing that the *Franks* doctrine applies to the omission of crucial information from a warrant application, as well as the inclusion of misleading facts); *State v. Green*, 540 N.W.2d 649, 657 (Iowa 1995) (holding that omissions of fact from a probable cause affidavit violate *Franks* if the facts were omitted intentionally or with reckless disregard for the truth, and the omitted facts "cast doubt on the existence of probable cause"); *State v. Paterno*, 309 N.W.2d 420, 424 (Iowa 1981) (the failure to disclose material facts in a warrant application can have the same practical effect as an affirmative misstatement).

North Carolina has not explicitly limited *Franks* to affirmative misrepresentations. In *State v. Martin*, 340 S.E.2d 326 (N.C. 1986), the Supreme Court of North Carolina did not address whether

Franks extends to material omissions of fact because the facts omitted from the warrant affidavit in that case were immaterial to a probable-cause determination.

Finally, the state of Oklahoma has not decided whether *Franks* is applicable to material omissions of fact. In the case cited by Petitioner, the Court of Criminal Appeals of Oklahoma found there was no merit to the defendant's argument that the police violated *Franks* by omitting facts from the warrant affidavit because, in that case, the alleged omissions had no bearing on probable cause. *See Underwood v. State*, 252 P.3d 221, 237 (Okla. Crim. App. 2011).

Given the absence of conflicting law among the lower courts, there is no pressing need for clarification from this Court on the applicability of the *Franks* doctrine to material omissions of fact from probable-cause affidavits.

IV. PETITIONER LACKS STANDING TO COMPLAIN ABOUT THE HYPOTHETICAL "SEVENTEENTH BLOOD DRAW" WHEN THE LOWER COURT EXPLICITLY ACKNOWLEDGED THE LIMITS OF ITS HOLDING.

The Petitioner complains, "A second, third, or seventeenth blood draw, surgical procedure, or exposure to radiation are just as reasonable as the first one. There is no principled stopping point." (Pet.13).

But the lower court explicitly acknowledged the limits of its holding. *Islas*, 562 S.W.3d at 200 n.4 ("We do not hold that repeated blood tests could never be unreasonable. In certain circumstances, the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity may outweigh the community's interest in fairly and accurately determining guilt or innocence.").

To invoke federal jurisdiction, it was incumbent upon Petitioner to establish that he suffered actual harm, not merely a conjectural or hypothetical injury.

Lujan, 504 U.S. at 560. Moreover, a litigant generally lacks standing to bring a claim unless he asserts his *own* legal rights and interests; he "cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Thus, Petitioner lacks Article III standing to complain about the general public's right to be free from excessive blood draws.

V. REVIEW OF PETITIONER'S SECOND QUESTION PRESENTED IS UNWARRANTED BECAUSE THE DECISION BELOW IS CORRECT.

The Fourth Amendment provides a right for people to be secure in their "persons, houses, papers, and effects, against unreasonable searches and seizures," and that "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."

U.S. Const. amend. IV (emphasis added).

The "touchstone" of the Fourth Amendment is reasonableness. *Riley v. California*, 573 U.S. 373, 381 (2014). In order for a search to be reasonable under the Fourth Amendment, a judicial warrant is generally necessary to guarantee that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *See id*. at 382 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

Prior to issuing a search warrant, a magistrate must make a finding of probable cause. *United States v. Jackson*, 470 F.3d 299, 306 (6th Cir. 2006). To find probable cause, the issuing magistrate must consider the "totality of the circumstances … to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him … there is a fair probability that contraband or evidence

of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

A blood draw is considered a "search" for Fourth Amendment purposes, and is therefore subject to the warrant requirement. *See Schmerber*, 384 U.S. at 767, 770. To establish probable cause for a blood-draw warrant, "the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the motorist's blood alcohol level is over the limit." *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2181 (2016).

Petitioner seems to aver that an affidavit in support of a blood-draw warrant must not only include facts which establish probable cause, but must also include facts showing that the blood draw would be reasonable under the all circumstances, including circumstances about which the magistrate is not even

aware. (Pet. 9). But he also states that under *Schmerber* and its progeny, "a warrant for a bodily invasion must, in addition to being supported by probable cause, be reasonable under the circumstances *as known to the magistrate* at the time of issuing the warrant." (Pet. 7) (emphasis added).

A. Schmerber v. California does not impose a requirement that a magistrate determining probable cause to issue a warrant to collect blood must also determine whether the search would be reasonable under the circumstances.

Schmerber does not support Petitioner's contention that the role of a magistrate issuing a blood-draw warrant is to determine whether a fair probability exists that a blood draw will reveal evidence of a crime *and* to determine whether a blood draw is reasonable and justified under the circumstances.

