Golden Gate University Law Review

Volume 26
Issue 1 *Ninth Circuit Survey*

Article 7

January 1996

The Constitutionality of Mandatory, Presentence Urine Testing of Convicted Defendants

Joshua W. Rose

NOTE

THE CONSTITUTIONALITY OF MANDATORY, PRESENTENCE URINE TESTING OF CONVICTED DEFENDANTS

I. INTRODUCTION

In *Portillo v. United States District Court for the District of Arizona*, the Ninth Circuit held that mandatory presentence urine testing of a convicted defendant violates the Fourth Amendment to the United States Constitution.[1] The court concluded that, because the particular facts of the case and the lack of information about the defendant's past drug usage did not support the district court's order, urine testing was constitutionally impermissible.[2]

II. FACTS AND PROCEDURAL HISTORY

In October of 1993, Jaime Portillo pled guilty to theft of a vacuum cleaner, a baby stroller, a child's car seat and a cellular telephone from an Arizona military base.[3] The district court ordered Portillo to assist the probation officer in preparing a presentence report.[4] The court also warned Portillo's

1. Portillo v. United States Dist. Ct. for the Dist. of Ariz., 15 F.3d 819, 824 (9th Cir. 1994) (per curiam) (D.W. Nelson, J., Thompson, J., and Schroeder, J.) (Schroeder, J. filed concurring opinion).

2. *See id.*

3. Portillo v. United States Dist. Ct. for the Dist. of Ariz., 15 F.3d 821 (9th Cir. 1994).

4. *Id.* 18 U.S.C.A. § 3552 (1995). "Presentence reports" provides, in pertinent part: (a) Presentence investigation and reports shall be made by a probation officer before the imposition of sentence. (b) If the court, before or after its receipt of a

attorneys to advise him to comply with all court orders, including an order that he submit to urine testing.[5] The court then released Portillo on his own recognizance pending sentencing.[6]

Portillo refused to submit to presentence urine testing.[7] He moved the district court to set aside and stay its order to submit to urinalysis.[8] The court denied the motion and expressly ordered Portillo to undergo urine testing.[9]

Portillo again refused to comply and immediately filed an emergency motion for a stay and a petition for writ of mandamus with the Ninth Circuit.[10] The Ninth Circuit stayed the

---

report, desires more information than is otherwise available to it as a basis for determining the sentence it may order a study of the defendant. *Id.*

5. *Id.* at 821 n.2. The court referred to United States Dist. Ct. for the Dist. of Ariz. Gen. Ord. 221 (1993). *Id.* General Order 221 provides: "IT IS HEREBY ORDERED that as directed by the Probation Officer, all defendants shall be required to submit to urine testing to determine substance abuse for presentence investigation purposes." *Id.* at n.3.

6. *Id.* at 821 n.1.

7. *Id.* at 823.

8. *Portillo,* 15 F.3d at 821.

9. *Id.* The court explained that General Order 221 was not the basis for the order and that it would not use any adverse results obtained from the testing against Portillo. *Id.*

10. *Id.* In 1967, the United States Supreme Court held that, because it is a drastic remedy, mandamus relief applies only in exceptional circumstances. *See* Will v. United States, 389 U.S. 90, 95 (1967) (the mandamus writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'") (quoting Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943)).

The Ninth Circuit in *Portillo* applied five guidelines to determine the appropriateness of granting mandamus relief. *Portillo*, 15 F.3d at 822. *See* Bauman v. United States Dist. Ct., 557 F.2d 650, 654 (9th Cir. 1977). The *Bauman* court explained that, "the considerations are cumulative and proper disposition will often require a balancing of conflicting indicators." *Id.* at 655. The factors to be considered are whether:

> (1) The party seeking the writ has no other adequate means, such as direct appeal to obtain the desired relief. . . . (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error. . . . and (5) the district court's order raises new and important problems or issues of law of first impression.

Portillo, 15 F.3d at 822 (citing *Bauman*, 557 F.2d at 654-55).

