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An Unwarranted Intrusion: The Constitutional Infirmities of Washington's DNA Collection Law

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AN UNWARRANTED INTRUSION: THE CONSTITUTIONAL INFIRMITIES OF WASHINGTON'S DNA COLLECTION LAW

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Abstract: Washington State law requires all convicted felons to submit a biological sample for purposes of DNA testing. Washington State courts have upheld this law as a permissible search under the Fourth Amendment to the United States Constitution. Article I, section 7 of the Washington State Constitution, however, provides broader protections against governmental intrusion than does its federal counterpart. Under the state constitutional provision, law enforcement officials may disturb a citizen's private affairs only if authority of law supports the disturbance. A statute alone cannot provide the requisite authority; rather, the search prescribed must either be pursuant to a warrant or fall within one of the exceptions to the warrant requirement. This Comment argues that the DNA collection statute is unconstitutional because it does not contain a warrant requirement and the required collection does not fall within any of the exceptions to the warrant requirement. Although the statute applies only to convicted felons, who arguably have lesser privacy rights, the statute permits an unconstitutional infringement of these rights because the prescribed search is not predicated on a minimal level of suspicion.

Under Washington State law, law enforcement officials[1] must collect a DNA sample from any adult or juvenile convicted of a felony.[2] The DNA collection statute, RCW 43.43.754, has survived constitutional challenges under the Fourth Amendment to the United States Constitution,[3] which prohibits unreasonable searches and seizures.[4]

1. Cities and counties are responsible for obtaining biological samples from persons who serve time in their jails; state facilities collect samples from felons who serve time there; and local sheriff's offices or police departments are responsible for collecting samples from persons who serve no time. WASH. REV. CODE § 43.43.754(1)(a)–(c) (2004). These provisions apply only to persons convicted after July 1, 2002. *Id.* In fiscal year 2004, of 27,930 adult felony convictions in Washington State, 34.5% (9,640) resulted in a prison sentence, 63% (17,572) resulted in jail, and the other 2.5% (718) resulted in a sentence other than prison or jail. *See* SENTENCING GUIDELINE COMM'N, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2004, at 15 (Dec. 2004) [hereinafter FELONY SENTENCING], *available at* http://www.sgc.wa.gov/PUBS/Statistical%20Summaries/FY2004_Statistical_Summary.pdf.

2. WASH. REV. CODE § 43.43.754(1). The law also requires DNA collection from persons convicted of harassment, stalking, or communicating with a minor for immoral purposes. *Id.* These three crimes may constitute gross misdemeanors or class C felonies. *See* WASH. REV. CODE § 9A.46.020(2)(a) (2004) (harassment); *id.* § 9A.46.110(5)(a) (stalking); *id.* § 9.68A.090(1) (communicating with a minor for immoral purposes).

3. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

However, Washington State courts have not yet analyzed the constitutionality of the statute under article I, section 7 of the Washington State Constitution,[5] which provides additional protection for privacy rights.[6]

Article I, section 7 of the state constitution prohibits the government from invading citizens' private affairs without authority of law.[7] Although this section provides protections similar to those of the Fourth Amendment, Washington State courts have found that the state constitution affords broader privacy rights than its federal counterpart.[8] Specifically, the Washington State Supreme Court has held that "private affairs" include privacy interests that Washington State citizens have historically held and should be entitled to hold,[9] and "authority of law" to invade these interests must come from a warrant or one of the carefully delineated exceptions to the warrant requirement.[10] Thus, when determining the permissibility of a search, courts employ a separate constitutional analysis under article I, section 7.[11]

This Comment argues that the collection of a biological sample under Washington State's DNA collection statute is an unconstitutional search because this collection involves a warrantless bodily intrusion that does not fit within any of the exceptions to the warrant requirement. DNA collection invades a person's private affairs and thus constitutes a search

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probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. *See* State v. Olivas, 122 Wash. 2d 73, 98, 856 P.2d 1076, 1089 (1993); State v. Surge, 122 Wash. App. 448, 460, 94 P.3d 345, 351 (2004).

5. WASH. CONST. art. I, § 7; *see Olivas*, 122 Wash. 2d at 82, 856 P.2d at 1080; *Surge*, 122 Wash. App. at 460, 94 P.3d at 351–52.

6. *See* State v. Rankin, 151 Wash. 2d 689, 694, 92 P.3d 202, 204 (2004).

7. WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

8. *See, e.g.*, *Rankin*, 151 Wash. 2d at 694, 92 P.3d at 204 (quoting State v. Jones, 146 Wash. 2d 328, 332, 45 P.3d 1062, 1064 (2002) ("[I]t is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution.").

9. *See* State v. Myrick, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984).

10. *See* State v. Hendrickson, 129 Wash. 2d 61, 70, 917 P.2d 563, 568 (1996); *see also* State v. Ladson, 138 Wash. 2d 343, 352 n.3, 979 P.2d 833, 839 n.3 (1999) (finding that even where statute purportedly provides "authority of law," it must still incorporate warrant requirement) (citing City of Seattle v. McCready, 123 Wash. 2d 260, 274, 868 P.2d 134, 141 (1994)).

11. *See, e.g.*, *Myrick*, 102 Wash. 2d at 510, 688 P.2d at 153–54.

under article I, section 7.[12] This search lacks the requisite authority of law because the statute does not require a warrant,[13] and the mandated search does not fit within any of the exceptions to the warrant requirement.[14] Additionally, the protections of article I, section 7 apply to convicted felons, as they do to other citizens.[15] Washington State courts have established that article I, section 7 requires some level of individualized suspicion before a search can take place, even when the persons searched are convicted felons.[16] Because the DNA collection statute constitutes an invasion of privacy without authority of law, it violates the privacy protections of article I, section 7.

Part I of this Comment discusses the Washington State cases that have upheld the DNA collection statute under the Fourth Amendment. Part II provides an overview of article I, section 7 and examines how this provision applies to bodily intrusions. Part III examines the privacy rights of convicted felons under article I, section 7. Part IV argues that the DNA collection statute's requirement that convicted felons submit to DNA testing constitutes an unconstitutional invasion of private affairs under article I, section 7. Finally, this Comment concludes that a challenge to the statute under article I, section 7 should succeed where prior Fourth Amendment challenges have failed.

I. WASHINGTON STATE'S STATUTE HAS SURVIVED FOURTH AMENDMENT SCRUTINY

Washington State courts have held that the state's DNA collection statute, RCW 43.43.754, does not infringe on Fourth Amendment rights.[17] The statute provides as follows:

> Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110,[18] harassment under RCW 9A.46.020,[19]

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12. *See* State v. Surge, 122 Wash. App. 448, 452, 94 P.3d 345, 348 (2004).

13. *See* WASH. REV. CODE § 43.43.754 (2004).

14. *See Hendrickson*, 129 Wash. 2d at 70, 917 P.2d at 568 (listing exceptions to warrant requirement for article I, section 7).

15. *See, e.g., id.* at 65, 70, 917 P.2d at 565, 568 (applying article I, section 7 to search of inmate who was serving sentence for manufacturing marijuana, a class C felony).

16. *See, e.g.*, State v. Campbell, 103 Wash. 2d 1, 22–23, 691 P.2d 929, 941–42 (1984) (holding that article 1, section 7 requires at least "well-founded" suspicion for search of inmate on work-release).

17. *See* State v. Olivas, 122 Wash. 2d 73, 98, 856 P.2d 1076, 1089 (1993); State v. Surge, 122 Wash. App. 448, 460, 94 P.3d 345, 351 (2004).

18. Under this statute, stalking is a gross misdemeanor, unless circumstances are present that

> communicating with a minor for immoral purposes under RCW 9.68A.090,[20] or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis . . . .[21]

The biological sample is collected via cheek swab or blood test,[22] and is used "solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense."[23] When analyzing the statute under the Fourth Amendment, Washington State courts have upheld the provision in both its current[24] and original[25] forms. In *State v. Olivas*,[26] the Washington State Supreme Court upheld the original version of the statute after determining that it survived constitutional scrutiny under the "special needs" exception to the Fourth Amendment's warrant requirement.[27] In the 2004 case *State v. Surge*,[28] Division I of the Washington State Court of Appeals first determined that *Olivas* still controls, and then similarly upheld the current version of the statute based on the "special needs" exception.[29] The *Surge* court pointed out that the law could also survive Fourth Amendment scrutiny under either the "minimally intrusive search" exception or the "totality of the circumstances" test.[30] Neither the *Olivas* nor the *Surge* court

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make it a class C felony. WASH. REV. CODE § 9A.46.110(5)(a)–(b) (2004).

19. Under this statute, harassment is a gross misdemeanor, unless circumstances are present that make it a class C felony. *Id.* § 9A.46.020(2)(a)–(b).

20. Under this statute, communicating with a minor for immoral purposes is a gross misdemeanor, unless circumstances are present that make it a class C felony. *Id.* § 9.68A.090(1)–(2).

21. WASH. REV. CODE § 43.43.754(1) (2004).

22. *See* State v. Surge, 122 Wash. App. 448, 451–52, 94 P.3d 345, 347 (2004).

23. WASH. REV. CODE § 43.43.754(2).

24. *See Surge*, 122 Wash. App. at 460, 94 P.3d at 351. The current version of the statute mandates DNA testing for anyone convicted of any felony. WASH. REV. CODE § 43.43.754(1).

