IN THE SUPREME COURT OF FLORIDA

NO. 88,011

RECCHI AMERICA, INC. et al.,

Appellants,

versus

ASTLEY HALL,

Appellee.

On Appeal from the District Court of Appeal
for the First District of Florida

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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STATEMENT OF THE CASE

Amicus Curiae, the American Civil Liberties Union Foundation of Florida, Inc. (hereinafter, "the ACLU"), adopts Appellee's Statement of the Case.

SUMMARY OF ARGUMENT

Section 440.09(7)(b)'s conclusive presumption that an injured worker who tests positive for drugs caused his own injury is irrational and hence an unconstitutional irrebuttable presumption. The state's primary concern is compensating faultless injured workers. Urinalysis is not time conscious and cannot determine fault. It bears no correlation to causation.

Section 440.09 encourages private employers to engage in suspicionless testing and is therefore violative of the fourth amendment. Suspicionless testing is permissible only where special needs are presented that overcome the individual's privacy interests. No special needs are presented by the construction industry.

Section 440.09 violates Article I, § 23 because it encourages private employers to invade the privacy of employees. Although the state has a compelling interest in preventing drug use, post-injury urinalysis is an inefficient mechanism to achieve this goal. It is therefore unconstitutional under the Florida Constitution.

ARGUMENT

Section 440.101(1) of the Florida Statutes states that "it is ... the intent of the Legislature that ... employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits." Toward this end, Florida's Drug-Free Workplace Act establishes several rights and incentives for private employers. For example, an employer who establishes a drug-free workplace has the right to "require the employee to submit to a test for the presence of drugs or alcohol and, if a drug or alcohol is found to be present in the employee's system ... the employee may be terminated and forfeits [sic] his eligibility for medical and indemnity benefits." § 440.101(2), Fla. Stat. (1996).[1] The employer must test applicants and "may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusing to hire a job applicant." § 440.102(4), Fla. Stat. (1996). The employer is entitled to discounts under § 627.0915, Fla. Stat. (1996). See § 440.102(2), Fla. Stat. (1996). The employer also earns an irrebuttable presumption by implementing a drug-free workplace; an employee injured on the job who tests positive for drug use is presumed to have caused his own injury.[2] See 440.09(7)(b), Fla.

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[1]See also § 440.102(2), Fla. Stat. (1996) (The employer "may test an employee or job applicant for any drug described in paragraph (1)(c) [of § 440.102, Fla. Stat. (1996)].").

[2]An injured worker who refuses a drug test is presumed to have caused his own injury "in the absence of clear and convincing evidence to the contrary." § 440.09(7)(c), Fla. Stat. (1996).

Stat. (1996).[3]

These rights and incentives are conditioned on an employer's implementing a drug-free workplace. Of primary importance here,

> [a]n employer is required to conduct the following types of drug tests:
>
> 1. Job applicant drug testing. -- An employer must require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusing to hire a job applicant.
>
> 2. Reasonable-suspicion drug testing. -- An employer must require an employee to submit to reasonable-suspicion drug-testing.
>
> 3. Routine fitness-for-duty drug testing. -- An employer must require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.
>
> 4. Followup drug testing. -- If the employee in the course of employment enters an employee assistance program for drug-related problems, or a drug rehabilitation program, the employer must require the employee to submit to a drug test as a followup to such program, unless the employee voluntarily entered the program. In those cases, the employer has the option to not require followup testing. If followup testing is required, it must be conducted at least once a year for a 2-year period after completion of the program. Advance notice of a followup testing date must not be given to the employee to be tested.

§ 440.102(4)(a), Fla. Stat. (1996). Although not required of all employees, random drug testing is not precluded. § 440.102(4)(b), Fla. Stat. (1996).

