IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HANS YORK and KATHERINE YORK, parents of AARON E. YORK and ABRAHAM P. YORK; and SHARON A. SCHNEIDER and PAUL A. SCHNEIDER, parents of TRISTAN S. SCHNEIDER, Appellants, v. WAHKIAKUM SCHOOL DISTRICT NO. 200; W. ROBERT GARRETT, in his official capacity as superintendent of Wahkiakum School District No. 200; FRANK WEBB, KARI KANDOLL, DAVID SMITH, LEE TISCHER, CATHY TURGEON, in their official capacities as members of the Board of Directors of Wahkiakum School District No. 200; WAHKIAKUM COUNTY DEPARTMENT OF HEALTH; Anne Ozment, in her official capacity as director of the Wahkiakum County Department of Health; WAHKIAKUM COUNTY BOARD OF HEALTH; RON OZMENT, DICK MARSYLA, and ESTHER GREGG, in their official capacities as members of the WAHKIAKUM COUNTY BOARD OF HEALTH, Respondents.	No. 78946-1 En Banc Filed March 13, 2008.

SANDERS, J.—The question before us is whether random and suspicionless drug testing of student athletes violates article I, section 7 of the Washington State Constitution.[1]

The Wahkiakum School District (school district) randomly drug tests all student athletes under the authority of Wahkiakum School Board Policy No. 3515 (policy 3515). Aaron and Abraham York and Tristan Schneider played sports for Wahkiakum High School, agreed to the policy, and were tested. Their parents (York and Schneider parents) sued the school district alleging its drug testing policy violated article I, section 7 of the Washington State Constitution. The school district claims random drug testing, without any individualized suspicion, is constitutional. The superior court agreed. We accepted direct review.

The school district asks us to adopt a "special needs" exception to the warrant requirement to allow random and suspicionless drug testing. But we do not recognize such an exception and hold warrantless random and suspicionless drug testing of student athletes violates the Washington State Constitution.

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[1] Article I, section 7 of the Washington Constitution provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

FACTS

Wahkiakum requires its student athletes to refrain from using or possessing alcohol or illegal drugs. Beginning in 1994, the school district implemented myriad ways to combat drug and alcohol use among the student population. Nevertheless, drug and alcohol problems persisted. Acting independently of the school district, the Wahkiakum Community Network (community network) began surveying district students. From these surveys, the community network ranked teen substance abuse as the number one problem in Wahkiakum County. As reiterated by the trial court, the community network's surveys showed that in 1998, 40 percent of sophomores reported previously using illegal drugs and 19 percent of sophomores reported illegal drug use within the previous 30 days, while 42 percent of seniors reported previously using illegal drugs and 12.5 percent reported illegal drug use within the previous 30 days. Clerk's Papers (CP) at 484-85 (Undisputed Facts 10(c), (d)). In 2000, 50 percent of student athletes self-identified as drug and/or alcohol users. *Id*. (Undisputed Fact 10(e)).

As a result, the school district decided to implement random drug testing where all students may be tested initially and then subjected to random drug testing during the remainder of the season. The school district formed the Drug and Alcohol Advisory Committee (now the "Safe and Drug Free Schools

Advisory Committee") to help deal with the student substance abuse problems. CP at 485 (Undisputed Fact 15). The committee evaluated the effectiveness of its previous programs, such as D.A.R.E. (Drug Abuse Resistance Education) and support groups, and contemplated adopting policy 3515, which would require random drug testing of student athletes.[2] The trial court found:

> Based upon the evidence of substantial alcohol and drug use among students and pursuant to the School District's statutory authority and responsibility to maintain order and discipline in its schools, to protect the health and safety of its students, and to control, supervise and regulate interschool athletics, the Board of Directors adopted the policy.

CP at 486 (Undisputed Fact 16).