25. *See* State v. Olivas, 122 Wash. 2d 73, 98, 856 P.2d 1076, 1088 (1993). The previous version of the statute mandated DNA testing for anyone convicted of a violent offense or sex offense. DNA Identification Program, ch. 350, § 4, 1989 Wash. Laws 1749 (codified at WASH. REV. CODE § 43.43.754 (1990)). The statute was amended to include all convicted felons, ch. 271, § 402, 1994 Wash. Laws 1715, as well as directions as to who is responsible for DNA collection, ch. 230, § 3, 1990 Wash. Laws 1271.

26. 122 Wash. 2d 73, 856 P.2d 1076 (1993).

27. *Id.* at 98, 856 P.2d at 1088.

28. 122 Wash. App. 448, 94 P.3d 345 (2004).

29. *Id.* at 460, 94 P.3d at 351.

30. *Id.* at 459–60, 94 P.3d at 351.

analyzed the constitutionality of the statute under article I, section 7.[31]

A. *Under the Fourth Amendment, Searches Are Permissible Only When Conducted Pursuant to a Warrant or an Exception to the Warrant Requirement*

The Fourth Amendment to the U.S. Constitution prohibits "unreasonable searches and seizures."[32] A search or seizure is reasonable only if it is undertaken pursuant to a warrant[33] or falls into one of the "carefully delineated,"[34] "well-defined"[35] exceptions to the warrant requirement.[36] Courts have determined that one such exception exists when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[37] In such cases, courts weigh the privacy interest of the individual against the government's interest in the search to determine whether a warrant requirement is practicable under the circumstances.[38]

An exception also exists when the governmental intrusion is minimal.[39] To determine whether a search was minimally intrusive, courts balance the government's interest in conducting the search, the degree to which the search meets that interest, and the severity of the intrusion on the individual.[40] Finally, the "totality of the circumstances" test is similar to the "minimally intrusive" balancing test, in that courts applying this test evaluate all of the facts surrounding a search, including the severity of the intrusion, to determine whether a warrant was required.[41]

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31. *See Olivas*, 122 Wash. 2d at 82, 856 P.2d at 1080 (declining to address state constitutional claims); *Surge*, 122 Wash. App. at 460, 94 P.3d at 351–52 (dismissing article I, section 7 claim).

32. U.S. CONST. amend IV.

33. *See* Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 619 (1989).

34. *See* Arkansas v. Sanders, 442 U.S. 753, 760 (1979), *overruled on other grounds by* California v. Acevedo, 500 U.S. 565, 579 (1991).

35. *See Skinner*, 489 U.S. at 619.

36. *Sanders*, 442 U.S. at 760 (1979).

37. *Skinner*, 489 U.S. at 619 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

38. *Id.*

39. *See* Brown v. Texas, 443 U.S. 47, 48–51 (1979) (finding that warrantless seizures that are less intrusive than traditional arrest may be reasonable under certain circumstances).

40. *Id.* at 50–51.

41. *See, e.g.*, Rise v. Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995) (considering multiple factors to conclude that federal DNA databank was constitutional under Fourth Amendment).

B. *Courts Have Upheld Washington State's DNA Collection Statute Under the "Special Needs" Exception to the Fourth Amendment Warrant Requirement*

Washington State courts have held that the DNA collection statute is constitutional under the Fourth Amendment.[42] The original version of the statute, upheld in *Olivas*,[43] mandated DNA collection from only those persons convicted of a violent offense or sex crime.[44] Though the court found that a blood draw constitutes a search under the Fourth Amendment,[45] the court held that the statute met the "special needs" exception to the warrant requirement.[46]

When analyzing the special needs exception, the *Olivas* court examined a federal case upholding a Virginia law requiring DNA collection from all convicted felons.[47] In *Jones v. Murray*,[48] the United States District Court for the Western District of Virginia held that the DNA collection statute served a special need beyond law enforcement.[49] The court cited a study that reported that nearly sixty-three percent of incarcerated felons were re-arrested for a felony or serious misdemeanor within three years of release.[50] The study also found that approximately twenty-three percent of the felons studied were re-arrested for a violent

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42. *See* State v. Olivas, 122 Wash. 2d 73, 98, 856 P.2d 1076, 1089 (1993); State v. Surge, 122 Wash. App. 448, 460, 94 P.3d 345, 351 (2004).

43. *Olivas*, 122 Wash. 2d at 98, 856 P.2d at 1089.

44. *See* DNA Identification Program, ch. 350, § 4, 1989 Wash. Laws 1749 (codified at WASH. REV. CODE § 43.43.754 (1990), *amended by* ch. 271, § 402, 1994 Wash. Laws 1715 (including all convicted felons); ch. 230, § 3, 1990 Wash. Laws 1271 (including directions as to who is responsible for DNA collection); *Olivas*, 122 Wash. 2d at 83 n.17, 856 P.2d at 1081 n.17.

45. *Olivas*, 122 Wash. 2d at 83, 856 P.2d at 1081.

46. *See Olivas*, 122 Wash. 2d at 97–98, 856 P.2d at 1088. In *Olivas*, the Washington State Supreme Court addressed the question of "whether the drawing of blood for DNA testing pursuant to RCW 43.43.754 constitutes an unreasonable search and seizure under the state and federal constitutions." *Id.* at 81, 856 P.2d at 1080. However, the court declined to consider the state constitutional grounds. *Id.* at 82, 856 P.2d at 1081.

47. *Id.* at 91–93, 98, 856 P.2d at 1085–86, 1088 (discussing Jones v. Murray, 763 F. Supp. 842, 844–48 (W.D. Va. 1991), *aff'd in part, rev'd in part*, 962 F.2d 302 (4th Cir. 1992)).

48. 763 F. Supp. 842 (W.D. Va. 1991), *aff'd in part, rev'd in part*, 962 F.2d 302 (4th Cir. 1992).

49. *Id.* at 844–48.

50. *See id.* at 846 n.9. Although the *Jones* court does not quote the percentages stated in the text accompanying this footnote, the *Olivas* court evidently looked at these studies and determined the relevant recidivism rates. *See Olivas*, 122 Wash. 2d at 92, 856 P.2d at 1085 (citing ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, NCJ 116261, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1 (Apr. 1989), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf).

offense within three years of release.[51] Another study reported that a perpetrator left his or her DNA at the crime scene in thirty percent of violent crimes.[52] Based on this information, the court concluded that a DNA database would significantly deter recidivist activity.[53] When the United States Court of Appeals for the Fourth Circuit heard the case, it did not employ the "special needs" analysis.[54] Rather, the court upheld the DNA collection law based on the limited privacy rights of convicted felons and the minimal intrusiveness of a blood test.[55]

The Washington State Supreme Court agreed with the *Jones* district court's reasoning and declined to follow the analysis of the appellate court.[56] The *Olivas* court rejected the Fourth Circuit's rationale because the *Olivas* court believed that the Fourth Circuit had "diminished the privacy rights of convicted persons" when it determined that a "need beyond law enforcement" was not required to uphold the statute.[57] The *Olivas* court concluded that the district court's "special needs" analysis was the "better reasoned approach" and upheld the Washington State DNA collection statute on these grounds.[58]

In July 2004, several convicted felons challenged the constitutionality of the DNA collection law.[59] In *State v. Surge*, the felons argued that the statute was no longer justifiable under the "special needs" exception because the legislature had amended the DNA collection law to require DNA sampling from *all* felons for the primary purpose of general law enforcement.[60] The felons further argued that the *Olivas* decision is no longer good law in light of U.S. Supreme Court decisions that clarified when the "special needs" exception is applicable.[61] The Court had held that a hospital urine-testing program and a vehicle check-point program

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51. *Jones*, 763 F. Supp. at 846 n.9 (citing BECK & SHIPLEY, *supra* note 50, at 1); *see also Olivas*, 122 Wash. 2d at 92, 856 P.2d at 1085 (stating that "approximately 22.7 percent were arrested for a violent offense within 3 years of release").

52. *Jones*, 763 F. Supp. at 847 (citing study from Virginia Department of Criminal Justice Services).

53. *Id.*

54. Jones v. Murray, 962 F.2d 302, 306–07 & n.2 (4th Cir. 1992).

55. *Id.* at 305–08.

56. *Olivas*, 122 Wash. 2d at 93, 856 P.2d at 1086.

57. *Id.*

58. *Id.*

59. State v. Surge, 122 Wash. App. 448, 449–50, 94 P.3d 345, 346–47 (2004).

60. *See id.* at 456, 94 P.3d at 349–50.

61. *Id.* at 454–55, 94 P.3d at 349 (citing Ferguson v. City of Charleston, 532 U.S. 67, 79–86 (2001); City of Indianapolis v. Edmond, 531 U.S. 32, 37–48 (2000)).

violated the Fourth Amendment because these programs were created for the purpose of law enforcement; thus they could not be justified under the "special needs" exception.[62] The *Surge* plaintiffs similarly argued that because the primary purpose of the DNA collection statute was for law enforcement, warrantless DNA collection could not be justified under the "special needs" exception.[63]

Division I rejected the *Surge* plaintiffs' arguments and upheld the current version of the statute based on the "special needs" exception.[64] The court distinguished the two U.S. Supreme Court cases because neither case involved DNA collection from felons.[65] The court also turned to a case from the U.S. Court of Appeals for the Seventh Circuit, in which the court upheld a Wisconsin DNA collection statute.[66] The Seventh Circuit determined that because the purpose of the DNA testing was, in part, to reliably identify felons, it served a "special need."[67] The *Surge* court found this analysis persuasive and determined that the Washington State DNA collection statute fit the "special need" exception because the purpose of the state law was to identify felons and curb recidivism.[68]

C. *Division I Has Indicated that the DNA Collection Statute Could Also Survive Under Other Exceptions to the Fourth Amendment*

In addition to the "special needs" analysis employed by the court in *Olivas*, Division I considered DNA collection under other exceptions to the warrant requirement of the Fourth Amendment.[69] The *Surge* court determined that *Olivas* was binding and thus upheld the statute based on

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62. *See Ferguson*, 532 U.S. at 79–83, 85–86 (urine-testing); *Edmond*, 531 U.S. at 48 (vehicle check-point).