"Reasonable-suspicion drug testing" is defined as testing "based on a belief that an employee is using or has used drugs in

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[3]This is the current codification of the irrebuttable presumption. As noted by the District Court of Appeal, the presumption was previously codified in § 440.09(3), Fla. Stat. The relevant language was not changed by the re-codification.

violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience." § 440.102(1)(n), Fla. Stat. (1996). Reasonable suspicion may, according to Florida law, be based upon

> 1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.
>
> 2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
>
> 3. A report of drug use, provided by a reliable and credible source.
>
> 4. Evidence that an individual has tampered with a drug test during his employment with the current employer.
>
> 5. Information that an employee has caused, contributed to, or been involved in an accident while at work.

§ 440.102(1)(n), Fla. Stat. (1996).

I. THE CONCLUSIVE PRESUMPTION FOUND IN SECTION 440.09(7)(b) IS AN IMPERMISSIBLE IRREBUTTABLE PRESUMPTION THAT VIOLATES THE FLORIDA CONSTITUTION.

Florida's doctrine against irrebuttable presumptions requires that there exist "some rational connection between the fact proved and the ultimate fact presumed." United States Fidelity and Guaranty Co. v. Department of Insurance, 453 So.2d 1355, 1362 (Fla. 1984). To the extent the state wishes to exclude workers who cause their injuries by drug use from receiving workers' compensation benefits, the ACLU agrees with the District Court of Appeal's conclusion that the irrebuttable presumption found in § 440.09 is irrational. It offers a very poor method of proving a causal connection between injury and drug use. See 671 So.2d at 200. As explained further below, a

positive urinalysis says absolutely nothing about a person's current use of drugs or the causal effects of drug use. Because urinalysis tests for metabolites it can establish only past drug use.

Appellants, however, argue that the irrebuttable presumption is also intended to punish workers who choose to "engage in drug abuse 'on or off the job'." Initial Brief of Appellants at 18. Foreclosing an injured worker from benefits, the argument goes, is a rational way of deterring and punishing drug use both on and off the job.

The difficulty with this argument is that it is inconsistent with the language of § 440.09. Section 440.09 states that "intoxicat[ed]" workers and those under "the influence of any drugs" are foreclosed from benefits. See § 440.09(3), Fla. Stat. (1996). Subsection (7)(a) of § 440.09 currently provides that an employer who has not implemented a drug-free workplace may still test an injured worker if "the employer has reason to suspect that the injury was occasioned primarily by the intoxication of the employee or by the use of any drug ... which affected the employee to the extent that the employee's normal faculties were impaired." § 440.09(7)(a), Fla. Stat. (1996).[4]

The primary intent behind § 440.09 seems clear; it is to deny compensation to those workers whose drug or alcohol use contributes to their injury. Section 440.09's irrebuttable presumption is an effort to implement this policy. Unfortunately, it is a poorly conceived mechanism for proving

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[4]The language in the prior codification at § 440.09(3) was virtually identical.

causation. Although a positive urinalysis might have some conceivable evidentiary value at trial, drawing a uniform conclusion that it proves fault or causation is irrational. The presumption therefore violates Florida's doctrine against irrebuttable presumptions.[5]

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[5]Note that the irrebuttable presumption doctrine has been abandoned as a component of the federal due process clause. See Weinberger v. Salfi, 422 U.S. 749, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975). The District Court of Appeal apparently relied on the due process clause of the Florida Constitution. See B.H. v. State, 645 so.2d 987, 991 (Fla. 1994). To the extent this Court chooses to use the federal constitution, it should therefore rely on the fourth amendment. See Gerald Gunther, Constitutional Law 877 & n.4 (12th ed. 1991) ("The approach may survive for use where there are independent reasons for heightened scrutiny, as when 'fundamental interests' are affected. ... But there is no longer basis for claiming that heightened scrutiny across the board can be triggered simply by asserting an irrebuttable presumptions claim.").