As part of the policy, all student athletes must agree to be randomly drug tested as a condition of playing extracurricular sports. The drug testing is done by urinalysis, with the student in an enclosed bathroom stall and a health department employee outside. The sample is then mailed to Comprehensive Toxicology Services in Tacoma, Washington.[3] If the results indicate illegal drug

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[2] Originally, the school district planned to test any student involved in extracurricular activities but later confined the testing only to student athletes.

[3] If a student athlete receives a positive result and believes the result is wrong, he or she may submit a list of prescription medications or past medical history to explain the false positive. This information is transmitted to the health department employee and not to the school district. The York and Schneider parents seem to press the argument the district's policy requires all students to reveal their medications. The trial court found, however, "the policy clearly does not require disclosure of other medications in the first instance. It is only if a

use, then the student is suspended from extracurricular athletic activities; the length of suspension depends on the number of infractions and whether the student tested positive for illegal drugs or alcohol. Also, the school district provides students with drug and alcohol counseling resources. The results are not sent to local law enforcement or included in the student's academic record. And the student is not suspended from school, only extracurricular sports.

During the 1999-2000 school year, Aaron York and Abraham York played sports and were tested under the policy. And Tristan Schneider was tested under the policy during the 2000-2001 year. The York and Schneider parents brought suit arguing the school district's policy violated the Washington State Constitution.[4] Their motion for a preliminary injunction was denied by superior court Judge Penoyar, and the Court of Appeals dismissed the petition as moot. *See York v. Wahkiakum Sch. Dist. No. 200*, 110 Wn. App. 383, 40 P.3d 1198

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positive result is obtained that a student must decide whether or not to reveal other medications or forfeit his or her right to participate in extracurricular activities." CP at 487-88 (Court's Mem. Decision, Disputed Facts).

[4] The York and Schneider parents abandoned one of their original claims—the policy also violated the Fourth Amendment to the United States Constitution—in light of the Supreme Court's decisions in *Acton* and *Earls*. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (holding random drug testing of public school athletes is permissible); *Bd. of Educ. v. Earls*, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002) (holding random drug testing of any public school student involved in an extracurricular activity is permissible).

(2002). The trial court then held that while the school district's policy "approached the tolerance limit" of our constitution, the policy was nevertheless constitutional and narrowly tailored to reach a compelling government end. CP at 497.

The York and Schneider parents sought and obtained direct review in our court of a summary judgment order and ask us to determine whether the school district's policy 3515 is constitutional.

STANDARD OF REVIEW

We review summary judgment de novo. *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). We construe the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Finally, we review questions of constitutional construction de novo. *State v. Norman*, 145 Wn.2d 578, 579, 40 P.3d 1161 (2002).

ANALYSIS

We are aware there are strong arguments, policies, and opinions marshaled on both sides of this debate, but we are concerned only with the policy's constitutionality. And while we are loath to disturb the decisions of a local school board, we will not hesitate to intervene when constitutional protections are implicated. *Millikan v. Bd. of Dirs.*, 93 Wn.2d 522, 527, 611 P.2d 414 (1980).

No matter the drawbacks or merits of the school district's random drug testing, we cannot let the policy stand if it offends our constitution. Students "do not 'shed their constitutional rights' at the schoolhouse door." *Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)).

The question before us is narrow: Whether Wahkiakum School District's blanket policy requiring student athletes to submit to random drug testing is constitutional. The United States Supreme Court has held such activity does not violate the Fourth Amendment to the federal constitution. *Vernonia Sch. Dist.*, 515 U.S. 646. But we have never decided whether a suspicionless, random drug search of student athletes violates article I, section 7 of our state constitution. Therefore, we must decide whether our state constitution follows the federal standard or provides more protection to students in the state of Washington.

I. May Wahkiakum School District Perform Suspicionless, Random Drug Tests of Student Athletes?

a. Federal cases concerning public school searches

The school district argues we should follow federal cases and allow suspicionless, random drug testing of its student athletes. Two federal cases are apposite to our consideration. These cases, while helpful, do not control how we interpret our state constitution. *City of Seattle v. Mighty Movers*, 152 Wn.2d 343, 356, 96 P.3d 979 (2004). There are stark differences in the language of the

two constitutional protections; unlike the Fourth Amendment, article I, section 7 is not based on a reasonableness standard.