Whether the district court's order was clearly erroneous as a matter of law requires a Fourth Amendment analysis to determine whether court ordered urinal-

district court's order pending resolution of the mandamus petition.[11] Applying a Fourth Amendment analysis, the Ninth Circuit concluded that requiring Portillo to submit to urine testing was unreasonable under the circumstances.[12]

III. BACKGROUND

A. FOURTH AMENDMENT PROTECTION

The Fourth Amendment to the United States Constitution protects against unreasonable governmental searches and seizures.[13] Undertaking a Fourth Amendment analysis, a court must first determine if there has been a search, and next, whether the search was reasonable.[14] The Supreme Court has held that a search occurs when the government has "violated the privacy upon which [the defendant] justifiably relied."[15] In *Katz v. United States*, the Supreme Court developed a two-part test to determine whether a search has occurred. The accused must show first, an "actual (subjective) expectation of privacy," and second, that the expectation is "one that society is prepared to recognize as reasonable."[16] Thus, once

---

ysis under the circumstances is reasonable. *Portillo*, 15 F.3d at 822. The *Portillo* court held that it was "firmly convinced that the district court has erred in requiring Portillo to submit to a presentence urine test." *Id.*

11. *Id.* at 821.

12. *Id.* at 824. The district court lacked any personal information about Portillo or his potential drug use. *Id.*

13. The Fourth Amendment states, in pertinent part: "The right of 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. . . ." U.S. CONST. amend IV.

14. Railway Labor Executives' Ass'n. v. Burnley, 839 F.2d 575, 577 (9th Cir. 1988) (Federal Railroad Administration regulations authorizing employee blood, urine, and breath tests violated the Fourth Amendment).

15. Katz v. United States, 389 U.S. 347, 353 (1967). *Katz* held that the police violated Katz's reasonable expectation that his conversation would remain private by attaching a "bug" to the outside of a telephone booth to monitor the conversation inside. *Id.* The Court explained:

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-53.

16. *Katz*, 389 U.S. at 361. Justice Harlan suggested later in United States v.

the court determines that a search took place, the inquiry shifts to its reasonableness.[17] A reasonable search is one performed by the government under authority of a warrant based on probable cause or pursuant to a well-delineated exception to the warrant requirement.[18]

B. URINE COLLECTION AND TESTING

Long before considering its first urinalysis case, the Supreme Court found that a bodily intrusion constitutes a search.[19] In 1952, the Supreme Court held that the police "shocked the court's conscience" and violated a defendant's due process rights by forcing him to vomit evidence that he had swallowed.[20] Conversely, in 1966, in *Schmerber v. California*, the Supreme Court ruled that the police did not violate an

---

White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) that society will not automatically deem an expectation of privacy to be reasonable. Instead, he explained, the inquiry must "[b]e answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." *Id.*

The subjective prong has been greatly diminished by the Court's decision in Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1971) (The Court's refusal in *White*, "to adopt a test of 'subjective expectation' is understandable [because] constitutional rights are generally not defined by the subjective intent of those asserting their rights.").

17. Camara v. Municipal Court, 387 U.S. 523, 533-35 (1967) (administrative searches of residences to enforce municipal fire, health, or housing codes are subject to the Fourth Amendment's prohibition against unreasonable searches and seizures).

18. *Id.* Six major categories of exceptions to the warrant requirement have been identified. They may be found in Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (consent); United States v. Robinson, 414 U.S. 218, 224 (1973) (search incident to valid arrest); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (movable vehicle); Harris v. United States, 390 U.S. 234, 236 (1968) (plain view); Terry v. Ohio, 392 U.S. 1, 27 (1968) (stop and frisk); and Warden v. Hayden, 387 U.S. 294, 298 (1967) (exigent circumstances).

19. Phoebe Weaver Williams, *Governmental Drug Testing: Critique and Analysis of Fourth Amendment Jurisprudence*, 8 HOFSTRA LAB. L.J. 1, 36 (1990).