II. FLORIDA'S DRUG FREE WORKPLACE ACT VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT ENCOURAGES AND REWARDS SUSPICIONLESS TESTING.[6]

A. STATE ACTION IS PRESENT BECAUSE FLORIDA ENCOURAGES PRIVATE EMPLOYERS TO ENGAGE IN SUSPICIONLESS DRUG TESTING.

Florida's Drug-Free Workplace Act encourages private employers to engage in mandatory, random, and suspicionless drug-testing in many instances that violate both the Constitutions of the United States and the State of Florida. Of relevance here is the private employer's decision to test all employees injured at work with or without reasonable suspicion. Although Florida law does not require suspicionless workplace-injury testing, and the discounts of § 627.0915, Fla. Stat. (1996) are not conditioned on it, see § 440.102(2), Fla. Stat. (1996), Florida law strongly encourages testing following workplace accidents. Employers are rewarded for uncovering drug use with an irrebuttable presumption against worker's compensation benefits. This presumption, moreover, is premised on post-injury testing.[7] Indeed, Appellants freely admit that the District Court's invalidation of the presumption "has removed any incentive or benefit to an

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[6]Although the privacy issue was not addressed by the District Court of Appeal, it was raised by Hall on appeal. This Court therefore has appellate jurisdiction to address this issue should it choose to do so. See John F. Cooper & Thomas C. Marks, Jr., Florida Constitutional Law: Cases and Materials 126 (1992) ("Once the supreme court has obtained jurisdiction under the provision of article V, section 3(b)(1), it presumably still possesses the discretionary authority it had under earlier law to resolve all points on appeal.") (citing Rojas v. State, 288 So.2d 234 (Fla. 1973)).

[7]"Reasonable suspicion" is also defined to include "[i]nformation that an employee has caused, contributed to, or been involved in an accident while at work." § 440.102(1)(n)(5), Fla. Stat. (1996).

employer to create a drug-free workplace as envisioned under § 440.102, Fla. Stat. (1991)." Brief for Appellants at 22.

Significant state encouragement is sufficient to tie private parties to the state and hold both accountable under the Constitution. See Blum v. Yaretsky, 457 U.S. 991, 1004-05, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). For example, a state law requiring segregation of the races is subject to the limitations of the equal protection clause even if it is enforced or implemented by private parties. Peterson v. Greenville, 373 U.S. 244, 83 S.Ct. 1133, 10 L.Ed.2d 323 (1963) (state segregation policies unconstitutional even though private restaurant owner might have segregated anyway). Similarly, a state law that encourages[8] racial segregation, though not requiring it, is subject to constitutional scrutiny. See Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) (state financial support for racially segregated private schools violates the Equal Protection Clause).

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989), provides the controlling state action precedent in the context of drug testing. In Skinner, federal regulations both required and permitted drug testing in the transportation industry. Subpart C of these federal regulations required that private railroads test

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[8]Two primary concerns motivate state action analysis: first, separation of powers counsels against inordinate judicial intrusion into governmental affairs, and second, individual liberty and personal autonomy direct that government not preempt private choices. See Laurence H. Tribe, American Constitutional Law 1691 (2d ed. 1988). The latter of these dual motives for judicial forbearance is diminished when government encourages the private activity at issue.

employees following major train accidents. Subpart D permitted reasonable suspicion testing of employees even in the absence of major accidents. The Supreme Court found that both Subparts implicated state action. Subpart C, given its mandatory nature, easily was found to involve state action. 489 U.S. at 614; see also Int'l Brotherhood of Electrical Workers v. U.S. Nuclear Regulatory Comm'n, 966 F.2d 521 (9th Cir. 1992). Because of its permissive wording, finding state action under Subpart D was somewhat more difficult. Still, the Court found state action:

> The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.

Id. at 615.

Subpart D encouraged drug testing in several ways: first, it preempted state prohibitions and collective bargaining agreements; second, it granted to the government the right to receive test results; third, employees could not refuse testing. Id. The Court concluded:

> In light of these provisions, we are unwilling to accept petitioners' submission that tests conducted by private railroads in reliance on Subpart D will be primarily the result of private initiative. The Government has removed all legal barriers to the testing authorized by Subpart D and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are the clear indices of the Government's encouragement, endorsement, and participation, and suffices to implicate the Fourth Amendment.

Id. at 615-16.