63. *Surge*, 122 Wash. App. at 455–56, 856 P.2d at 349. The appellants also argued that the Ninth Circuit's decision in *United States v. Kincade*, 345 F.3d 1095, 1096 (9th Cir. 2003), *vacated*, 354 F.3d 1000 (9th Cir. 2004), overruled *State v. Olivas*. *Surge*, 122 Wash. App. at 456–57, 94 P.3d at 350. The *Kincade* court held unconstitutional a federal statute mandating parolees to provide DNA samples to the federal DNA database. *Kincade*, 345 F.3d at 1096. At the time *Surge* was decided, the Ninth Circuit had vacated *Kincade*, but had not yet reversed it. *Surge*, 122 Wash. App. at 450, 94 P.3d at 346–47. The Ninth Circuit subsequently reversed *Kincade* after rehearing the case en banc. United States v. Kincade, 379 F.3d 813, 840 (2004), *cert denied*, __ U.S. __ (Mar. 21, 2005).

64. *Surge*, 122 Wash. App. at 460, 94 P.3d at 351.

65. *See id.* at 456, 94 P.3d at 350.

66. *Id.* at 457, 94 P.3d at 350 (citing Green v. Berge, 354 F.3d 675, 678–79 (7th Cir. 2004)).

67. *See Green*, 354 F.3d at 679.

68. *Surge*, 122 Wash. App. at 459, 94 P.3d at 351.

69. *See id.* at 459–60, 94 P.3d at 351.

that opinion.[70] However, the *Surge* court also stated in dicta that, even if the statute failed to qualify under the special needs exception to the warrant requirement, it could nevertheless survive under the "totality of the circumstances" test or the "minimally intrusive search" exception to the warrant requirement.[71]

In sum, Washington State courts have upheld the DNA collection statute against Fourth Amendment challenges. Collection of a biological sample constitutes a search under the Fourth Amendment; however, courts have held that this search is permissible under the "special needs" exception to the warrant requirement because DNA collection serves an important function outside of law enforcement. Division I has indicated that the statute could also be upheld under the "totality of the circumstances" test or the "minimally intrusive search" exception to the warrant requirement. Washington State courts have not yet addressed the constitutionality of DNA collection under article I, section 7 of the state constitution.

II. THE WASHINGTON STATE CONSTITUTION PROTECTS AGAINST INVASIONS OF PRIVACY RIGHTS

Article I, section 7 of the Washington State Constitution protects citizens from invasions of their "private affairs" absent "authority of law."[72] Washington State courts have determined that this section provides broader privacy protections than the Fourth Amendment.[73] Courts have concluded that a bodily intrusion is an invasion of a person's private affairs.[74] Thus bodily intrusions, like other invasions of private affairs, are permissible only with proper "authority of law."[75]

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70. *Id.* at 460, 94 P.3d at 351.

71. *Id.* at 459–60, 94 P.3d at 351.

72. WASH. CONST. art. I, § 7.

73. *See, e.g.*, State v. Rankin, 151 Wash. 2d 689, 694, 92 P.3d 202, 204 (2004) (quoting State v. Jones, 146 Wash. 2d 328, 332, 45 P.3d 1062, 1064 (2002), for proposition that "it is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution").

74. *See, e.g.*, Robinson v. City of Seattle, 102 Wash. App. 795, 819, 10 P.3d 452, 465 (2000) (stating that there is "no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass").

75. *See* WASH. CONST. art. I, § 7; *see also* City of Seattle v. McCready, 123 Wash. 2d 260, 270, 868 P.2d 134, 139 (1994) (breaking article I, section 7 into two components and finding that disturbance of person's "private affairs" invokes protections of section, which requires "authority of law" for disturbance).

Under article I, section 7, a warrant or exception to the warrant requirement provides this authority.[76] A statute alone cannot provide authority of law.[77]

A. *Washington State Courts Have Recognized that Article 1, Section 7 Provides Broader Privacy Rights than the Fourth Amendment*

Washington State courts have held that article I, section 7 provides greater privacy protection than the Fourth Amendment to the U.S. Constitution.[78] At the 1889 Washington State Constitutional Convention, the attendees rejected language identical to the Fourth Amendment.[79] Instead, article I, section 7 states that: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[80] In *State v. Gunwall*,[81] the Washington State Supreme Court determined that article I, section 7 provides greater privacy protections than the Fourth Amendment.[82] In *Gunwall*, the Washington State Supreme Court elucidated six nonexclusive criteria for courts to review to determine whether the Washington State Constitution provides more expansive rights than its federal counterpart.[83] For several years after *Gunwall* was decided, courts continued to require parties to provide an analysis of the *Gunwall* factors to establish a claim under the state constitution, rather than its federal counterpart.[84] However, the Washington State Supreme Court has since determined that *Gunwall* analysis is no longer necessary because it is "well settled" that article I, section 7 provides broader

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76. *See* State v. Ladson, 138 Wash. 2d 343, 350, 979 P.2d 833, 838 (1999); State v. Hendrickson, 129 Wash. 2d 61, 70–71, 917 P.2d 563, 568 (1996).

77. *See Ladson*, 138 Wash. 2d at 352 n.3, 979 P.2d at 839 n.3.

78. *See, e.g.*, *Rankin*, 151 Wash. 2d at 694, 92 P.3d at 204 (quoting State v. Jones, 146 Wash. 2d 328, 332, 45 P.3d 1062, 1064 (2002) ("[I]t is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution.").

79. State v. Gunwall, 106 Wash. 2d 54, 66, 720 P.2d 808, 814 (1986).

80. WASH. CONST. art. I, § 7.

81. 106 Wash. 2d 54, 720 P.2d 808 (1986).

82. *See id.* at 66–67, 720 P.2d at 815.

83. Those criteria are: (1) the textual language of the constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Id.* at 61–62, 720 P.2d at 812–13.

84. *See, e.g.*, State v. Ferrier, 136 Wash. 2d 103, 110–11, 960 P.2d 927, 930 (1998) (considering Ferrier's state constitutional claim because she addressed the "required" *Gunwall* factors).

protections than the Fourth Amendment for individual privacy rights.[85]

B. *Private Affairs Are Those Privacy Interests Historically Held by Washington State Citizens, Which Includes Freedom from Bodily Intrusion*

Washington State courts have concluded that bodily intrusion constitutes an invasion into a person's "private affairs" under article I, section 7.[86] To determine the scope of a person's private affairs, courts use an objective standard, which is based on the privacy interests that citizens of the state have historically held and should be entitled to hold.[87] Such protections are broader than the Fourth Amendment, which the U.S. Supreme Court has expressly declined to interpret as a general "right to privacy."[88]

1. *The State Test for a Right of Privacy Is Objective*

In *State v. Myrick*,[89] the Washington State Supreme Court established that article I, section 7 protects not only subjective expectations of privacy, but also "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass."[90] The *Myrick* court stated that privacy protections are not confined to the subjective expectations of modern citizens who, due to advances in technology, may expect more invasions of their privacy.[91] Thus, to establish whether a right of privacy exists, courts must determine whether the privacy interest asserted is one that the state has historically recognized.[92]

Washington State courts have rejected the proposition that a person's subjective expectation of privacy determines whether a warrantless

85. State v. Rankin, 151 Wash. 2d 689, 694, 92 P.3d 202, 204 (2004) (quoting State v. Jones, 146 Wash. 2d 328, 332, 45 P.3d 1062, 1064 (2002)).

86. *See, e.g.*, Robinson v. City of Seattle, 102 Wash. App. 795, 819, 10 P.3d 452, 465 (2000) (stating that there is "no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass").

87. State v. Myrick, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984).

88. United States v. Katz, 389 U.S. 347, 350 (1967) (stating that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy'").

89. 102 Wash. 2d 506, 688 P.2d 151 (1984).

90. *Id.* at 511, 688 P.2d at 154.

91. *Id.*

92. State v. Carter, 151 Wash. 2d 118, 126, 85 P.3d 887, 890 (2004).

governmental intrusion is permissible.[93] In *State v. Hendrickson*,[94] the Washington State Supreme Court found it irrelevant whether the defendant, an inmate on work release, had a diminished expectation of privacy.[95] The court stated that an "expectation of privacy, even if reduced . . . does not constitute an exception to the requirement of a warrant under art. 1, § 7."[96] Similarly, in *State v. Ladson*,[97] the Washington State Supreme Court pointed out that, unlike its federal counterpart, article 1, section 7 does not "operate[] on a downward ratcheting mechanism of diminishing expectations of privacy."[98]

2. *Bodily Intrusion Constitutes an Invasion of a Person's "Private Affairs"*

Washington State courts have established that an intrusion into the body constitutes an invasion of a person's "private affairs."[99] In *Robinson v. City of Seattle*,[100] Division I concluded that bodily intrusions necessarily implicate a person's "private affairs," for "[t]here is . . . no doubt that the privacy interest in the body . . . is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass."[101] Furthermore, courts have specifically determined that, under the Fourth Amendment, collection and analysis of biological samples constitutes a search.[102]

C. *Authority of Law May Come from a Warrant or an Exception to the Warrant Requirement*

The authority of law required by article I, section 7 may come from a

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93. *See, e.g.*, State v. Hendrickson, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996) (finding that person's reduced expectation of privacy does not constitute exception to warrant requirement).