20. Rochin v. California, 342 U.S. 165, 172 (1952). After forcibly entering Rochin's home, the police saw him put two capsules into his mouth. *Id.* at 166. The officers attempted to extract the capsules by force, after which they took him to the hospital. *Id.* A doctor then inserted a tube with an emetic solution into Rochin's stomach until he vomited and the police retrieved the capsules. *Id.* The Court suppressed the evidence applying Fourteenth Amendment due process instead of the Fourth Amendment, since the exclusionary rule was not yet applicable to the states. *Id. See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.4 at 155 (2d. ed. 1992) (hereinafter "LAFAVE").

injured and intoxicated arrestee's Fourth Amendment rights by ordering a physician to take a sample of his blood and test it for the presence of alcohol.[21]

In finding the blood test permissible, the *Schmerber* Court considered three factors: (1) whether there was a clear indication that the sample would produce evidence of crime, e.g., that the defendant was intoxicated while driving; (2) whether the test was reasonable, commonplace and involved "virtually no risk, trauma, or pain;" and (3) whether the test "was performed in a reasonable manner . . . by a physician in a hospital environment according to accepted medical practices."[22]

Although blood and urine testing similarly involve a toxicological examination of bodily fluid, the Supreme Court has never applied the three *Schmerber* factors to urine testing.[23] Rather, the Court has focused on the privacy interests implicated by the gathering and analysis of urine.[24]

In 1989, the Supreme Court held that "[t]he collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable. . . . [T]hese intrusions must be deemed searches under the Fourth Amendment."[25] The Court held that society recognizes as reasonable one's expectation of privacy regarding the act of urination and the medical information which may be derived from the urine.[26] Although reasonable searches generally require a

---

21. Schmerber v. California, 384 U.S. 757, 769-72 (1966).

22. *Id.* at 771. *See* Winston v. Lee, 470 U.S. 753 (1985) (applying the *Schmerber* factors to a surgery case and determining that the lower court properly declined to authorize surgery to remove a bullet).

23. *Williams*, 8 HOFSTRA LAB. L.J. at 36. In Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 617 (1989), the Court noted that blood and urine tests are different since urine tests do not involve surgical intrusion into the body. *Id.*

24. *Skinner,* 489 U.S. at 617.

25. *Id.*

26. *Id.* at 603. According to the *Skinner* Court, urinalysis intrudes upon one's reasonable expectation of privacy in two ways. *Id.* The Court found that collecting urine is a search when visually or aurally observed. *Id.* at 617. The Court reasoned:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a func-

warrant based on probable cause,[27] a well-defined exception applies when "special needs" make the warrant requirement infeasible.[28]

C. THE "SPECIAL NEEDS" EXCEPTION TO THE WARRANT REQUIREMENT

Courts have dispensed with the warrant requirement when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement[s] impracticable."[29] The Supreme Court has applied this exception to several situations, including warrantless searches of employees, probationers and students.[30]

> tion traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom.

Id. (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)). In addition, the *Skinner* Court explained that urinalysis involves an independent search because "[c]hemical analysis of urine . . . can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant or diabetic." *Id.*

27. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). The *Camara* Court balanced the need to search against the invasion which the search entails. *See* LAFAVE § 3.3 at 139. The *Camara* balancing test has been "[e]mployed in upholding other kinds of so-called administrative or regulatory searches. . . . " *Id.*

28. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (a high school's interest in maintaining discipline and order constituted special needs justifying the warrantless search of a student's purse by school authorities).

29. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 469 U.S. at 351). In 1925, the Supreme Court held that an officer had probable cause to believe defendant was transporting intoxicating liquor in his automobile when the "[f]acts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that . . . an offense has or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925). In United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972), nearly 50 years later, the D.C. Court of Appeals applied the same definition of probable cause. *Davis* held that the "total circumstances, judged in light of the officer's experience," justified the arrest of two individuals engaged in a furtive transaction. *Davis*, 458 F.2d at 822.

30. *See generally Griffin*, 483 U.S. at 873 (discussing Fourth Amendment protection for probationers and prisoners). The *Griffin* Court also noted that a state's operation of a school or government office falls within the "special needs" exception. *Id. See e.g.* O'Connor v. Ortega, 480 U.S. 709, 714 (1987) (special needs may justify the search of a public employee's office by his supervisor); *T.L.O.*, 469 U.S. at 351 (school officials may conduct warrantless searches of student property without probable cause); *Camara*, 387 U.S. at 538 (government investigators conducting searches pursuant to a regulatory scheme need not adhere to a warrant based on probable cause as long as their searches meet "reasonable legislative or adminis-

1. Employee Urine Testing

The Supreme Court applied the "special needs" exception and upheld warrantless urine testing of employees in two cases decided on the same day.[31] In both cases, the Court reasoned that the employers had constitutionally applied suspicionless employment drug testing programs without a warrant.[32] According to the Court, important governmental interests in ensuring public safety outweigh employees' diminished privacy expectations in producing urine for testing.[33]

2. The Operation of a Probation System

In 1987, the Supreme Court applied the "special needs" exception to the probation system.[34] The Court recognized a probationer's legitimate expectation of privacy in his home, but held that the ongoing supervisory and nonadversarial relation-

---

trative standards"); Veronica School District 47J v. Acton, 115 S. Ct. 2386, 2391 (1995) (no probable cause requirement is necessary for urine testing of students who participate in interscholastic athletics; in fact, the urine testing can be suspicionless and random).

31. Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). *Skinner* upheld governmental regulations requiring private railroad employees to submit to blood and urine testing after being involved in train accidents. *Skinner*, 489 U.S. at 602. *Skinner* also upheld employer authorized breath and urine tests in situations where employees violated rules or where the supervisor had a reasonable suspicion that the employee was under the influence of alcohol. *Id.* at 634.

Von Raab involved urinalysis to detect drug use by employees seeking promotion to United States Customs Service positions. *Von Raab*, 489 U.S. at 679. The Court ruled that the Customs employer could conduct warrantless urine testing on employees applying for positions directly involved with drug enforcement, or employees working in positions which required the carrying of firearms. *Id.*

32. *Skinner*, 489 U.S. at 622-27; *Von Raab*, 489 U.S. at 680. The *Skinner* Court reasoned that the procedures surrounding the testing minimized the intrusion. *Skinner*, 489 U.S. at 622-27. The Court explained that the governmental regulations did not require the direct observation of employees when producing the urine sample, and the sample was collected and tested in a medical environment by personnel unrelated to the railroad employer. *Id.* The *Von Raab* Court reasoned that, since the governmental interest in promoting the safety, propriety, health and fitness of Customs Service employees was so important, warrantless, and even suspicionless urine testing was constitutional despite the employees' privacy interest. *Von Raab*, 489 U.S. at 680.

33. *Skinner*, 489 U.S. at 627-28; *Von Raab*, 489 U.S. at 674.

34. *Griffin*, 483 U.S. at 873 (a probation officer's warrantless search of the probationer's home was reasonable).

ship between probation officer and probationer justified diminished Fourth Amendment protection.[35] The Court reasoned that a warrant requirement would impede the probation relationship because: (1) a probation officer is better able than a magistrate to judge how close the supervision of a probationer should be; (2) the delay inherent in obtaining a warrant makes it difficult for a probation officer to respond quickly to evidence of misconduct; and (3) the deterrent effect of expeditious searches will be reduced.[36] Similarly, the Ninth Circuit, using the same reasoning, has held that probation officers are not required to obtain a warrant before ordering urine testing of probationers.[37]

3. Imposing an Appropriate Sentence

Since courts often sentence convicted defendants to probation, the imposition of sentence also presents "special needs."[38] Sentencing courts have wide discretion in the information they may consider to determine whether probation is "an appropriate, safe, useful and reasonable disposition of a defendant's sentence."[39] The Supreme Court held that the "sentencing court or jury must be permitted to consider any

---

35. *Id.* at 879.

36. *Id.* at 873.

37. United States v. Duff, 831 F.2d 176, 179 (9th Cir. 1987).

38. Portillo v. United States Dist. Ct. for the Dist. of Ariz., 15 F.3d 819, 823-24 (9th Cir. 1994).

39. *Id.* 18 U.S.C.A. § 3553 "Imposition of sentence" states, in pertinent part:

> The court, in determining the particular sentence to be imposed, shall consider - - (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed - - (A) to reflect the seriousness of the offense. . . . (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kind of sentences available; (4) the kinds of sentence [and the sentencing range.]

