

### SELF-TEST

**Instructions: Answer the following questions before the presentation. This is meant to be a pre-assessment. The answers will be provided during the presentation. Do not worry about writing them down, as they are also provided on the back of this document.**

1. In what seminal case did the U.S. Supreme Court decide that students have a Fourth Amendment Right against unreasonable searches and seizures?  
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2. What is the standard for a reasonable search by a school administrator?
  - a. Probable Cause
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3. What is the balancing interests in these cases?
  - a. The school's interest \_\_\_\_\_
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4. Reasonable suspicion is less than \_\_\_\_\_, but more than \_\_\_\_\_.
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6. In what recent U.S. Supreme Court case did the court review the standard for strip search of a student? \_\_\_\_\_
7. Name three factors in the standard for strip searches of students.
  - a. \_\_\_\_\_
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8. To give notice of the lack of privacy in lockers, schools give notice to students in parents via
  - a. \_\_\_\_\_
  - b. \_\_\_\_\_
9. Sniffer dogs may sniff \_\_\_\_\_ and \_\_\_\_\_ but may not sniff \_\_\_\_\_.
10. Technology-based searches have created the latest wave of litigation. These cases often involve both the \_\_\_\_\_ and \_\_\_\_\_ amendments.

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## 1 **SEARCH & SEIZURE IN SCHOOLS**

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Alpine Municipal Judge

### 2 **Search & Seizure in Schools**



- ⊙ What is a reasonable search of a student's

### 3 **Search & Seizure in Schools**

- ⊙ Can schools use

### 4 **Search & Seizure in Schools**

- ⊙ Who is concerned?

- School Administrators
- School Board Members
- Campus Resource Officers/Campus Police
- Parents
- Students

- ⊙ Why do Municipal Judges need to know S&S?

- Motions to Suppress
- Juvenile Docket – Questions from campus police, principals, students, parents
- We have/are/know parents too!

### 5 **Student's Point of View**

- ⊙ <http://www.youtube.com/watch?v=OGFWPUqaYyM>



### 6 **School's Point of View**



- <http://www.youtube.com/watch?v=aHIJMWr1Zy0>

### 7 **School's Point of View**

(Josephine Institute for Ethics in Los Angeles, 2006)

- ⊙ 60% of the 36,000 students surveyed said they used their cell phone to cheat during a test at school within the previous 12 months



- ⊙ 35% said they had done so two or more times (Sussman, 2007).

### 8 **What We Will Cover**

- ⊙ Take a self-assessment
- ⊙ Examine reasonable suspicion standard
- ⊙ Analyze seminal cases
- ⊙ Group Work – Hypos
- ⊙ Provide responses to self-assessment



### 9 **SEMINAL CASE**

- ⊙ *New Jersey v. T.L.O.* (U.S. 1985)



◎ HOLDING: The 4<sup>th</sup> and 14<sup>th</sup> Amendments, protecting persons from unreasonable searches and seizures, APPLY TO PUBLIC SCHOOL STUDENTS.

10 **SEARCH & SEIZURE IN SCHOOLS**

- INTENSELY FACTUAL DETERMINATIONS
- 
- BASED ON THE TOTALITY OF CIRCUMSTANCES

11 **Balance of Competing Interests**

12 **REASONABLE SUSPICION**

- 1 ◎ POLICE SEARCH
  - WARRANT
  - PROBABLE CAUSE
- ◎ POLICE PAT DOWN
  - REASONABLE SUSPICION
  - EXIGENT CIRCUMSTANCES
  -
- 2 ◎ PRINCIPAL SEARCH
  - REASONABLE SUSPICION

13 **HUNCHES**

14 **Texas Cases**

◎ Reasonable Suspicion" means there are articulable grounds to conduct the search.

15 **5<sup>th</sup> Circuit case**

*Porter v. Ascension Parish School Board, 2004*

- ◎ 5<sup>th</sup> Circuit UPHELD SEARCH OF STUDENT'S BOOK BAG AND PERSON
  - FOUND REASONABLE SUSPICION TO SEARCH
    - Younger brother brought to school a controversial picture that the older boy had drawn
    - Older boy admitted drawing the picture
    - Picture depicted violence against school employees and students and contained obscenities and racial epithets.
    - Search revealed a box cutter, notebooks containing references to death, drugs, sex, and gang symbols, and a fake ID.
    - He was arrested, spent 4 nights in jail, enrolled in alternative school, dropped out of school.

NOTE: The Court ruled in favor of the student on 1<sup>st</sup> Amendment grounds...

16 **SCOPE OF SEARCH (Intrusiveness)**

17 **Strip Search**

- <http://www.youtube.com/watch?v=ITanYFkzEzU>
- 

18 **REVIEW OF THE STANDARD**

- After *Safford*, the standard looks like this:
  - To search a student, a school official must
  - 1) have reasonable suspicion (not probable cause) for believing that the student is violating or has violated a student rule or a law, and
  - 2) make sure that the search conducted is reasonable in scope in light of the age and sex of the student and the nature of the offense.