94. 129 Wash. 2d 61, 917 P.2d 563 (1996).

95. *Id.* at 65–66, 71, 917 P.2d at 565–66, 568.

96. *Id.* at 71, 917 P.2d at 568.

97. 138 Wash. 2d 343, 979 P.2d 833 (1999).

98. *Id.* at 349, 979 P.2d at 837.

99. *See, e.g.*, Robinson v. City of Seattle, 102 Wash. App. 795, 819, 10 P.3d 452, 465 (2000) (stating that there is "no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass").

100. 102 Wash. App. 795, 10 P.3d 452 (2000).

101. *Id.* at 819, 10 P.3d at 465.

102. *See, e.g.*, State v. Surge, 122 Wash. App. 448, 452, 94 P.3d 345, 347–48 (2004).

warrant or an exception to the warrant requirement.[103] Any search conducted without a warrant is unreasonable per se.[104] However, Washington State courts have identified six exceptions to the warrant requirement, under which a warrantless search may be constitutionally permissible.[105] The burden is on the state to prove that any warrantless intrusion falls within one of these categories.[106] Washington State courts have not recognized the "minimally intrusive search," "special needs," or "totality of the circumstances" exceptions[107] under article I, section 7.

1. Warrantless Searches May Be Permissible if They Fall Within One of the Exceptions to the Warrant Requirement

A search is permissible if it is undertaken pursuant to a warrant or if it fits within one of the exceptions to the warrant requirement.[108] Under article I, section 7, warrantless searches are unreasonable per se.[109]

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103. *See* State v. Hendrickson, 129 Wash. 2d 61, 70–71, 917 P.2d 563, 568 (1996) (holding that under article I, section 7, warrantless searches are per se unreasonable, and must fit exception from warrant requirement to be constitutionally permissible).

104. *Id.* at 70, 917 P.2d at 568.

105. *See id.* at 71, 917 P.2d at 568.

106. *Id.*

107. Although there is no case law explicitly rejecting these exceptions, the Washington State Supreme Court has not listed them among the exceptions it does recognize. *See, e.g., id.* at 71, 917 P.2d at 568 (listing exceptions to warrant requirement).

108. *Id.* at 70, 917 P.2d at 568.

109. *Id.* Courts may issue warrants only where they are authorized by a statute or court rule. *See* State v. Lansden, 144 Wash. 2d 654, 663, 30 P.3d 383, 487 (2001). Such authority exists permitting courts to issue warrants for crime-related searches. *Id.*; *see also* WASH. REV. CODE § 10.79.015(3) (2004) (authorizing magistrate to issue warrant for investigation or prosecution of any felony); WASH. CR. L.J. 2.3(b) (authorizing courts to issue warrants to search and seize evidence of crime). However, the *Lansden* court pointed out that the parties cited no analogous provisions providing general authority allowing courts to issue warrants for civil infractions. *Lansden*, 144 Wash. 2d at 663, 30 P.3d at 487. Instead, individual statutes provide this authority in specific situations. *See, e.g., id.* at 663 n.5, 30 P.3d at 487 n.5 (citing WASH. REV. CODE § 15.09.070 (horticultural pests and diseases); *id.* § 15.17.190 (grade of fruits and vegetables); *id.* § 16.57.180 (livestock and hides); *id.* § 17.24.021 (plant and bee pests and diseases); *id.* § 19.94.260 (weights and measures); *id.* § 69.50.502 (pharmaceutical premises)); City of Seattle v. McCready, 123 Wash. 2d 260, 272 n.3, 868 P.2d 134, 140 n.3 (1994) (citing WASH. REV. CODE § 17.10.160 (noxious weed laws); *id.* § 51.48.200 (certain tax laws); *id.* § 66.32.020 (liquor laws); *id.* § 69.41.060 (legend drugs); *id.* § 75.10.090 (unlawfully caught foodfish or shellfish); *id.* § 77.12.120 (contraband game)). Unlike warrants for crime-related purposes, judges issue these so-called "administrative" search warrants under statutes that do not always require a showing of probable cause. *See, e.g.*, WASH. REV. CODE § 15.17.190 (2004) (authorizing court to issue search warrant, without requiring showing of probable cause, where director of Department of Agriculture is denied entry to fruit and vegetable facilities during business hours). The party requesting a warrant need show only that he or she was denied entry into an area that he or she wished to search for purposes of ensuring compliance with a

However, the Washington State Supreme Court recognizes "a few 'jealously and carefully drawn exceptions' to the warrant requirement."[110] The court delineated these exceptions in *State v. Hendrickson*: (1) consent; (2) searches incident to a valid arrest; (3) inventory searches; (4) plain view;[111] (5) *Terry* investigative stops;[112] and (6) exigent circumstances.[113]

State and federal courts have defined these categories.[114] Consent that is neither coerced nor involuntary obviates the need for a warrant.[115] Searches incident to a valid arrest must be contemporaneous with the arrest,[116] and they must be conducted for the purpose of securing evidence and ensuring officer safety.[117] Inventory searches of a defendant's belongings are undertaken upon the defendant's incarceration to insulate law enforcement officials from claims of lost or damaged property.[118] The "plain view" exception applies where a law enforcement officer is lawfully in a constitutionally protected area and inadvertently identifies an object as contraband.[119] *Terry* searches allow

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particular chapter of the Revised Code of Washington. *See id.*

110. *See* State v. Houser, 95 Wash. 2d 143, 149, 622 P.2d 1218, 1222 (1980) (quoting Arkansas v. Sanders, 442 U.S. 753, 759 (1979)).

111. *Hendrikson*, 129 Wash. 2d at 71, 917 P.2d at 568.

112. Terry v. Ohio, 392 U.S. 1, 16–19 (1968). In *Terry*, the U.S. Supreme Court stated that "where a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons." *Id.* at 30.

113. *Hendrickson*, 129 Wash. 2d at 71, 917 P.2d at 568.

114. The protections of article I, section 7 are "never less than those of the Fourth amendment." Robinson v. City of Seattle, 102 Wash. App. 795, 819, 10 P.3d 452, 465 (2000). Accordingly, federal courts' definitions of these exceptions under the Fourth Amendment are relevant to Washington State courts' definitions of these exceptions under article I, section 7.

115. *See* State v. Hastings, 119 Wash. 2d 229, 234, 830 P.2d 658, 661 (1992).

116. *See* State v. Smith, 88 Wash. 2d 127, 135, 559 P.2d 970, 974 (1977). The *Smith* court quoted *State v. Gluck*, 83 Wash. 2d 424, 428, 518 P.2d 706–07 (1974), to delineate the three purposes of an inventory search: "(1) finding, listing, and securing from loss during detention, property belonging to a detained person, (2) protecting police from liability due to dishonest claims of theft, and (3) protecting temporary storage bailees against false charges." *Smith*, 76 Wash. App. at 16, 882 P. 2d at 194. Although *Smith* discussed the Fourth Amendment, Washington State courts have established that the protections of article I, section 7 are "never less than those of the Fourth amendment," *Robinson*, 102 Wash. App. at 819, 10 P.3d at 465, and thus the rationale applies to state constitutional analyis as well.

117. *See* Chimel v. California, 395 U.S. 752, 762–63 (1969).

118. *See Smith*, 76 Wash. App. at 16, 882 P.2d at 194.

119. *See* State v. Daugherty, 94 Wash. 2d 263, 267, 616 P.2d 649, 651 (1980) (finding that for

an officer to briefly detain and perform a surface-level frisk of a person suspected of criminal activity.[120]

The "exigent circumstances" exception applies to situations where obtaining a warrant would be impractical.[121] In *State v. Counts*,[122] the Washington State Supreme Court delineated various circumstances in which the exception would apply: cases involving hot pursuit, a fleeing suspect, danger to the arresting officer or to the public, where mobility of the suspect's vehicle is a factor, or where there is danger involving mobility or destruction of evidence.[123] The U.S. Supreme Court has used the "exigent circumstances" exception to justify a bodily intrusion in the form of a blood draw where intoxication of the suspect was at issue.[124] Because alcohol in the bloodstream dissipates over time, the Court found that exigent circumstances justified this warrantless intrusion to secure evidence.[125] Thus, in limited circumstances, "exigent circumstances" may justify a warrantless intrusion into the body.

2. *Washington State Courts Have Not Applied All Fourth Amendment Warrant Exceptions When Analyzing Cases Under Article I, Section 7*

Under article I, section 7, "minimally intrusive" searches are not exempt from the warrant requirement.[126] Although the U.S Supreme Court has recognized that warrantless, minimally instrusive searches may be reasonable under the Fourth Amendment,[127] Washington State

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plain view exception to apply, there must be "(1) a prior justification for the intrusion, (2) an inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the police that they have evidence before them") (citations omitted).

120. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

121. *See* State v. Muir, 67 Wash. App. 149, 152, 835 P.2d 1049, 1051 (1992).

122. 99 Wash. 2d 54, 659 P.2d 1087 (1983).

123. *Id.* at 60, 659 P.2d at 1089–90 (citations omitted).