18 U.S.C.A. § 3553 (1995). In addition, 18 U.S.C.A. § 3661 "Use of information for sentencing" provides: "[n]o limitation shall be placed on information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C.A. § 3661 (1995).

and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. . . ."[40] At least one court has held that presentence urine testing without any background information about a defendant is appropriate if the crime committed was drug-related.[41] However, when the crime is unrelated to drugs and the court has absolutely no background information about the defendant, the "special needs" exception will not apply to allow warrantless urine testing for the sake of imposing an appropriate sentence.[42]

4. The Fourth Amendment Balancing Test of Reasonableness

The existence of "special needs" does not itself eliminate the requirement of an individualized determination or some finding of cause.[43] Instead, courts must balance governmental and private interests to determine whether the "special needs" exception justifies the total abrogation of probable cause or merely requires the application of a lesser standard of reasonableness.[44] When the balance of the interests precludes requiring probable cause, courts usually rely on "some quantum of individualized suspicion" to find a search reasonable.[45] Accordingly, warrantless probation officers may constitutionally search probationers provided the search is reasonably based upon the probation officer's belief that the search is necessary.[46]

---

40. Wasman v. United States, 468 U.S. 559, 563 (1984) (a sentencing judge may base a harsher sentence on conduct subsequent to the first trial for an offense committed before imposition of the original sentence).

41. State v. Guzman, 480 N.W.2d 446, 456 (Wis. 1992).

42. *Portillo*, 15 F.3d at 824.

43. *Skinner*, 489 U.S. at 624-25.

44. *Portillo*, 15 F.3d at 823, (citing *Skinner*, 489 U.S. at 624).

45. *Skinner,* 489 U.S. at 624. "We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) upholding the constitutionality of routine, fixed, boarder patrol checkpoint stops absent a warrant or even individualized suspicion). *Id.* The Court also held that the limited scope of the stop was sufficiently minimal requiring no particularized reason to justify the intrusion. *Id.* at 563.

46. United States v. Duff, 831 F.2d 176, 179 (9th Cir. 1987) (citing Latta v. Fitzharris, 521 F.2d 246, 250-52 (9th Cir. 1975)).

IV. THE COURT'S ANALYSIS

The Ninth Circuit considered whether court-imposed mandatory presentence urine testing violated Portillo's Fourth Amendment right against unreasonable search and seizure.[47] In a per curiam opinion, the court evaluated Portillo's appeal in light of the Fourth Amendment.[48]

A. THE MAJORITY

1. Urine Testing Constitutes a Search

The majority relied on the United States Supreme Court holding in *Skinner v. Railway Labor Executives' Ass'n.* that the collection and subsequent testing of urine constitutes a search.[49] In addition, the majority noted the Supreme Court's recognition of the "special needs" exception regarding a person released on probation.[50]

2. "Special Needs" Exception Applies to Presentence Urine Testing

The majority relied on the Supreme Court application of the "special needs" exception to the operation of a probation system where the probation officer supervises and monitors the released probationer.[51] The majority explained that a reasonable determination of Portillo's sentence was an essential part of the probation system since probation was an available sentencing option.[52] The court acknowledged that a sentencing court needs all pertinent information about a defendant to determine whether probation is safe, effective, and sensible.[53]

---

47. Portillo v. United States Dist. Ct. for the Dist. Ariz., 15 F.3d 819, 821 (9th Cir. 1994).

48. *Id.* at 822.

49. *Id.* (citing Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 617 (1989)).

50. *Id. See* Griffin v. Wisconsin, 483 U.S. 868, 876-78 (1987) (applying the "special needs" exception to the operation of a probation system).

51. *Id.* (citing *Griffin*, 493 U.S. at 875).

52. *Portillo*, 15 F.3d at 822.

53. *Id.* The sentencing court is to consider a broad range of factors when determining a sentence, including:

The Ninth Circuit had previously held that requiring probationers to submit to warrantless urine testing is constitutional due to the "special needs" exception.[54] Moreover, the Ninth Circuit compared the supervisory nature of Portillo's release to that of a supervised probationer, and found that they were substantially similar.[55] Accordingly, the *Portillo* court extended the "special needs" exception, making a warrant requirement inapplicable to post-conviction, presentence urine testing.[56]

3. Presentence Urine Testing Order was Unreasonable

After determining that urine testing fell within the "special needs" exception, the majority balanced Portillo's privacy interest in refusing urine testing against the governmental

---

> [1] the gravity of the offense, [2] the character of the offender, [3] the need for protection of the public, [4] the past record of criminal offenses, [5] any history of undesirable behavior patterns, [6] the defendant's personality, [7] character and social traits, [8] the results of a presentence investigation, [9] the vicious or aggravated nature of the crime, [10] the degree of defendant's culpability, [11] the defendant's demeanor at trial, [12] the defendant's age, educational background, and employment record, [13] the defendant's remorse, repentance, and cooperativeness, [14] the defendant's need for close rehabilitative control, [15] the rights of the public, [16] and the length of pretrial detention.