The United States Supreme Court has held public school searches presented a "special need," which allowed a departure from the warrant and probable cause requirements. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).[5] The *T.L.O.* Court held school teachers and administrators could search students without a warrant if: (1) there existed "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school," and (2) the search is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id*. at 341-42.

Next, in *Acton*, a public school district implemented a random drug testing of school athletes, similar to the one at issue here. *Vernonia Sch. Dist.*, 515 U.S. 646. Each student athlete was tested at the beginning of the season and then each week 10 percent were randomly selected for testing. Most critics of *Acton* are not persuaded the majority's analysis justifies a suspicionless search of the student athletes. But the *Acton* majority claimed individualized suspicion would unduly interfere with the government's goals and might actually make the

[5] The federal special needs exception is discussed, *infra*, in part II, section 1.

situation worse. Its reasoning was based primarily on three rationales: (1) individualized suspicion would "transform[] the process into a badge of shame," *id*. at 663, where teachers could claim any troublesome student was abusing drugs; (2) teachers and student officials are neither trained nor equipped to spot drug use; and (3) individualized suspicion creates an unnecessary loss of resources in defending claims and lawsuits against arbitrary imposition, when students and parents will inevitably challenge whether reasonable suspicion did indeed exist. *Id*. at 664 ("In many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse.").[6]

But these arguments were unpersuasive several years earlier when the Court applied an individualized suspicion standard to public schools in *T.L.O.* The *Acton* majority never adequately explained why individual suspicion was needed in *T.L.O.* but not in *Acton*. Justice O'Connor spent much of her dissent

[6] Professor Wayne LaFave criticizes the majority's defense of suspicionless searches: "The most objectionable aspect of this passage . . . is the violence that it does to established Fourth Amendment doctrine. The *Acton* majority treats random testing and testing upon reasonable suspicion as being essentially the same, perhaps slightly different in *degree*, but not different in *kind*. But in point of fact, the two are quite different in kind, which is why the Supreme Court and the lower courts had theretofore required at least individualized suspicion to justify a search, except in exceedingly rare instances in which circumstances much more compelling than those in the instant case were present." 5 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.11(c), at 516 (4th ed. 2004) (footnotes omitted).

taking issue with this standard:

> [N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms. . . .
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> . . . The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T.L.O.* decision.

Acton, 515 U.S. at 678-79 (O'Connor, J., dissenting).[7]

The Wahkiakum School District modeled its policy after the one used by the Vernonia School District. But simply passing muster under the federal constitution does not ensure the survival of the school district's policy under our state constitution. The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Therefore, a Fourth Amendment analysis hinges on whether a warrantless search is reasonable, and it is possible in some circumstances for a search to be reasonable without a warrant. *See Acton*, 515 U.S. at 652 ("As the text of the Fourth Amendment indicates, the

[7] The Court then expanded on *Acton* and allowed random drug testing of students participating in extracurricular activities of any kind. *Earls*, 536 U.S. 822.

ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"). But our state constitutional analysis hinges on whether a search has "authority of law"—in other words, a warrant. Wash. Const. art. I, § 7.

b. Search and seizure analysis under article I, section 7

Our state constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. It is well established that in some areas, article I, section 7 provides greater protection than its federal counterpart—the Fourth Amendment. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002); *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984) ("[T]he unique language of Const. art. 1, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally."). When determining whether article I, section 7 provides greater protection in a particular context, we focus on whether the unique characteristics of the constitutional provision and its prior interpretations compel a particular result. *State v. Walker*, 157 Wn.2d 307, 317, 138 P.3d 113 (2006). We look to the constitutional text, historical treatment of the interest at stake, relevant case law and statutes, and the current implications of recognizing or not recognizing an interest. *Id*.