124. Schmerber v. California, 384 U.S. 757, 770–71 (1966).

125. *Id.* An individual's DNA, in contrast, does not dissipate over time. *See* Dan L. Burk, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 JURIMETRICS J. 455, 470 (1988) (stating that because DNA fragment patterns do not diminish over time, unlike blood-alcohol levels, exigencies that permit warrantless blood draws may not be present for DNA samples).

126. *See* State v. Hendrickson, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996) (listing exceptions to warrant requirement and omitting "minimally intrusive" searches).

127. *See, e.g.*, Brown v. Texas, 443 U.S. 47, 50–51 (1979) (finding that reasonableness of intrusion less than traditional arrest depends on balancing of public's interests against individual's privacy interests).

courts have not recognized this exception under article I, section 7.[128] When the *Hendrickson* court, applying article I, section 7, outlined the "jealously and carefully drawn exceptions" to the warrant requirement, it did not list an exception for minimally intrusive searches.[129] Justice Utter's concurrence in *Olivas* further indicates the nonexistence of a minimally intrusive search exception under article I, section 7.[130] Justice Utter stated that the DNA collection statute could be upheld based on "traditional doctrines of criminal *Fourth Amendment* law,"[131] and he pointed out that the U.S. Supreme Court recognizes a minimally intrusive search exception.[132] The justice made clear that he was analyzing only the Fourth Amendment, and he explicitly declined to address how his opinion in *Olivas* would relate to his concurring opinion in *State v. Curran*,[133] a similar case that was decided under article I, section 7.[134]

Division I has determined that the "special needs" exception does not apply to the article I, section 7 warrant requirement, but it has applied an analogous test.[135] In *Robinson v. City of Seattle*, Division I determined that the Fourth Amendment "special needs" analysis was inapplicable under the state constitution.[136] Instead, the court applied a similar "strict scrutiny" test that considered whether the government had a compelling interest that it achieved through narrowly tailored means.[137] In applying strict scrutiny, Division I followed the precedent set by the Washington State Supreme Court in *In re Juveniles A, B, C, D, E*,[138] a case in which

128. *See Hendrickson*, 129 Wash. 2d at 71, 917 P.2d at 568.

129. *See id.* at 70–71, 917 P.2d at 568 (quoting Arkansas v. Sanders, 442 U.S. 753, 759 (1979)).

130. *See* State v. Olivas, 122 Wash. 2d 73, 102–08, 856 P.2d 1076, 1091–94 (1993) (Utter, J., concurring) (analyzing "minimally intrusive" warrant exception under Fourth Amendment doctrine).

131. *Id.* at 99, 856 P.2d at 1089 (Utter, J., concurring) (emphasis added). Justice Utter pointed out that one of the kinds of searches upheld under this exception are *Terry* searches, which are also recognized exceptions under article I, section 7. *Id.* at 103–04, 856 P.2d at 1091–92 (Utter, J., concurring). However, law enforcement must have reasonable suspicion prior to undertaking such a search. Terry v. Ohio, 392 U.S. 1, 30 (1968). Thus, although *Terry* searches are minimally intrusive, this feature alone does not make them permissible searches. *Id.*

132. *Olivas*, 122 Wash. 2d at 103, 856 P.2d at 1091–92 (Utter, J., concurring).

133. 116 Wash. 2d 174, 804 P.2d 558 (1991).

134. *Olivas*, 122 Wash. 2d at 99 n.85, 856 P.2d at 1089 n.85 (Utter, J., concurring).

135. *See* Robinson v. City of Seattle, 102 Wash. App. 795, 816, 10 P.3d 452, 464–65 (2000).

136. *Id.*

137. *Id.*

138. 121 Wash. 2d 80, 847 P.2d 455 (1993).

the plaintiffs challenged the constitutionality of post-conviction HIV testing.[139] The *Robinson* court subsequently determined that the ordinance at issue, which required pre-employment drug testing for certain city government positions, violated the state constitution by failing the second prong ("narrowly tailored") of the "strict scrutiny" test.[140]

Washington State courts have not created a separate exception under which the "totality of the circumstances" could justify a warrantless search. Although courts look at the totality of the circumstances to determine whether a given search is permissible, they do so only to determine whether the search fits within one of the exceptions to the warrant requirement.[141] Courts have established that the totality of the circumstances must be considered when determining the voluntariness of consent to search,[142] whether exigent circumstances existed to justify a warrantless search,[143] and whether a *Terry* stop was reasonable.[144] However, courts have not found that the totality of the circumstances can justify a search that does not fit within one of the "jealously and carefully drawn" exceptions to the warrant requirement.[145] In fact, courts have explicitly rejected the totality of the circumstances test in certain situations, such as those involving searches of an arrestee's vehicle.[146] Thus, although courts consider the totality of the circumstances in determining the validity of a search, courts have not created a separate "totality of the circumstances" exception to the warrant requirement of article I, section 7.

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139. *See Robinson*, 102 Wash. App. at 816–17, 10 P.3d at 464 (quoting *A, B, C, D, E*, 121 Wash. 2d at 96–97).

140. *Id.* at 826–27, 10 P.3d at 469.

141. *See, e.g.*, State v. Carter, 151 Wash. 2d 118, 128–30, 85 P.3d 887, 892 (2004) (analyzing totality of circumstances to determine whether exigent circumstances were present to justify warrantless search).

142. *See* State v. Bustamante-Davila, 138 Wash. 2d 964, 981, 983 P.2d 590, 599 (1999).

143. *See Carter*, 151 Wash. 2d at 128–30, 85 P.3d at 892.

144. *See* State v. Acrey, 148 Wash. 2d 738, 747, 64 P.3d 594, 598 (2003).

145. *See* State v. Hendrickson, 129 Wash. 2d 61, 70, 917 P.2d 563, 568 (1996) (listing exceptions to warrant requirement and omitting totality of circumstances).

146. *See* State v. Stroud, 106 Wash. 2d 144, 151, 720 P.2d 436, 440 (1986) (finding that totality of circumstances test was too burdensome on law enforcement and "clearer line" was needed).

3. *A Statute Alone Cannot Provide "Authority of Law" for a Warrantless Search*

When upholding searches conducted pursuant to statute, the Washington State Supreme Court has employed the same rationale used to justify other warrantless searches.[147] Although the *Gunwall* court stated that "authority of law" may come from a valid statute,[148] the Washington State Supreme Court has since rejected the proposition that "authority of law" may be supplied by a statute in lieu of a warrant or an exception to the warrant requirement.[149] The *Ladson* court determined that the statement in *Gunwall* meant only that a statute may authorize a court to issue a warrant, not that the warrant requirement may be skirted altogether.[150] The *Ladson* court also cited to Justice Madsen's concurrence in *In re Personal Restraint of Maxfield*,[151] which stated that "[t]his court has never found that a statute requiring a procedure less than a search warrant . . . constitutes 'authority of law' justifying an intrusion into the 'private affairs' of its citizens."[152]

The Washington State Supreme Court has upheld statutorily prescribed searches under article I, section 7, but in doing so it relied on the rationale underlying previously delineated exceptions to the warrant requirement.[153] In *State v. Curran*,[154] the court considered a warrantless blood draw from a vehicular homicide suspect, conducted pursuant to RCW 46.20.308, and upheld the blood draw against constitutional

147. *See, e.g.*, State v. Curran, 116 Wash. 2d 174, 185, 804 P.2d 558, 564 (1991) (analyzing statutorily prescribed search based on *Schmerber v. California*, 384 U.S. 757, 770–71 (1966), in which Supreme Court cited exigent circumstances to uphold analogous search).

148. State v. Gunwall, 106 Wash. 2d 54, 68, 720 P.2d 808, 816 (1986).

149. *See* State v. Ladson, 138 Wash. 2d 343, 352 n.3, 979 P.2d 833, 839 n.3 (1999).

150. *See id.* (citing City of Seattle v. McCready, 123 Wash. 2d 260, 274, 868 P.2d 134, 141 (1994)).

151. 133 Wash. 2d 332, 945 P.2d 196 (1997).

152. *Id.* at 345, 945 P.2d at 203 (Madsen, J., concurring). Justice Madsen dissented in *Ladson*, arguing that the motive of law enforcement officials for conducting traffic stops was irrelevant because various statutes provided the requisite "authority of law" to make such stops. *Ladson*, 138 Wash. 2d at 360–62, 979 P.2d at 843–44 (Madsen, J., dissenting). However, she based her opinion on the fact that those statutes encompass a probable cause standard, and thus codify a "constitutionally valid standard for warrantless traffic stops." *Id.*

153. *See* State v. Curran, 116 Wash. 2d 174, 185, 804 P.2d 558, 564 (1991) (upholding statutorily prescribed search based on rationale of U.S. Supreme Court in *Schmerber v. California*, which cited exigent circumstances to justify a warrantless blood draw from a drunken driving suspect, 384 U.S. 757, 770–71 (1966)).

154. 116 Wash. 2d 174, 804 P.2d 558 (1991).

challenges under article I, section 7.[155] The *Curran* court analogized the facts of the case to the facts of a U.S. Supreme Court case, *Schmerber v. California*.[156] In *Schmerber*, the Court upheld the warrantless blood draw of an intoxicated driver under the exigent circumstances exception to the Fourth Amendment's warrant requirement.[157] Although the Washington State Supreme Court did not determine which warrant exception applied in *Curran*, the court implicitly adopted the exigent circumstances exception when it relied on the *Schmerber* court's analysis to approve the statutorily prescribed blood draw.[158]

In sum, Washington State courts have determined that bodily intrusion constitutes an invasion into a citizen's private affairs under article I, section 7. Such invasion is permissible only where law enforcement officials take this action pursuant to a warrant, or where the circumstances fall within one of the exceptions to the warrant requirement. Where a statute authorizes a search, courts evaluate the search under the same criteria used to determine the constitutionality of warrantless searches.