State v. Guzman, 480 N.W.2d 446, 451 (Wis. 1992) (citing State v. Jones, 444 N.W.2d 760 (Wis. 1989)).

54. United States v. Duff, 831 F.2d 176, 179 (9th Cir. 1987).

55. *Portillo,* 15 F.3d at 824. After Portillo's conviction, he remained free on his own recognizance pending sentencing. *Id. Griffin* defined the purposes of probation as (1) rehabilitation and (2) assurance against harm to the community by the released probationer. *Griffin*, 483 U.S. at 874-75. 18 U.S.C.A. § 3143(a) "Release or detention of a defendant pending sentence or appeal" permits court supervision of a convicted defendant pending sentencing if the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the community if released. 18 U.S.C.A. § 3143(a) (1995).

> [M]ore intensive supervision can reduce recidivism, and the importance of supervision has grown as probation has become an increasingly common sentence . . . Supervision, then, is a "special need" of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large."

Griffin, 483 U.S. at 875.

56. *Id.*

interest in determining an appropriate sentence.[57] The court acknowledged that, although Portillo had a lesser privacy interest than an ordinary citizen based on his convicted status, the government still must exercise some degree of reasonableness in ordering urine testing.[58] Thus, the court continued its analysis of the order imposing urinalysis and emphasized that Portillo's theft conviction bore no relationship to drug usage.[59]

The majority stressed that the district court had no information regarding Portillo's background, criminal history, or possible former drug use that might lead the court to impose testing.[60] However, the majority suggested that the outcome could have been different if Portillo's crime were drug-related.[61] Finally, the majority noted that the government could not argue exigency as a "special needs" exception since Portillo was aware of the routinely administered test.[62] The court con-

---

57. *Id.* at 822. *See* Wasman v. United States, 468 U.S. 559, 562 (1984) ("a judge is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed").

58. *Id.* at 823. Portillo, a convicted defendant awaiting sentencing, implicitly enjoys the same privacy interest as a probationer. *Portillo*, 15 F.3d at 822. The *Griffin* court reasoned that ordinary citizens enjoy the highest degree of privacy expectations followed by parolees, probationers, and finally prisoners. Griffin, 489 U.S. at 876-78. A probation officer need not have probable cause to search the defendant's home. *Id.* at 878. However, in applying the reasonable grounds standard, the *Griffin* Court held "the search must be reasonable and must be based on the probation officer's reasonable belief that it is necessary to the performance of her duties." *Id.* at 876-78.

See also State v. Guzman, 480 N.W.2d 446, 452 (Wis. 1992) ("Where probation is a sentencing alternative, a convicted defendant awaiting sentencing has a lesser expectation of privacy than one already granted probation").

59. *Id.* at 824. The district court's record was void of any such evidence. *C.f. Guzman*, 480 N.W.2d 446 at 455 (A judge could order a convicted defendant to submit to urinalysis to determine the presence of illegal drugs where the defendant is awaiting sentencing for a drug related offense and probation is a sentencing alternative.). *Id.*

60. *Portillo,* 15 F.3d at 824. The district court's record was void of any such evidence.

61. *Id.* at 824 n.5. *See also infra* note 69.

62. *Id.* at 824. Here, the urine testing was mandatory, and routinely administered among all convicted criminals to facilitate the judge's sentencing decisions. *See id.* The Ninth Circuit implied that, assuming Portillo had been using drugs, he could have stopped prior to testing to avoid detection. *See id.* This would thwart the government interest in imposing an appropriate sentence. *Id. See* Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 630 (1989) (requiring urine testing only where railroad employees had accidents or violated safety rules). The

cluded that the search was unreasonable because Portillo's privacy interest outweighed the government's interests in his urinalysis.[63]

The *Portillo* majority held that mandatory urine testing of convicted persons awaiting sentencing, whose crimes are unrelated to drugs and who have no prior drug history, violates their Fourth Amendment rights.[64] Consequently, the majority overturned as unconstitutional the district court order requiring Portillo to submit to presentence urine testing.[65]