This requires a two-part analysis. First, we must determine whether the

state action constitutes a disturbance of one's private affairs. Here that means asking whether requiring a student athlete to provide a urine sample intrudes upon the student's private affairs. Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The "authority of law" required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions. Because the Wahkiakum School District had no warrant, if we reach the second prong of the analysis we must decide whether the school district's activity fits within an exception to the warrant requirement. Relying on federal law, the school district claims there is a "special needs" exception to the warrant requirement that we should adopt. The York and Schneider parents point out we have not adopted such an exception and urge us not to do so here.

II. Suspicionless, Random Drug Testing Disturbs a Student Athlete's Private Affairs.

When inquiring about private affairs, we look to "'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *State v. Young,* 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). This is an objective analysis.

The private affair we are concerned with today is the State's interference in a student athlete's bodily functions. Specifically, does it intrude upon a

privacy interest to require a student athlete to go into a bathroom stall and provide a urine sample, even against that student's protest? Federal courts and our court both agree the answer is an unqualified yes, such action intrudes into one's reasonable expectation of privacy. *Robinson v. City of Seattle*, 102 Wn. App. 795, 813 n.50, 10 P.3d 452 (2000) (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 90, 847 P.2d 455 (1993); *State v. Olivas*, 122 Wn.2d 73, 83, 856 P.2d 1076 (1993); *State v. Meacham*, 93 Wn.2d 735, 738, 612 P.2d 795 (1980); *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558 (1991)). Indeed, we offer heightened protection for bodily functions compared to the federal courts. *Robinson*, 102 Wn. App. 795.

But the school district claims student athletes have a lower expectation of privacy. Certainly, students who choose to play sports are subjected to more regulation. For example, RCW 28A.600.200 provides, "Each school district board of directors is hereby granted and shall exercise the authority to control, supervise and regulate the conduct of interschool athletic activities."[8] And certainly there is generally less privacy in locker rooms than in other parts of a school. But the district does not link regulations and the communal atmosphere of locker rooms with a student's lowered expectation of privacy in terms of being subjected to suspicionless, random drug testing. We do not see how what

happens in the locker room or on the field affects a student's privacy in the context of compelling him or her to provide a urine sample.[9] A student athlete has a genuine and fundamental privacy interest in controlling his or her own bodily functions. The urinalysis test is by itself relatively unobtrusive. Nevertheless, a student is still required to provide his or her bodily fluids. Even if done in an enclosed stall, this is a significant intrusion on a student's fundamental right of privacy. *See Robinson*, 102 Wn. App. at 822.

This analysis should in no way contradict what we have previously said about students' privacy interests. Generally we have recognized students have a lower expectation of privacy because of the nature of the school environment. Courts have held a school official needs some "reasonable" or "individualized" suspicion in order to protect students from arbitrary searches, yet still give

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[8] Specifically, the Washington Interscholastic Activities Association requires all member schools to adopt rules to discourage use of drugs and alcohol. CP at 112. Also, all student athletes must undergo a physical examination prior to participating in athletics. *Id*. at 111. The school district also points out the male athletes at Wahkiakum High School should expect even less privacy since there are no dividers between urinals, or between the showers, and athletes routinely undress in each other's presence.

[9] Furthermore, even the United States Supreme Court has apparently put less emphasis on these arguments as they now allow public school districts to randomly drug test any student engaged in any extracurricular activity. *Earls*, 536 U.S. at 831 (stating it was not dispositive to their analysis in *Acton* whether the students' expectation of privacy was altered because they were subjected to "regular physicals or communal undress").

officials sufficient leeway to conduct their duties. *T.L.O.*, 469 U.S. at 341; *State v. McKinnon,* 88 Wn.2d 75, 558 P. 2d 781 (1977). Our court discussed student searches and student rights under the Fourth Amendment prior to the United States Supreme Court's holding in *T.L.O.* In *McKinnon*, we said:

> Although a student's right to be free from intrusion is not to be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order.