III. ARTICLE I, SECTION 7 PROTECTS THE PRIVATE AFFAIRS OF PROBATIONERS, PAROLEES, AND INMATES

The Washington State Supreme Court has determined that law enforcement officials must abide by the protections provided by article I, section 7 in conducting any search.[159] Although Washington State courts have stated that probationers,[160] parolees,[161] and inmates[162] have a reduced expectation of privacy, which results in diminished privacy rights under the Fourth Amendment and article I, section 7, the cases that established these propositions were decided before *Gunwall*, and thus were based solely on Fourth Amendment authority.[163] More recent

155. *Id.* at 185, 804 P.2d at 564.

156. 384 U.S. 757 (1966).

157. *See id.* at 770–71.

158. *See Curran*, 116 Wash. 2d at 183–85, 804 P.2d at 563–64 (concluding that facts of *Curran* were similar to those of *Schmerber* and determining that blood draw was reasonable).

159. *See* State v. Hendrickson, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996) (stating that "expectation of privacy, even if reduced . . . does not constitute an exception to the requirement of a warrant under art. I, § 7").

160. *See* State v. Lampman, 45 Wash. App. 228, 233, 724 P.2d 1092, 1095 (1986).

161. *See* Hocker v. Woody, 95 Wash. 2d 822, 826, 631 P.2d 372, 375 (1981).

162. *See* State v. Campbell, 103 Wash. 2d 1, 22–23, 691 P.2d 929, 941–42 (1984).

163. *See Campbell*, 103 Wash. 2d at 22, 691 P.2d at 941; *Hocker*, 95 Wash. 2d at 826, 631 P.2d

case law indicates that a person's subjective "expectation of privacy" is irrelevant under article I, section 7.[164] Regardless, searches of these persons must be predicated on some level of suspicion.[165]

A. *Courts in Post-*Gunwall *Cases Have Indicated that the Full Protections of Article I, Section 7 Apply to Convicted Criminals*

Washington State courts purporting to apply article I, section 7 to searches of probationers,[166] parolees,[167] and inmates[168] have found that these individuals have a reduced expectation of privacy, and thus they may be searched based on less than probable cause.[169] However, these courts have cited pre-*Gunwall* cases that applied only the Fourth Amendment.[170] More recent cases indicate that a reduction in a subjective expectation of privacy does not result in a reduction of privacy rights.[171]

In the 1984 case of *State v. Campbell*,[172] the Washington State Supreme Court upheld the warrantless search of a vehicle belonging to an inmate on work release.[173] The court determined that because other courts had held that searches of probationers and parolees may be based on less than probable cause, this lower predicate should apply to inmates on work release as well.[174] The *Campbell* court supported this proposition by citing *Hocker v. Woody*,[175] a case decided under the

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at 375; *Lampman*, 45 Wash. App. at 233, 724 P.2d at 1095.

164. *See Hendrickson*, 129 Wash. 2d at 71, 917 P.2d at 568; *see also* State v. Parker, 139 Wash. 2d 486, 495, 987 P.2d 73, 79 (1999) (stating that *Hendrickson* court "*expressly* held that any alleged subjective expectation of privacy, even if it were reduced, does not constitute an exception to the requirement of a warrant under art. I, § 7") (emphasis added) (citations omitted).

165. *See Campbell*, 103 Wash. 2d at 22, 691 P.2d at 941; *see also Lampman*, 45 Wash. App. at 233, 724 P.2d at 1095 (requiring well-founded suspicion for search of probationer).

166. *See Lampman*, 45 Wash. App. at 233, 724 P.2d at 1095.

167. *Hocker*, 95 Wash. 2d at 826, 631 P.2d at 375.

168. *See Campbell*, 103 Wash. 2d at 22–23, 691 P.2d at 941–42.

169. *See, e.g., Lampman*, 45 Wash. App. at 232–33, 724 P.2d at 1095 (holding that probationer could be searched based on well-founded suspicion); *see also Campbell*, 103 Wash. 2d at 22–23, 691 P.2d at 941 (holding that inmates may be searched based on well-founded suspicion).

170. *See infra* notes 173–83 and accompanying text.

171. *See infra* notes 184–92 and accompanying text.

172. 103 Wash. 2d 1, 691 P.2d 929 (1984).

173. *Id.* at 23, 691 P.2d at 942.

174. *Id.* at 22–23, 691 P.2d at 941–42.

175. 95 Wash. 2d 822, 631 P.2d 372 (1981).

Fourth Amendment.[176] The *Campbell* court referred only to a "diminution of Fourth Amendment protection," and did not discuss article I, section 7 protection.[177]

Similarly, in the 1986 case of *State v. Lampman,*[178] Division II of the Washington State Court of Appeals stated that a probationer has a diminished expectation of privacy, and thus he or she could be searched based on only a "well-founded suspicion,"[179] rather than the higher probable cause predicate. However, the court then cited to *State v. Keller*[180] and *State v. Simms,*[181] two cases in which the court of appeals decided that, under the Fourth Amendment, probationers and parolees have reduced expectations of privacy and are thus excepted from the warrant requirement.[182] The *Lampman* court also cited *Hocker* for the proposition that a probationer has a diminished expectation of privacy and thus a diminished right of privacy.[183]

More recent decisions show that a person's subjective "expectation[] of privacy" does not determine his or her level of protection under article I, section 7.[184] Washington State courts have determined that this principle holds true even where the subject of the search may appear to have lesser rights than other citizens.[185] In *State v. Hendrickson*, the court rejected the argument that because the defendant was an inmate,

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176. *See id.* at 824, 826, 631 P.2d at 374, 375. In *Hocker*, the plaintiff brought suit under 42 U.S.C. § 1983, which provides a federal remedy when officials have denied a person rights secured by the U.S. Constitution. 42 U.S.C. § 1983 (2000). Thus, when the Washington State Supreme Court addressed the plaintiff's claim, it reviewed only whether the officials had violated her Fourth Amendment rights. *Hocker*, 95 Wash. 2d at 826, 631 P.2d at 375.

177. *Campbell*, 103 Wash. 2d at 22, 691 P.2d at 941 (quoting State v. Simms, 10 Wash. App. 75, 86, 516 P.2d 1088, 1095 (1973)).

178. 45 Wash. App. 228, 724 P.2d 1092 (1986).

179. *Id.* at 233, 724 P.2d at 1095.

180. 35 Wash. App. 455, 667 P.2d 139 (1983).

181. 10 Wash. App. 75, 516 P.2d 1088 (1973).

182. *See Lampman*, 45 Wash. App. at 232–33, 724 P.2d at 1095; *see also Keller*, 35 Wash. App. at 458–59, 667 P.2d at 141–42 (analyzing Fourth Amendment and determining exception to its warrant requirement exists for parolees and probationers); *Simms*, 10 Wash. App. at 84–85, 516 P.2d at 1094–95 (finding that, while protections of Fourth Amendment apply to parolees, law enforcement officials may search such persons without warrants, when reasonable).

183. *See Lampman*, 45 Wash. App. at 233, 724 P.2d at 1095 (citing Hocker v. Woody, 95 Wash. 2d 822, 826, 631 P.2d 372, 375 (1984)).

184. *See* State v. Rankin, 151 Wash. 2d 689, 698, 92 P.3d 202, 207 (2004) (quoting State v. Ladson, 138 Wash. 2d 343, 349, 979 P.2d 833, 837 (1999), which held that, unlike Fourth Amendment, article I, section 7 does not "operate[] on a downward ratcheting mechanism of diminishing expectations of privacy").

185. *See* State v. Hendrickson, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996).

and therefore had a reduced expectation of privacy, the warrantless search of his car was permissible.[186] The court stated that an "expectation of privacy, even if reduced . . . does not constitute an exception to the requirement of a warrant under article I, § 7."[187]

Even more recently, in *State v. Cheatam*,[188] the Washington State Supreme Court reiterated that under article I, section 7 there are no express limitations to the right to privacy, even where the rights of an inmate are concerned.[189] The court engaged in separate federal and state constitutional analyses to determine whether the search of a county jail inmate's shoes was proper.[190] The court determined that when Cheatam was booked into the prison, officers lawfully searched his shoes pursuant to the inventory exception to the warrant requirement.[191] Therefore, when a law enforcement officer searched the shoes a second time, Cheatam no longer had any objective expectation of privacy in the shoes and thus the search did not constitute an invasion of his private affairs.[192]

B. *Even If Probationers, Parolees, and Inmates Have a Reduced Expectation of Privacy, Searches of These Persons Must Be Based on Some Level of Suspicion*

If a court determines that probationers, parolees, and inmates have a reduced expectation of privacy under article I, section 7, and thus may be subject to searches on less than probable cause, searches of these

186. *Id.*

187. *Id.*

188. 150 Wash. 2d 626, 81 P.3d 830 (2003).