The Fourteenth Court of Appeals correctly observed that *Schmerber* concerned the constitutionality of a *warrantless* blood draw. *Islas*, 562 S.W.3d at

198. In *Schmerber*, this Court extended the Fourth Amendment's prohibition against unreasonable searches and seizures to intrusions into the human body:

> [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

Schmerber, 384 U.S. at 768. In assessing whether the search violated the Fourth Amendment, this Court considered such factors as: (1) whether there was probable cause; (2) the extent to which the procedure threatened the safety or health of the individual; and (3) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. *Id.* at 768-69, 771.

This Court held that, although a sample of Schmerber's blood was collected without a warrant, the admission of the chemical analysis thereof did not violate the Fourth Amendment because the arresting officer had probable cause to believe that Schmerber had been driving while intoxicated and there were exigent circumstances which justified the officer's reasonable belief that the delay inherent in obtaining a warrant would have resulted in the destruction of evidence. *But see Missouri v. McNeely*, 569 U.S. 141, 165 (2013) (the natural dissipation of alcohol in the bloodstream does not create a per se exigency justifying a warrantless blood draw).

This Court next considered the reasonableness of the procedure used to measure Schmerber's blood-alcohol level. In concluding that the blood draw was reasonable, this Court observed that "[s]uch tests are a commonplace in these days of periodic physical examination and experience with them teaches that the

quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771. This Court further determined that the manner in which the blood was drawn was reasonable—Schmerber's blood was taken by a physician at a hospital in accordance with accepted medical practices. *Id*. at 771-72.

Thus, *Schmerber* held that the reasonableness of the manner of the intrusion into an individual's body is a factor which may ultimately violate the Fourth Amendment and require the suppression of the evidence. But the holding does not suggest that the reasonableness of a blood draw is incorporated into a finding of probable cause which must be made by a magistrate prior to issuing a warrant.

In support of his argument that the reasonableness of a blood draw is an element of probable cause, Petitioner also cites to this Court's holding in *Winston*

v. Lee, 470 U.S. 753, 759 (1985) that a compelled surgical intrusion into an individual's body may be unreasonable even if likely to produce evidence of a crime. In that case, the Commonwealth of Virginia sought a state court order to direct the respondent—an individual suspected to have been shot during an attempted robbery—to undergo surgery to remove a bullet from his chest to be used as evidence against him. Applying the analytical framework set forth in *Schmerber*, this Court held that such an extreme bodily intrusion posed a significant risk of danger to the respondent and violated his Fourth Amendment right to be free from unreasonable searches and seizures. *Id*. at 761-62.

Winston v. Lee does not lend support to Petitioner's argument because the reasonableness of the search and seizure in that case was not incorporated into a finding of probable cause made by a magistrate prior to issuing a warrant. Rather than seeking a

warrant to seize the bullet, the petitioners in *Winston* moved in state court for an order directing the respondent to undergo surgery. After an extensive evidentiary hearing regarding the reasonableness of the search, the state trial court granted the motion, but the order was ultimately enjoined by the Federal district court. Such procedural protections are neither necessary nor tenable for blood draws because the intrusion is significantly less invasive than surgery. Blood draws are considered to be "commonplace" and "routine," and typically involve "virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771, n.13. In addition, a prompt decision by a magistrate to issue a blood-draw warrant is often necessary to prevent the loss of evidence through the metabolization of alcohol in the blood.

Moreover, *Winston* appears to recognize a distinction between probable cause and the other factors

in a Fourth Amendment analysis as to the reasonableness of a search. *See Winston*, 470 U.S. at 761 ("*Notwithstanding the existence of probable cause*, a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect.") (emphasis added). Although there was probable cause to believe that a surgical intrusion into the suspect's body would reveal evidence of a crime, the threat to the health or safety of the respondent rendered the search "unreasonable" under the Fourth Amendment. *See id.* at 764-67. Thus, the Fourteenth Court of Appeals correctly concluded that a probable-cause determination is separate and distinct from a reasonableness determination.

B. The reasonableness of a search is not an element of probable cause under a Franks v. Delaware analysis.

Because the reasonableness of a blood draw is not an element of probable cause, it follows logically that the omission from the warrant affidavit of facts

pertaining to the reasonableness of a blood draw does not implicate *Franks v. Delaware*. In *Franks*, this Court observed that "a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." *Franks*, 438 U.S. at 165. This Court ruled that a defendant has a Fourth Amendment right to challenge the veracity of the statements in a probable-cause affidavit. Accordingly, under *Franks*, a hearing is required if, after setting aside the allegedly false material in the warrant affidavit, the remaining content is insufficient to support a finding of probable cause. *Id*. at 171-72.