McKinnon, 88 Wn.2d at 81. And in *Kuehn*, we also opined in dicta that although a warrant or probable cause might be unnecessary to search a student's backpack, the school nevertheless needed to articulate some reasonable suspicion to justify a search of a student under both the Fourth Amendment and article I, section 7. *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985); *State v. Slattery*, 56 Wn. App. 820, 823, 787 P.2d 932 (1990) ("Under the school search exception, school officials may search students if, under all the circumstances, the search is reasonable."); *State v. B.A.S.*, 103 Wn. App. 549, 554 n.8, 13 P.3d 244 (2000).[10]

[10] A search is reasonable if (1) it is justified at its inception, (2) is reasonably related in scope to the circumstances that justified the search, and (3) there is a nexus between the item sought and the infraction being investigated. *State v.*

We decided these cases before the United States Supreme Court decided *T.L.O.*, which cited *McKinnon* when it also held reasonable suspicion was necessary to search a student. *T.L.O.*, 469 U.S. at 333 n.2. Nevertheless, in *State v. Brooks*, 43 Wn. App. 560, 568, 718 P.2d 837 (1986), the Court of Appeals analyzed *McKinnon* and *Kuehn* and said, "Accordingly, since the holding in *T.L.O.* is consistent with our Supreme Court's holding in *McKinnon*, we conclude that article 1, section 7 affords students no greater protections from searches by school officials than is guaranteed by the Fourth Amendment." The school district points to this one sentence to say we should adopt whole cloth the federal analysis with regards to both student searches and student drug testing. But *Brooks* did not involve drug testing and was decided before *Acton*. Nor are we bound to the Court of Appeals' broad language.

Because we determine that interfering with a student athlete's bodily functions disturbs one's private affairs, we must address the second prong of the article I, section 7 analysis: does the school district have the necessary authority of law to randomly drug test student athletes?

III. Under Article I, Section 7 There Is No Authority of Law That Allows a School District to Conduct Random Drug Tests.

We have long held a warrantless search is per se unreasonable, unless it

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B.A.S., 103 Wn. App. 549, 553-54, 13 P.3d 244 (2000).

fits within one of the "'jealously and carefully drawn exceptions.'" *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (internal quotation marks omitted) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). These exceptions include exigent circumstances, consent, searches incident to a valid arrest, inventory searches, the plain view doctrine, and *Terry*[11] investigative stops. *Robinson*, 102 Wn. App. at 813. Any exceptions to the warrant requirement must be rooted in the common law. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999); *Robinson*, 102 Wn. App. at 813. And it is always the government's burden to show its random drug testing fits within one of these narrow exceptions. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988). Today the school district asks us to accept an analog to the federal special needs doctrine to justify its drug testing policy. The York and Schneider parents point out we have never formally adopted a special needs exception and therefore claim no exception to the warrant requirement exists here.

a. Federal special needs exception

Before addressing whether we have adopted or will adopt such a special needs exception, it is helpful to briefly examine the federal exception to understand both its requirements and its breadth. The United States Supreme

[11] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Court has held there are certain circumstances when a search or seizure is directed toward "'special needs, beyond the normal need for law enforcement" and "the warrant and probable-cause requirement [are] impracticable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)).[12] For there to be a special need, not only must there be some interest beyond normal law enforcement but also any evidence garnered from the search or seizure should not be expected to be used in any criminal prosecution against the target of the search or seizure. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).[13] The Court has applied such reasoning to administrative searches,[14] border patrols,[15] and prisoners and

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[12] The school search cases previously discussed, *T.L.O.* and *Acton*, were also decided under the Supreme Court's special needs exception.

[13] As one commentator has noted, "the line between . . . a criminal investigation and . . . searches and seizures designed primarily to serve noncriminal law enforcement goals, is thin and, quite arguably, arbitrary. Yet, it is a line of considerable constitutional significance." Joshua Dressler, Understanding Criminal Procedure 323 (3d ed. 2002).

[14] *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967); *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636; 96 L. Ed. 2d 601 (1987). When the Court balanced the interests in *T.L.O.*, it relied on its analysis of administrative searches promulgated in *Camara*. *T.L.O.*, 469 U.S. at 341.