189. *Id.* at 642, 81 P.3d at 838. In *State v. Rainford*, 86 Wash. App. 431, 936 P.2d 1210 (1997), Division II rejected appellant Rainford's argument that article I, section 7 provides greater protections for prisoners than the Fourth Amendment. *Id.* at 437–38, 936 P.2d at 1213. The court pointed out that Rainford had inadequately addressed the *Gunwall* factors because he did not cite any cases analyzing a prisoner's expectation of privacy under the state constitution. *Id.* Subsequently, the court determined that prisoners are afforded no greater protection under the state constitution than they are under the Fourth Amendment. *Id.* However, because the Washington State Supreme Court no longer requires *Gunwall* analysis for claims under article I, section 7, and because that court has applied the protections of article I, section 7 to other inmates, the validity of the *Rainford* opinion is questionable. *See Rankin*, 151 Wash. 2d at 694, 92 P.3d at 204 (finding that *Gunwall* analysis is no longer needed for article I, section 7 claims); *Cheatam*, 150 Wash. 2d at 637–38, 81 P.3d at 836 (applying article I, section 7 to search of inmate's shoes); *Hendrickson*, 129 Wash. 2d at 71, 917 P.3d at 568 (applying article I, section 7 to search of inmate's car).

190. *Cheatam*, 150 Wash. 2d at 634–38, 81 P.3d at 834–36.

191. *Id.* at 632, 642, 81 P.3d at 833, 838.

192. *See id.* at 643, 81 P.3d at 839.

individuals must still be based on some level of suspicion.[193] Washington State courts have held that the requisite suspicion existed where a probationer ran quickly away from her probation officer and appeared "extremely nervous,"[194] and where a citizen-informant provided information about a parolee's threats toward the informant.[195] Thus, although searches of probationers, parolees, and inmates require less than a finding of probable cause, law enforcement officials must have some indication that the suspect has engaged in a violation of the law in order to search that suspect.

IV. WASHINGTON STATE'S DNA COLLECTION STATUTE IS UNCONSTITUTIONAL UNDER ARTICLE 1, SECTION 7

The collection of a biological sample pursuant to Washington State's DNA collection statute is an unconstitutional search because it involves a warrantless bodily intrusion that does not fit within any of the exceptions to the warrant requirement. Whether it is undertaken by cheek swab or blood test,[196] DNA collection invades a person's private affairs and constitutes a search under article I, section 7.[197] This search lacks the authority of law required under the state constitutional provision because the statute does not require a warrant,[198] nor does this search fit within any of the exceptions to the warrant requirement recognized by the Washington State courts.[199] The fact that the persons addressed by this statute are convicted felons is inapposite, as article I, section 7 protects the "private affairs" of these persons as it does other

193. *See, e.g.*, State v. Wallin, No. 52920-0-I, 105 P.3d 1037, 1040 (Wash. Ct. App. Feb. 7, 2005) (finding that searches of parolees require either "well founded" or "reasonable" suspicion); State v. Lampman, 45 Wash. App. 228, 233, 724 P.2d 1092, 1095 (1986) ("The standard for determining whether a search of a probationer is reasonable is whether the police or probation officer has a well-founded suspicion that a probation violation has occurred.").

194. *See Lampman*, 45 Wash. App. at 230, 234, 734 P.2d at 1093, 1095 (citations omitted).

195. *See* State v. Coahran, 27 Wash. App. 664, 665–67, 620 P.2d 116, 117–18 (1980).

196. *See* State v. Surge, 122 Wash. App. 448, 451–52, 94 P.3d 345, 347 (2004).

197. *See id.* at 452, 94 P.3d at 348 (finding that DNA collection is search pursuant to Fourth Amendment). Because the protections of article I, section 7 are "never less than those of the Fourth amendment," *Robinson v. City of Seattle*, 102 Wash. App. 795, 819, 10 P.3d, 452, 465 (2000), DNA collection thus constitutes a search under the state constitution, as well.

198. *See* WASH. REV. CODE § 43.43.754 (2004).

199. *See* State v. Hendrickson, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996); *see also infra* Part IV.B.1 (explaining why search pursuant to RCW 43.43.754 does not fall within any exception to warrant requirement).

citizens.[200] Even if such persons do have diminished privacy rights, the law still requires some level of suspicion before a search of these persons can take place.[201] Because DNA collection pursuant to the state statute constitutes a search without authority of law, it violates the privacy protections of article I, section 7.

A. *Under Article 1, Section 7, DNA Collection Constitutes an Invasion into a Person's Private Affairs*

The cheek swab or blood test conducted in compliance with Washington State's DNA collection statute is an intrusion into a person's private affairs.[202] An intrusion beneath the body's surface necessarily implicates a person's "private affairs," for "[t]here . . . is no doubt that the privacy interest in the body . . . is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass."[203] Washington State courts, in interpreting the DNA collection statute, have already deemed both cheek swabs and blood tests to be searches and seizures under the Fourth Amendment.[204] Thus, because article I, section 7 provides greater protections than the federal constitution,[205] such intrusions are a search under the state constitution as well.

B. *Washington State's DNA Collection Statute Does Not Provide Proper Authority of Law for a Search*

The search prescribed by the DNA collection statute is not justified

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200. *See Hendrickson*, 129 Wash. 2d at 65, 70, 917 P.2d at 565, 568 (applying protections of article 1, section 7 to convicted felon).

201. *See, e.g.*, State v. Campbell, 103 Wash. 2d 1, 22, 691 P.2d 929, 941 (1984) (finding that at least "well founded" suspicion is required). Some administrative searches do not require any level of suspicion. *See supra* note 109. However, such searches still require a warrant. *See* State v. Lansden, 144 Wash. 2d 654, 663, 30 P.3d 383, 487 (2001). Therefore, because the DNA collection statute at issue here does not contain a warrant requirement, the search must be based on some level of suspicion.

202. *See Surge*, 122 Wash. App. at 452, 94 P.3d at 348 (holding that DNA collection is search pursuant to Fourth Amendment). Because the protections of article I, section 7 are "never less than those of the Fourth amendment," *Robinson v. City of Seattle*, 102 Wash. App. 795, 819, 10 P.3d, 452, 465 (2000), DNA collection thus constitutes a search under the state constitution, as well.

203. *Robinson*, 102 Wash. App. at 819, 10 P.3d at 465.

204. *See Surge*, 122 Wash. App. at 452, 94 P.3d at 347–48.

205. *See Hendrickson*, 129 Wash. 2d at 70 n.1, 917 P.2d at 567 n.1 (stating that Washington State Supreme Court has "frequently held that art. I, § 7 affords more protection to individuals from searches and seizures by the government than the Fourth Amendment").

because it is not predicated on proper authority of law. The requisite authority to comply with article I, section 7 may come either from a warrant or an exception to the warrant requirement.[206] Even where a search is conducted pursuant to statute, the search must still comply with these requirements.[207] Because the DNA collection statute does not contain a warrant requirement,[208] it is unreasonable per se.[209] Because DNA collection from felons does not satisfy any of the exceptions to the warrant requirement, the statute lacks proper authority of law to justify an invasion of private affairs.

1. DNA Collection Under Washington State's DNA Collection Statute Does Not Fall Within Any of the Exceptions to the Warrant Requirement

One cannot justify DNA collection pursuant to the DNA collection statute under any of the exceptions to the warrant requirement. When analyzing article I, section 7, the Washington State Supreme Court has recognized only six limited and narrowly drawn exceptions to the warrant requirement: (1) consent; (2) searches incident to a valid arrest; (3) inventory searches; (4) plain view; (5) *Terry* investigative stops; and (6) exigent circumstances.[210] A search conducted pursuant to the statute cannot require the felon to voluntarily consent to DNA collection.[211] DNA collection is not contemporaneous with arrest, nor is it undertaken for purposes of officer safety or preservation of evidence.[212] Thus it does not fall within the search incident to arrest exception.[213] Because the search is of a person and not property,[214] it does not fit within the inventory search exemption.[215] Finally, DNA collection is not an

206. *See id.* at 70–71, 917 P.2d at 568.

207. *See supra* Part II.C.3.

208. *See* WASH. REV. CODE § 43.43.754 (2004).

209. *See Hendrickson*, 129 Wash. 2d at 70–71, 917 P.2d at 568.

210. *See id.* at 71, 917 P.2d at 568.

211. *See* WASH. REV. CODE § 43.43.754.

212. *See id.* at § 43.43.754(2) (stating that DNA collected "shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons").

213. *See* State v. Smith, 88 Wash. 2d 127, 135, 559 P.2d 970, 974 (1977) (finding that search incident to arrest must be "restricted in time and place in relation to the arrestee").

214. *See* State v. Surge, 122 Wash. App. 448, 451–52, 94 P.3d 345, 347 (2004) (finding that collection of DNA sample involves either blood draw or cheek swab).

215. *See Smith*, 76 Wash. App. at 16, 882 P.2d at 194. The *Smith* court quoted *State v. Gluck*, 83

observation of an item in plain view,[216] nor is it a mere surface-level frisk, as in *Terry*.[217]

The DNA collection statute also does not satisfy the "exigent circumstances" exception. Courts created this exception for circumstances in which it would be impractical for law enforcement officials to obtain a warrant.[218] A warrantless search is permissible in the following exigent circumstances: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of suspect's vehicle; and (5) mobility or destruction of evidence.[219] In all of these circumstances, stopping to obtain a warrant would result in the loss of evidence or risk an officer's safety.[220] Felons subject to DNA collection are already under the state's control.[221] Therefore, none of these exigent circumstances are applicable to the DNA collection context.