In the present case, the state grants to employers the right

to "require the employee to submit to a test for the presence of drugs or alcohol and, if a drug or alcohol is found to be present in the employee's system ... the employee may be terminated and forfeits [sic] his eligibility for medical and indemnity benefits." § 440.101(2), Fla. Stat. (1996). The employer is entitled to worker's compensation discounts under Fla. Stat. § 627.0915. See § 440.102(2), Fla. Stat (1996). Most importantly, the employer earns an irrebuttable presumption against worker's compensation benefits should an injured worker test positive. See § 440.09(7)(b), Fla. Stat. (1996). An injured worker, moreover, is not free to refuse the drug test.[9] See § 440.09(7)(c), Fla. Stat. (1996) (a worker who refuses a drug test is presumed to have caused his own injury "in the absence of clear and convincing evidence to the contrary."). Because Florida clearly promotes and encourages mandatory testing of injured workers, the testing program must be subjected to constitutional scrutiny. See Charles A. Reich, The Individual Sector, 100 Yale L.J. 1409, 1429 (1991) ("Corporations engaged in this ["drug-free workplace"] program are clearly acting as an arm of the government, and should be treated as such by imposing Bill

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[9]Appellants argue that Hall's employment relationship, and his participation in the drug-free workplace program, was "volitional, and constituted a bargain or understanding between Mr. Hall and his employer which bound Mr. Hall both to the terms of the statute and to the presumption of impairment upon which causation would necessarily lie." Initial Brief of Appellants at 17. For constitutional purposes, it is clear that "voluntary" consent cannot be arrived at by way of bargaining. Instead, consent must be freely given, with no adverse consequences such as refusal of employment or loss of job. See, e.g., Ford v. Dowd, 931 F.2d 1286 (8th cir. 1991) (no voluntary consent where job conditioned on acceptance of drug-testing program). For this reason, no consent can be inferred from Hall's acceptance of the job.

of Rights safeguards.").[10]

B. IN THE ABSENCE OF SPECIAL CIRCUMSTANCES, SUSPICIONLESS URINALYSIS INFRINGES UPON ONE'S LEGITIMATE EXPECTATION OF PRIVACY IN VIOLATION OF THE FOURTH AMENDMENT.

Suspicion-based urinalysis survives scrutiny under the fourth amendment. See, e.g., Saavedra v. City of Albuquerque, 73 F.3d 1525 (reasonable suspicion justifies testing of firefighters); Garrison v. Department of Justice, 72 F.3d 1566 Fed. Cir. 1995) (suspicion-based testing is valid); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987). Suspicionless testing, however, is valid in only limited contexts and under special circumstances. In National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 103 L.Ed.2d 685 (1989), and Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989), the Supreme Court upheld suspicionless drug testing in certain, well-defined contexts. In Skinner the Court upheld federal regulations that required urine and blood tests of all train crew members following major train accidents. Emphasizing the government's interest in determining the cause of major train accidents, the Court found that the scales tilted in favor of testing. Id. at 634; see also id. (Stevens, J., concurring) ("the public interest in determining

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[10]Contrast the federal Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 et seq., which applies only to federal contractors and grant recipients. The federal Drug-Free Workplace Act requires that contractors and grantees make a good faith effort to maintain a drug-free workplace, but does not require drug testing. Hence, unlike Florida's Drug Free Workplace Act, this federal legislation does not implicate state action. See, e.g., Parker v. Atlanta Gas Light Co., 818 F.Supp. 345 (S.D. Ga. 1993); Mares v. Conagra Poultry Co., 773 F.Supp. 248 (D. Col. 1991), aff'd, 971 F.2d 492 (10th Cir. 1992).

the causes of serious railroad accidents adequately supports the validity of the challenged regulations").

In Von Raab the Court upheld suspicionless testing of federal Customs employees who actively sought promotion. Id. at 666. An employee could therefore avoid testing altogether by not seeking promotion. Only certain categories of employees, moreover, were subject to testing. Customs employees who were either actively involved in drug interdiction, carried firearms, or were privy to classified material were the only agents tested. The Court explained:

> It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching travelers entering the country.