B. JUDGE SCHROEDER'S CONCURRENCE

Judge Schroeder disagreed with the majority regarding what information a sentencing court may consider when ordering urine testing.[66] Judge Schroeder concurred in the outcome, but contended that, absent probable cause to believe a defendant had used illegal drugs, a district court should not base its sentencing decisions on drug testing results.[67] Judge Schroeder also argued that sentencing issues do not fall within the "special needs" exception to the Fourth Amendment whenever probation is a sentencing option.[68] She submitted that the "special needs" exception does not apply if the government ties a defendant's drug usage to the crime committed, especially if the crime is unrelated to drugs.[69]

Skinner Court reasoned that, if the employees were aware of potential testing, they would refrain from using drugs. Therefore, the possibility of urine testing would provide a deterrent effect as well as ensure safety. *Id.*

63. *Id.*

64. *Id.*

65. *Portillo*, 15 F.3d at 824.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* The government supplied the Ninth Circuit with statistical data purporting to relate crime in general to drug usage. *Id.* at n.5. However, since the government did not initially present this data to the district court, the Ninth Circuit disregarded it. *Id.* Judge Schroeder argued that the majority erroneously opened the door to future decisions that may permit urine testing where statistics of behavior engaged in by others are applied to an unrelated defendant or where the crime committed was related to drugs, but the court has no background information concerning the defendant. *Id.*

V. CRITIQUE

The Ninth Circuit's decision in *Portillo* rests upon its analysis of the applicability of the "special needs" exception to the warrant requirement for post-conviction, presentence urine testing.[70] However, this analysis might have been unnecessary had the Ninth Circuit recognized the possibility of imposing assessment drug testing.[71]

Compelled urine testing without any factual or background information about a defendant is urine testing for mere assessment purposes.[72] Assessment drug testing identifies offenders in need of drug treatment by providing objective evidence of drug use and identifying the drugs being abused.[73] Assessment urine testing by its very nature is suspicionless, without any articulable facts that a test will be positive on any particular occasion.[74] Had the district court's interest been in imposing an appropriate sentence, it would not have stated that it would not use any adverse results obtained from the urine testing against Portillo.[75] The Ninth Circuit did not acknowl-

---

70. *See* Portillo v. United States Dist. Ct. for the Dist. of Ariz., 15 F.3d 819, 821 (9th Cir. 1994).

71. *See* Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1249 (1990) (assessment testing as a screening device to identify offenders in need of drug treatment may be inappropriate if the government is screening individuals who are serving probationary sentences subject to minimal supervision for nonviolent, relatively minor offenses that are rarely associated with substance abuse). *See also* Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 622 n.6 (1989) (railway employees may be required to submit to urine tests only if they have been directly involved in specified rule violations or errors, or if their acts or omissions contributed to the severity of an event, but this limited use of the objective circumstances surrounding the event does not devolve unbridled discretion upon the supervisor in the field).

72. *See generally Rosen*, 55 BROOK. L. REV. at 1247.

73. *Id.* at 1247-48. Assessment testing is not to be administered unless adequate treatment resources are available to serve the offenders who are determined to obtain treatment. *Id.* at 1248. Assessment testing itself may be unwarranted when there are other sources for determining whether defendant is a drug abuser, including criminal records, observation of the defendant's behavior and physical appearance, third party reports, defendant's admissions, and results of psychological testing. *Id.* at 1247. The district court in *Portillo* investigated none of these. *See generally, id.*

74. *Id.* at 1172.

75. *See Portillo*, 15 F.3d at 821. This is merely a possibility based on the author's speculation.

edge this district court statement, nor did it recognize that assessment urine testing could have been imposed.[76]

Rather than categorizing the urinalysis as assessment testing and striking it as unconstitutional, the Ninth Circuit focused on the governmental interest in imposing an appropriate sentence.[77] The Ninth Circuit seemed to focus on the wrong governmental interest.[78] The facts suggest that the court may not have been concerned with imposing an appropriate sentence, but instead, was interested in assessment testing.[79] For example, it considered absolutely no background information about Portillo's lifestyle.[80] Also, Portillo's crime was unrelated to drugs.[81] Finally, according to the lower court, adverse results from the testing would not be used against him.[82]