The exigent circumstances that have justified warrantless bodily intrusions in some situations are not present under the DNA collection statute.[222] Both the U.S. Supreme Court and the Washington State Supreme Court have upheld warrantless blood draws where law enforcement officers had a clear indication that the search would reveal the desired evidence and such evidence would be lost if the officers obtained a warrant prior to conducting the search.[223] The risk of losing evidence is not present in searches conducted pursuant to the DNA collection statute because, unlike alcohol in the bloodstream, a person's

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Wash. 2d 424, 428, 518 P.2d 703, 706–07 (1974), which delineated the three purposes of an inventory search: "(1) finding, listing, and securing from loss during detention, property belonging to a detained person, (2) protecting police from liability due to dishonest claims of theft, and (3) protecting temporary storage bailees against false charges." *Smith*, 76 Wash. App. at 16, 882 P. 2d at 194. DNA collection cannot be justified under any of these rationales, as an individual's DNA cannot be lost or stolen.

216. *See* State v. Patterson, 37 Wash. App. 275, 280–81, 679 P.2d 416, 421 (1984).

217. *See* Terry v. Ohio, 392 U.S. 1, 29–30 (1968).

218. *See* State v. Counts, 99 Wash. 2d 54, 60, 659 P.2d 1087, 1089–90 (1983) (listing situations that constitute "exigent circumstances").

219. *Id.*

220. *Id.*

221. *See* FELONY SENTENCING, *supra* note 1, at 15. The persons subject to the DNA collection statute have already been tried and convicted, and are not suspects in an ongoing criminal investigation.

222. *See* Schmerber v. California, 384 U.S. 757, 770–71 (1966); *see also* State v. Curran, 116 Wash. 2d 174, 184–85, 804 P.2d 558, 564 (1991) (holding that warrantless blood draws of suspected drunken driving suspects were justified because alcohol dissipates in bloodstream).

223. *Schmerber*, 384 U.S. at 770–71; *Curran*, 116 Wash. 2d at 184–85, 804 P.2d at 564 (upholding warrantless blood draw of drunken driving suspect).

DNA does not dissipate over time.[224] When collecting DNA, law enforcement officials can take the time to secure a warrant prior to the collection without risking a loss of the desired evidence. Additionally, law enforcement officials do not have cause to believe that the "desired evidence" will be found when a search is conducted pursuant to the DNA collection statute because the DNA is collected in part for the purpose of prosecuting crimes that have yet to be committed, or for past crimes for which law enforcement has no suspicion that DNA collection from a particular person will yield information.[225]

2. *The* Robinson *Court Erred When It Determined that a Warrantless Search Is Permissible if It Survives Strict Scrutiny*

Under article I, section 7, strict scrutiny does not justify a warrantless search. Although Division I of the Washington State Court of Appeals determined in *Robinson v. City of Seattle* that there is an exception to the warrant requirement where a warrantless search survives strict scrutiny,[226] the court relied on Fourth Amendment authority to support its conclusion.[227] Division I based its analysis and subsequent conclusion on an erroneous determination that the Washington State Supreme Court used strict scrutiny in *In re Juveniles A, B, C, D, E* to determine the constitutionality under article I, section 7 of post-conviction HIV testing.[228] However, the *A, B, C, D, E* court explicitly declined to decide that case under the state constitutional provision because neither party had briefed the *Gunwall* factors.[229] The court stated that it would interpret the state constitutional provision under "federal Fourth Amendment analysis."[230] Such analysis does not incorporate the full

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224. *See* Burk, *supra* note 125, at 470.

225. *See* WASH. REV. CODE § 43.43.754(2) (2004) (stating that DNA collected "shall be used solely for the purpose of providing DNA or other tests for identification analysis and *prosecution of a criminal offense* or for the identification of human remains or missing persons") (emphasis added). Because the persons subject to RCW 43.43.754 have already been convicted of crimes, it can be inferred that "prosecution of a criminal offense" relates to prosecution of a *future* offense, or a past offense that law enforcement has been unable to solve but where there is no suspicion that the person from whom DNA is being collected is involved.

226. *See* Robinson v. City of Seattle, 102 Wash. App. 795, 817, 10 P.3d 452, 464 (2000).

227. *See id.* (finding that test established in *In re Juveniles A, B, C, D, E*, 121 Wash. 2d 80, 847 P.2d 455 (1993), was correct test to apply in instant case).

228. *See Robinson*, 102 Wash. App. at 817–18, 10 P.3d at 464–65 (2000) (quoting *A, B, C, D, E*, 121 Wash. 2d at 96–97, 847 P.2d at 462).

229. *A, B, C, D, E*, 121 Wash. 2d at 91 n.6, 847 P.2d at 459 n.6.

230. *Id.*

extent of the privacy protections of article I, section 7.[231] The Washington State Supreme Court has maintained that for a search to be lawful under the state constitution, it must either be supported by a warrant or satisfy one of the few exceptions to the warrant requirement.[232] Thus, the DNA collection statute is not justifiable under strict scrutiny analysis.

C. *Although the DNA Collection Statute Applies Only to Convicted Felons, This Does Not Justify Intrusion into Felons' "Private Affairs"*

The persons subject to the DNA collection statute retain the same article I, section 7 privacy rights as other citizens. Although some courts have expressed that there are classes of persons who have a "reduced expectation of privacy" under article I, section 7,[233] the continuing validity of these opinions is highly questionable. The courts that made these determinations relied solely on Fourth Amendment, pre-*Gunwall* authority.[234] More recent Washington State court decisions establish that article I, section 7 protects the "private affairs" of incarcerated persons.[235] In *Hendrickson* and *Cheatam*, the court applied article I, section 7 analysis to searches of inmates, thus illustrating that inmates retain their state constitutional privacy protections.[236] Therefore, an individual's status as a convicted felon does not diminish that person's article I, section 7 interest in protecting his or her "private affairs" with

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231. *See* State v. Hendrickson, 129 Wash. 2d 61, 70 n.1, 917 P.2d 563, 567 n.1 (1996) (stating that Washington State Supreme Court has "frequently held that art. I., § 7 affords more protection to individuals from searches and seizures by the government than the Fourth Amendment").

232. *See* State v. Rankin, 151 Wash. 2d 689, 695, 92 P.3d 202, 205 (2004).

233. *See, e.g.*, State v. Lampman, 45 Wash. App. 228, 233, 724 P.2d 1092, 1095 (1986) (finding that probationers have diminished expectations of privacy).

234. *See* State v. Campbell, 103 Wash. 2d 1, 22, 691 P.2d 929, 941 (1984); Hocker v. Woody, 95 Wash. 2d 822, 826, 631 P.2d 372, 375 (1981); *Lampman*, 45 Wash. App. at 233, 724 P.2d at 1095.

235. *See, e.g.*, State v. Cheatam, 150 Wash. 2d 626, 642, 81 P.3d 830, 838 (2003) (applying article I, section 7 to search of inmate's shoes); State v. Hendrickson, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996) (applying article I, section 7 to search of inmate's car).

236. *See Cheatam*, 150 Wash. 2d at 641–42, 81 P.3d at 838; *Hendrickson*, 129 Wash. 2d at 71, 917 P.2d at 568. The only case to the contrary is a court of appeals case, *State v. Rainford*, in which the court determined that Rainford had not made a showing that prisoners have greater privacy protections under article I, section 7. State v. Rainford, 86 Wash. App. 431, 437–38, 936 P.2d 1210, 1213 (1997). However, the Washington State Supreme Court did apply state constitutional analysis to the inmates in *Hendrickson* and *Cheatam*. *Cheatam*, 150 Wash. 2d at 641–42, 81 P.3d at 838; *Hendrickson*, 129 Wash. 2d at 71, 917 P.2d at 568. Thus, because the latter two cases remain good law, it is evident that the privacy protections of the state constitution apply to incarcerated persons.

respect to bodily intrusions.

Even if a court were to conclude that felons have diminished privacy rights, the DNA collection statute still fails constitutional scrutiny because it does not require law enforcement officials to have any level of individualized suspicion prior to conducting a search.[237] Courts require some level of suspicion before law enforcement officials can invade the private affairs of probationers, parolees, and inmates.[238] Accordingly, the Washington State DNA collection statute is invalid because it requires law enforcement officials to collect DNA from felons, regardless of whether the officials suspect that these persons have committed other crimes.

In sum, the search required by Washington State's DNA collection statute constitutes an invasion into a citizen's private affairs without authority of law. An intrusion into the body is an intrusion into a protected interest, and thus it may be undertaken only pursuant to a warrant or an exception to the warrant requirement. A statute alone cannot provide the proper authority to intrude in this way. Moreover, the statute cannot be upheld on the grounds that it applies to a class of persons with a reduced expectation of privacy because subjective privacy interests are inapposite to the analysis under article I, section 7. Finally, even searches of persons with reduced rights must be based on a well-founded suspicion, an element that the DNA collection statute does not require. Thus the statute violates article I, section 7 of the Washington State Constitution.

V. CONCLUSION

Although Washington State courts have upheld DNA collection under the Fourth Amendment to the U.S. Constitution, the broader privacy rights granted under article I, section 7 of the state constitution require a separate analysis. Under that analysis, the DNA collection statute constitutes a disturbance of a person's private affairs without authority of law. Collecting the biological sample required by the statute necessarily involves a bodily intrusion, which Washington State courts have determined constitutes a search, and therefore a disturbance of private affairs. A warrantless search is unreasonable per se, and thus such a search must fall under one of the exceptions to the warrant

237. *See* WASH. REV. CODE § 43.43.754 (2004).

238. *See supra* Part III.B.

requirement to be deemed constitutionally permissible. The fact that the statute directs DNA collection only from convicted felons does not save the statute, for courts have determined that invasions into the private affairs of such persons are evaluated under the same criteria as searches of other citizens. For these reasons, Washington State's DNA collection statute is invalid under article I, section 7 of the Washington State Constitution.