Id. at 670. The Court felt that testing Customs employees involved in drug interdiction was much like a border search, long an exception to any requirement of particularized suspicion.

As to those who carried firearms, the Court reasoned that "employees who may use deadly force plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Id. And as to those exposed to classified material, the Court found that national security justified their testing.

Importantly, in regard to this last category of Customs employees, the Court remanded the case back to the lower courts to determine whether the Customs Service's decision to test a host of employees including such diverse positions as "'Accountant', 'Accounting Technician', ... 'Messenger'," id. at

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Most recently, the Supreme Court sustained suspicionless testing of high school athletes. See Vernonia School District 47J v. Acton, --- U.S. ---, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In Acton an Oregon high school experienced an emerging drug culture on the school grounds. Drug use was particularly problematic among the school's various athletes. 115 S. Ct. at 2388-89. To combat the problem, school officials implemented a policy requiring that all athletes be tested at the beginning of the season and that random testing be conducted each week. Id. The Court sustained the policy as an exception to the fourth amendment:

> A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

Id. at 2391 (citations omitted). Special needs were found to exist because of the educational environment. High school students, as unemancipated minors, do not enjoy the full panoply of constitutional rights of adults. 115 S.Ct. at 2391. School authorities stand in loco parentis to students; the relationship

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[11]See also National Treasury Employees Union v. U.S. Customs Service, 27 F.3d 623 (D.C. Cir. 1994) (extending testing to employees with access to sensitive information).

is "custodial and tutelary, permitting a degree of supervision and control that could not be exacted over free adults." 115 S.Ct. at 2392. "Legitimate privacy expectations are even less with regard to student athletes." Id. "Somewhat like adults who choose to participate in a 'closely regulated industry', students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." Id. at 2393.

Importantly, the Court cautioned

> against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is ... that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.

Id. at 2396. The present case involves no special circumstances nor special needs. Rather than limiting its reach to a defined class of employees, like engineers involved in major accidents or Customs agents in sensitive positions, Florida law broadly embraces all employees. Compounding the problem is that Florida law reaches into the private sector. While it might be said that one gives up a limited measure of privacy by working for the government, the same can not be said for working for private industry. Certainly, Florida's adult workers have more rights than school children.

Courts across the United States have been careful to limit the reach of suspicionless urinalysis. For example, in Beattie v. City of St. Petersburg Beach, 733 F. Supp. 1455 (M.D. Fla. 1990), the court struck down a municipal ordinance requiring suspicionless testing. And in Guiney v. Roach, 873 F.2d 1557

(1st Cir. 1989), the court struck down suspicionless testing of police department employees.[12]

No special need exists in relation to private-sector employees who are not involved in drug interdiction, see Von Raab, criminal law enforcement, see, e.g., McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (prison guards present special need); Penney v. Kennedy, 846 F.2d 1563 (6th Cir. 1988) (police present special need), have no access to classified information, see, e.g., AFGE Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991) (civilian Navy employees with security clearances present special need), and who are not engaged in medical emergencies. See, e.g., Piroglu v. Coleman, 25 F.3d 1098 (D.C. Cir. 1994) (emergency medical technicians present special need). Instead, construction workers are more like the maintenance workers in Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F.2d 807 (3rd Cir. 1991) (suspicionless testing of maintenance worker invalid), and the truck drivers in Rutherford v. City of Albuquerque, 77 F.3d 1258 (10th Cir. 1996) (truck drivers do not present a special need). Suspicionless urinalysis in this case is therefore unconstitutional under the fourth amendment.

III. SUSPICIONLESS URINALYSIS VIOLATES ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION.

Article I, § 23 of the Florida Constitution guarantees to "every natural person ... the right to be let alone and free from government intrusion into his private life ...." This Court has

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[12]See also Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992) (suspicionless testing of police officer invalid); Ford v. Dowd, 931 F.2d 1286 (8th Cir. 1991) (suspicionless testing of police officer invalid). Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) (Justice Department employees).

held on several occasions that this provision offers greater protection for privacy than does either the Fourth or Fourteenth Amendments to the United States Constitution.