[15] *United States v. Ramsey*, 431 U.S. 606, 616, 97 S. Ct. 1972, 52 L. Ed. 2d 617

probationers.[16]

The United States Supreme Court has also held drug testing presents a special need and may be done under certain circumstances without a warrant or individualized suspicion. In *Skinner*, 489 U.S. at 634, the Court upheld warrantless and suspicionless blood and urine testing of railroad employees following major train accidents. The Court applied similar reasoning in *Von Raab* when it held immigration officials may be subjected to random drug testing. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989).[17]

(1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

[16] *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987); *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

[17] But the Court has not always allowed drug testing without some individualized suspicion. In *Chandler*, the Court held a Georgia law requiring candidates for state office pass a drug test was unconstitutional because the Court could not identify a "sufficiently vital" special need to override the candidates' privacy interests. *Chandler v. Miller*, 520 U.S. 305, 318, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). Then in *Ferguson* the Court held a public hospital could not test any maternity patient suspected of drug use without her consent. *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001). While the ultimate goal—"protecting the health of both mother and child"—was laudable, the invasion of privacy was more substantial here because positive test results were given to the police for prosecution purposes. *Id*. at 81.

b. Is there a Washington State special needs exception?

We have never adopted a special needs exception but have looked to federal special needs cases when dealing with similar issues. In cases concerning administrative searches,[18] border patrols,[19] and prisoners and probationers,[20] our courts have departed from the warrant requirement in similar, but not always identical, ways.

In *Juveniles A, B, C, D, E*, 121 Wn.2d 80, we held convicted sex offenders could be tested for HIV (human immunodeficiency virus). But because neither

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[18] Our courts have adopted an approach to administrative searches similar to those enunciated in *Camara*, 387 U.S. 523. *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 183, 931 P.2d 208 (1997); *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003).

[19] *State v. Almanza-Guzman*, 94 Wn. App. 563, 972 P.2d 468 (1999) (relying only on federal case law for its border analysis). In *State v. Quick*, 59 Wn. App. 228, 232, 796 P.2d 764 (1990), the Court of Appeals held probable cause was needed to search persons at places other than the actual border. This is a higher reasonable suspicion standard than that articulated by the United States Supreme Court in *Brignoni-Ponce*, 422 U.S. at 884. Also, before the United States Supreme Court decided *Sitz*, 496 U.S. 444, we held sobriety checkpoints violated both the federal and state constitutions. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988).

[20] *State v. Baker*, 28 Wn. App. 423, 623 P.2d 1172 (1981). Our court has recognized a "warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects." *State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984) (citing *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981)). *See also State v. Lucas*, 56 Wn. App. 236, 783 P.2d 121 (1989).

party briefed nor asked for an independent construction of the state constitution, we relied exclusively on federal cases when deciding *Juveniles A, B, C, D, E*. *Id*. at 91 n.6. In *Curran*, 116 Wn.2d 174, we held taking blood pursuant to former RCW 46.20.308(3) (1987) did not violate article I, section 7 if there was a clear indication it would reveal evidence of intoxication and was performed in a reasonable manner. In *Olivas*, 122 Wn.2d 73, after we analyzed the federal reasoning in *Skinner*, 480 U.S. 602, and *Von Raab*, 489 U.S. 656, we held the State may conduct blood tests of violent sex offenders without a warrant, probable cause, or individualized suspicion under both the United States and Washington State Constitutions.

In *Robinson*, 102 Wn. App. at 827-28, the Court of Appeals held the city of Seattle could require a preemployment urinalysis test of police officers, firefighters, and any other city position where public safety is in jeopardy. In its analysis, the Court of Appeals claimed our court had accepted a variation of the federal "special needs" analysis:

> Although the special needs analysis appears to be an established part of Fourth Amendment jurisprudence, the Washington Supreme Court has developed a different approach for article I, section 7 analysis of governmental searches outside the context of law enforcement.