Nothing in *Franks* suggests that its analysis applies to misrepresentations or omissions concerning the reasonableness of a search, rather than misrepresentations related to establishing probable cause. *See*, *e.g.*, *Pennsylvania v. James*, 69 A.3d 180, 190 (Pa.

2013) (recognizing the distinction between a claim that evidence was seized unconstitutionally and a claim that there was no probable cause, and observing that "The magistrate is to evaluate probable cause, not anticipate or rule pre-search on any conceivable suppression issue counsel may later assert.").

The Fourteenth Court of Appeals properly concluded that the magistrate's role in determining probable cause was simply to evaluate whether a fair probability existed that a blood draw would reveal evidence of alcohol in Petitioner's blood. *See Islas*, 562 S.W.3d at 197. Thus, even if the officer who swore to the warrant affidavit had intentionally omitted the prior warrantless blood draw from the affidavit, the inclusion of this information in the warrant would not have affected the magistrate's probable-cause determination. *Id*. at 197-98.

C. The exclusionary rule provides an adequate remedy for an unreasonable blood draw.

Petitioner further argues that it is necessary to incorporate the reasonableness of a search into a magistrate's probable-cause determination to ensure an individual's interest in being free from an unreasonable searches. (Pet. 9). Discretionary review of this issue is not merited because the exclusionary rule presently protects against unreasonable searches by requiring the suppression of evidence obtained in violation of the Fourth Amendment. *See United States v. Calandra*, 414 U.S. 338, 347 (1974); *see also Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (applying the federal exclusionary rule to the states). Petitioner could have moved to suppress the results of the subsequent blood draw on the basis that the search was constitutionally unreasonable.

Notably, Petitioner does not contend that the collection of a subsequent blood sample endangered

his health, or that the blood was collected in an unreasonable manner. Instead, Petitioner advances the position that a subsequent blood draw can never be reasonable under the Fourth Amendment because "the only evidence it can possibly produce is *redundant.*" (Pet. 9) (emphasis in original). The purpose of the subsequent blood draw was not to seek redundant evidence, but to secure admissible evidence. The results of the medical blood draw and the mandatory blood draw were ultimately suppressed, and the subsequent blood draw conducted pursuant to the warrant was the State's only source of admissible blood.

A suppression hearing is the appropriate vehicle for judicial review of the constitutionality of a blood draw because the nature of an alleged Fourth Amendment violation can be fully assessed through the presentation of evidence and legal arguments, and the trial court can consider whether—under the totality of the circumstances particular to that case—the

intrusion into an individual's privacy is outweighed by the government's need for the evidence.

Moreover, the suppression of evidence seized in violation of the Fourth Amendment already operates as an effective deterrent to police misconduct. *See Terry v. Ohio*, 392 U.S. 1, 12, 29 (1968) (holding that the deterrent purpose of the exclusionary rule rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself."); *Elkins v. United States*, 364 U.S. 206, 217 (1960) (the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). By rendering the results of an unreasonable blood draw inadmissible, the exclusionary rule discourages law enforcement from seeking repeated warrantless blood draws.

To illustrate the potential danger of omitting the fact of a prior blood draw from a warrant affidavit,

Petitioner presents a hypothetical scenario in which every drop of blood could be seized from an individual suspected of driving while intoxicated if the magistrate issuing the warrant is only concerned with the existence of probable cause, and does not consider prior blood draws. (Pet. 8). However, the potential risk to the public of exsanguination through recurrent blood draws is such a remote possibility as to obviate the need for review by this Court. Moreover, the lower court's holding did not extend to that situation. *Islas*, 562 S.W.3d at 200 n.4 ("We do not hold that repeated blood tests could never be unreasonable. In certain circumstances, the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity may outweigh the community's interest in fairly and accurately determining guilt or innocence."). Finally, a majority of states have statutes either imposing significant restrictions upon law enforcement's ability to collect a blood sample without a

warrant or prohibiting law enforcement from conducting warrantless blood draws. *See McNeely*, 569 U.S. at 161 n.9. As a result, the likelihood of law enforcement engaging in repetitive warrantless blood draws and failing to disclose this fact to a magistrate prior to seeking a blood draw warrant is marginal at best.

For all of these reasons, the refusal of the Fourteenth Court of Appeals to conflate the reasonableness of a blood draw with a magistrate's determination of probable cause was correct, and the petition for a writ of certiorari should be denied.

CONCLUSION

For the forgoing reasons, the Respondent asks this Court to refuse Petitioner's petition for a writ of certiorari.

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