For example, in In re T.W., 551 So.2d 1186 (Fla. 1989), this Court held that a minor's right to choose an abortion is entitled to greater protection under § 23 than under the Fourteenth Amendment. Contrast Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. 279, 120 L.Ed.2d 674 (1992). Similarly, in Shaktman v. State, 553 So.2d 148, 152 (Fla. 1989), this Court held that § 23 prohibits the installation of pen registers without some "reasonable founded suspicion" and prior judicial approval, notwithstanding the inapplicability of the Fourth and Fourteenth Amendments. Contrast Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). This Court explained in Shaktman, 553 So.2d at 150, that § 23 "ensures that individuals are able to determine for themselves when, how and to what extent information about them is communicated to others." (Citation omitted).

> One of its ultimate goals is to foster the independence and individualism which is a distinguishable mark of our society and which can thrive only by assuring a zone of privacy into which not even government may intrude without invitation or consent.

Id. The logic of § 23 has been applied to protect an individual's right to refuse blood transfusions, see Public Health Trust of Dade County v. Wons, 541 So.2d 96 (Fla. 1989); In re Dubreuil, 629 So.2d 819 (Fla. 1994), and the privacy rights of blood donors. Rasmussen v. South Florida Blood Service, Inc., 500 So.2d 533 (Fla. 1987). Bodily invasions and extractions are offensive to fundamental privacy rights not only because they

allow the perpetrator to rummage through the sanctity of the human body, but also because they allow for a larceny of precious information about the individual.[13]

In a labor case not specifically addressing constitutional concerns, Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 609 So.2d 31 (Fla. 1992), this Court upheld Miami's unilateral decision to test several police officers suspected of drug use. Although constitutional issues were not specifically raised, Justice Kogan noted in a concurring opinion that "compulsory drug-testing of governmental safety workers raises distinct problems under the Fourth Amendment, Florida's privacy amendment, and in some cases due process." Id. at 36 (Kogan, J., concurring).

Because the right to be free from drug testing is fundamental, it can only be overcome by compelling state interests that are served by the most narrowly tailored means available. See Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 547 (Fla. 1985). Although preventing on-the-job drug

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[13]Should this Court conclude that state action exists and that the fourth amendment, though applicable, is not violated, it might find itself unable to reach the question of whether Article I, § 23 has been violated. The lock-step requirement of Article I, § 12 would require equivalency between the requirements of the fourth amendment and Florida's Constitution. If the fourth amendment is inapplicable, however, because state action is insufficient to implicate it, this Court is free to turn to Article I, § 23. See Shaktman v. State, 553 So.2d 148 (Fla. 1989). Note that state action is a flexible requirement, so that it might exist for one constitutional right (here Article I, § 23), but not another (the fourth amendment). The more fundamental the right, the less state action necessary to cause judicial scrutiny. See John E. Nowak & Ronald D. Rotunda, Constitutional Law 483-86 (4th ed. 1991). Of course, should the Court find the fourth amendment violated, it would have no difficulty using Article I, § 23.

use is a compelling state interest, mandatory workplace-injury testing is not an efficient method of achieving this goal. It is vastly overinclusive. Narcotics officials estimated in 1982 that 3% to 5% of the American workforce used illicit drugs.[14] Even assuming that drug use triples the likelihood of job-site injury, see id. at 258, eight out of ten of those tested are innocent of drug use.

Compounding the problem is the fact that urinalysis only identifies metabolites in the system and not the presence of the drugs. It therefore says nothing at all about whether the employee is currently under the influence of drugs.[15] In the present case, for example, Hall used marijuana five days before the accident. Because urinalysis bears little correlation to insuring workplace safety, it cannot survive strict scrutiny.[16]

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[14]See James Felman & Christopher J. Petrini, Drug Testing and Public Employment: Toward A Rational Application of the Fourth Amendment, 51 L. & Contemp. Probs. 253, 256 (1988).