Id. at 816-17 (footnote omitted). The *Robinson* court examined several of our cases, including *Juveniles A, B, C, D, E*, and said:

> "[The Washington State Supreme Court has] recognized two types of privacy: the right to nondisclosure of intimate personal information or confidentiality, and the right to autonomous decisionmaking. The former may be compromised when the State has a rational basis for doing so, while the latter may only be infringed when the State acts with a narrowly tailored compelling state interest."

Id. at 817 (quoting *Juveniles A, B, C, D, E*, 121 Wn.2d at 96-97). But aside from what *Robinson* claims we did, we have not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement. In the context of randomly drug testing student athletes, we see no reason to invent such a broad exception to the warrant requirement as such an alleged exception cannot be found in the common law. *See Ladson*, 138 Wn.2d at 350 (finding no common law exception for a pretextual warrantless traffic stop).

c. Washington State cases concerning suspicionless searches

Though we have not considered drug testing in public schools, we have a long history of striking down exploratory searches not based on at least reasonable suspicion. *State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007) ("[T]his court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition."); *Robinson*, 102 Wn. App. at 815 ("Our

Supreme Court has thus not been easily persuaded that a search without individualized suspicion can pass constitutional muster."). In *Mesiani*, this court held a random roadblock sobriety checkpoint program initiated by Seattle police was "highly intrusive" search and violated "the right to not be disturbed in one's private affairs guaranteed by article I, section 7." *Mesiani*, 110 Wn.2d at 458-60.[21] In *Kuehn*, this court held a search of student luggage required by school officials as a condition of participation in a school-sponsored trip to Canada violated both the Fourth Amendment and article I, section 7. *Kuehn*, 103 Wn.2d at 595. We opined, "[i]n the absence of individualized suspicion of wrongdoing, the search is a general search. '[W]e never authorize general, exploratory searches,'" (alteration in original) and such searches are "anathema to the Fourth Amendment and Const. art. 1, § 7 protections." *Id*. at 599 (quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)); *id*. at 601-02.

The few times we have allowed suspicionless searches, we did so either relying entirely on federal law or in the context of criminal investigations or dealing with prisoners. In *Meacham*, 93 Wn.2d at 738-39, we upheld mandatory

[21] Additionally, in *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983), this court held warrantless patdown searches conducted as a condition admission to concerts at the Seattle Center Coliseum were not allowed. However, the court relied entirely on federal Fourth Amendment cases and not our state constitution.

blood tests of putative fathers. In *Juveniles A, B, C, D, E*, 121 Wn.2d at 90, we upheld mandatory HIV tests of convicted sexual offenders. In *Olivas*, 122 Wn.2d at 83, we upheld blood tests of convicted felons without individualized suspicion. And recently in *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007), we held a DNA sampling of convicted felons did not violate article I, section 7. That case allowed for warrantless testing without individualized suspicion because we asserted such testing did not disturb a reasonable right to privacy. But these cases present far different factual situations from drug testing student athletes. A felon has either already pleaded guilty or been found guilty beyond a reasonable doubt of a serious crime; a student athlete has merely attended school and chosen to play extracurricular sports. Most troubling, however, is that we can conceive of no way to draw a principled line permitting drug testing only student athletes. If we were to allow random drug testing here, what prevents school districts from either later drug testing students participating in any extracurricular activities, as federal courts now allow, or testing the entire student population?

We cannot countenance random searches of public school student athletes with our article I, section 7 jurisprudence. As stated earlier, we require a warrant except for rare occasions, which we jealously and narrowly guard. We decline to adopt a doctrine similar to the federal special needs exception in

the context of randomly drug testing student athletes. In sum, no argument has been presented that would bring the random drug testing within any reasonable interpretation of the constitutionally required "authority of law." *See Mesiani*, 110 Wn.2d at 458.

Accordingly, we hold the school district's policy 3515 is unconstitutional and violates student athletes' rights secured by article I, section 7. Therefore we reverse the superior court. The York and Schneider parents shall recover their costs.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Susan Owens

Justice Tom Chambers