Conversely, if Portillo had a history of prior drug convictions or if his crime was related to drugs, even without evidence of his personal history, imposing a proper sentence would be a plausible governmental interest justifying urinalysis.[83] The governmental interest in testing for assessment

---

76. *See generally id.*

77. *Id.* at 823. Since the Ninth Circuit was greatly concerned with the absence of individualized suspicion by the district court that Portillo used drugs, it is unlikely that the court would be willing to permit assessment testing under these circumstances. *See id.*

78. *See generally* Rosen, 55 BROOK. L. REV. 1159. *See supra* notes 72-76. The Ninth Circuit could have recognized that the district court's true intent may have been to impose assessment urine testing to determine whether Portillo used drugs, since personal and potential criminal background information about Portillo is required to determine appropriate sentencing. *See Portillo,* 15 F.3d at 824.

79. *See Portillo,* 15 F.3d at 823. The Ninth Circuit discussed requiring knowledge of pertinent facts to determine an appropriate sentence. *Id.* Instead, the district court seemingly just wanted to know whether Portillo was a drug-user and what drugs, if any, he used. *See id.* at 820.

80. *Id. See supra* note 57.

81. *Id.*

82. *Id.* at 821. The Ninth Circuit was silent on this issue. *Id.*

83. *Id.* at 823. *See supra* note 59. Under the majority's logic, a defendant convicted of a drug-related crime may be compelled to submit to urinalysis before the court completes a presentence report. *See Portillo,* 15 F.3d at 824. However, it is likely that a sentencing court will not stop here. A court may also attempt to compel drug testing without any background information on the defendant if there is evidence of a prior drug related charge or conviction, prior use, or self-reported use, however inconsequential. *See* David N. Adair Jr., *Recent Cases On Probation and Supervised Release,* 58 FED. PROBATION 67 (1994).

purposes would be diminished, since the sentencing court would already have at least some evidence that drugs may have played a role in the defendant's commission of the crime.[84]

Finally, because of the Ninth Circuit's emphasis on the government's lack of individualized suspicion about Portillo, the court would also be likely to find assessment testing constitutionally infirm.[85] Urine testing for assessment purposes is, by its very foundation, suspicionless intrusion.[86] Most importantly, had the Ninth Circuit undertaken an assessment analysis, such undertaking would have had the critical effect of rendering the "special needs" exception analysis unnecessary.[87] The Ninth Circuit could have disposed of this case by holding that the urine testing ordered here for mere assessment purposes was unconstitutional and saved the "special needs" analysis for a more appropriate case where a defendant's crime was related in some way to drugs.[88]

VI. CONCLUSION

In *Portillo v. United States District Court for the District of Arizona,* the Ninth Circuit Court of Appeals extended the "special needs" exception to the warrant requirement.[89] This exception now applies to mandatory urine testing ordered after conviction, but before sentencing.[90] Although the Ninth Circuit recognized that a warrant requirement to test urine would be impracticable under the circumstances, it held that when a district court has no evidence that the crime committed was

84. State v. Guzman, 480 N.W.2d 446, 452 (Wis. 1992).

85. *See Portillo*, 15 F.3d at 824.

86. *Portillo*, 15 F.3d at 823. *See supra* note 72. *See also* Berry v. District of Columbia, 833 F.2d 1031, 1035 (D.C. Cir. 1987) (suggesting that not all offenders should be screened and opting for an analysis into the intrusiveness of the testing of a pre-arraignment defendant, instead of the lesser protection afforded under a categorical approach). The *Berry* argument applies to a presentence situation as well since Portillo was not yet a probationer, his crime was minor, and he was free on his own recognizance. *Portillo*, 15 F.3d at 823.

87. *See supra* notes 78-79 and accompanying text.

88. *C.f.* State v. Guzman, 480 N.W.2d 446, 455 (Wis. 1992). *See supra* note 59.

89. Portillo v. United States Dist. Ct. for the Dist. of Ariz., 15 F.3d 819, 822 (9th Cir. 1994).

90. *Id.*

related to drug use, nor any background information about the defendant, warrantless urine testing can not be ordered within the protections of the Constitution.[91]

Joshua W. Rose[*]

91. *Id.*

* Golden Gate University School of Law, Class of 1996. First and foremost, I wish to thank my editors for their invaluable assistance, direction and contributions. I would also like to thank my family and friends for their continued understanding, love and support.