[15]See Cohen, Drugs in the Workplace, 45:12 J. Clin. Psychiatry 4, at 5 ((1984) ("A positive urine test for marijuana does not necessarily mean one is intoxicated."); Lundberg, Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism, 256 J.A.M.A. 3003, 3004 (1986) ("Under no circumstances can impairment be diagnosed or even presumed from a urine test result.").

[16]The accuracy of urinalysis is also questionable. Although gas chromatography-mass spectrometer (GC/MS) testing is highly accurate in theory, human error is unavoidable. The Center for Disease Control studied thirteen independent laboratories over a nine year period beginning in the late 1970s and discovered a false-positive rate ranging from 6 to 60 percent. Felman & Petrini, supra, at 265. Felman and Petrini report that "the CDC study indicates that even established companies with professional technicians and comprehensive testing controls remain subject to remarkably high rates of error." Id. The experience of Butch Reynolds, a world-class sprinter and Olympic gold medalist in 1988 attests to the possibility of wrongfully labeling someone a drug user based on urinalysis. Reynolds was banned from international competitions after testing positive for using

The state also asserts an interest in deterring and punishing drug use. Mandatory testing certainly punishes those who use drugs, as well as a host of innocent individuals whose privacy is invaded. It might also be called an effective deterrent. The problem is that the state's deterrent/punitive objective proves too much. If this objective can sustain suspicionless drug testing, then it can also sustain suspicionless searches of one's home, papers and personal effects. Certainly, one who knows that his home can be arbitrarily searched will be deterred from using or possessing illicit drugs. Fishing expeditions, however, are antithetical to America's respect for privacy. That a small percentage of Americans abuse the privileges of citizenship should not be used to punish the whole.

Several states have relied on state constitutional privacy provisions to strike down drug testing programs.[17] They have reached the cogent conclusion that the emerging "drug exception"

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performance-enhancing drugs in 1990. Reynolds maintained his innocence, however, and took his case to arbitration. An independent arbiter exonerated Reynolds, finding that his sample was confused with another during the testing process. See Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110, 1112 (6th Cir. 1994). Although the Sixth Circuit ultimately reversed a large monetary award in Reynolds's favor on jurisdictional grounds, id. at 1114, Reynolds's recent performance at the 1996 U.S. Olympic trials, qualifying for the United States Olympic team in the 400 meter event, corroborates his innocence.

[17]See, e.g., Commonwealth v. Danforth, 576 A.2d 1013 (Pa. Super. Ct. 1990) (striking down Pennsylvania law requiring blood test of individual involved in automobile accident that causes injury or death); Guiney v. Police Commissioner of Boston, 582 N.E.2d 523 (Mass. 1991) (striking down random testing of police officers); Horesemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 532 N.E.2d 644 (Mass. 1989) (striking down testing of jockeys).

should not be allowed run amok over the Bill of Rights.

> There is an old saying that truth is the first casualty of war. In the United States it seems safe to add that the Bill of Rights is the second casualty of war. ... As the nation moves to a "semi-martial state" in the war on drugs it is likely that our fundamental liberties will continue to erode. As long as we approach the problem of drugs in terms of warfare, and total warfare with the objective of unconditional surrender at that, it is likely that civil liberties will suffer as they have during other wars.

Paul Finkelman, The Second Casualty of War: Civil Liberties and the War on Drugs, 66 So. Cal. L.Rev. 1389, 1389-90 (1993).

CONCLUSION

Because the irrebuttable presumption found in § 440.09(7)(b), Fla. Stat. (1996) is irrational, it should be struck down as violative of due process under the Florida Constitution. Alternatively, because the presumption is a primary component of Florida's suspicionless drug testing program, it is unconstitutional under the Fourth Amendment to the United States Constitution and Article I, § 23 of the Florida Constitution. The results of unconstitutional suspicionless testing should not be used to penalize Hall. The judgment of the First District Court of Appeal should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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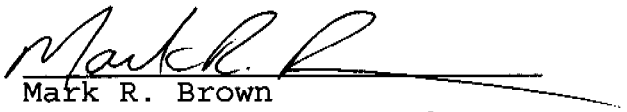

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