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- o 3) The administrator must be able to articulate reasonable suspicion to search that particular area of the student's person.

- o

- o

- o

#### 19 **Locker Searches**

- o Permissible if –

- Reasonable suspicion to believe there are illegal items in the locker
- Custodial search
  - o To find books and clean
    - Policy should allow locker searches
    - Student code of conduct puts students on notice
      - That their lockers may be searched
      - Disciplinary actions may be taken
      - *Shoemaker v. State* (1998, Tex)

#### 20 **Sniffer Dogs**

- o *In the Matter of D.H., \_\_\_ S.W.3d \_\_\_, 2010 WL 744117 (Tex. App. – Austin, 2010).*

- Austin ISD policy upheld
  - o Students leave their backpacks and go into hall
  - o Dogs sniff backpacks and jackets

- o

#### 21 **Technology-Based Searches**

- o Cell Phones

- o Must have reasonable suspicion and the search must be justified at its inception and be reasonable in scope.

- o FACTS: Pennsylvania federal case held that school officials were not justified in calling 9 other students listed in the directory of a phone that had been confiscated to determine if those students, too, were violating school's cell phone use policy (*Klump v. Nazareth Area School District, 2006*).

#### 22 **GROUP WORK INSTRUCTIONS**

##### 23 **Search of Student by Police Officer**

- o Does a police officer need only "reasonable suspicion" when searching a student? Or, is probable cause required? (*Russell v. State, 2002*).

- Initial pat down followed by a pocket search by a security officer assigned to the school by Richardson Police Department
- Facts: A parking lot attendant notified the principal that 3 students were smoking in a car. The principal directed the students to come to the office. She noticed one of the students "messing with" the pockets of his cargo shorts. Fearing he might have a concealed weapon, she asked the police officer to intervene when the students refused to empty his pockets. The officer conducted a pat-down, then discovered a bag of marijuana.
- The Tex. Ct. Appeals ruled that the search was both reasonable and not excessively intrusive under the circumstances, thus evidence could be used a trial. The appeals judges followed reasoning of courts outside of Texas that when school officials initiate the search or police involvement is minimal, the reasonable cause standard from T.L.O applies. However, if the search had been initiated by the police officer or done by school officials at the request of the officer, then the more stringent probable cause standards would apply.

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#### 24 **Off Campus Search of Student**

- ⊙ No Texas case, however, a N.Y. federal district court upheld search on field trip. (*Rhodes v. Guarricino*, 1999)
  - School principal smelled marijuana on field trip and searches the student hotel rooms after the principal smelled marijuana smoke in the hallway. Students and parents had signed pledges not to use drugs or alcohol during field trip, students were warned that room checks might be conducted. The principal found marijuana in one student's room and alcohol in another.
    - The students argued that T.L.O. applies only to on-campus searches and that the higher probable cause, not reasonable cause, standard should apply to searches conducted off campus. The court disagrees, "Where, however, a field-trip is part of a school activity, organized at school, and administered completely by school employees, T.L.O. clearly applies."

#### 25 **Suspicionless/Administrative Searches** **MAGNETOMETERS, METAL DETECTORS, BREATHALYZERS**

- ⊙ *People v. Dukes* (1992, New York City case)
  - Court upheld use of magnetometers through which all students pass as they enter school and the use of handheld metal detectors
  - FACTS: Court upheld a carefully developed metal detector search policy in the face of a serious and growing weapons problem in N.Y. city public schools.
  - Policy: Informs students that metal detector searches of their persons, book bags, and parcels might occur periodically. Signs are posted outside the building on the day of the search. The searches are conducted by police officers using handheld metal detectors that never touch the student's person. If the device activates, the officer reminds the student to remove metal objects from the student's pockets or parcels. If the device activates again, the officer then leads the student to a private area for a pat-down. If an object is detected, the student is given the chance to remove it before the officer does so. Note how the policy balances student personal privacy rights with the interests of the school in assuring a safe environment.

#### 26 **Texas Administrative Searches**

- ⊙ Where all students are searched as part of the school's daily routine (as opposed to individualized search of a particular student) are generally upheld as reasonable "when the intrusion involved is no greater than necessary to satisfy the governmental interest underlying the need for the search."
  - Tex. Cases – Upheld administrative searches of students upon entering alternative schools where they have been placed for disciplinary reasons.
    - District required students to remove their shoes, socks and belt and submit to a pat-down (*In the Matter of P.O.*, 2009, S. Antonio)
    - Walk through a metal detector (*In the Matter of O.E.*, 2003, Austin).
    - In both, students and parents were notified of the search policy and thus had a diminished expectation of privacy.

#### 27 **Locker and Desk Searches**

- ⊙ Searches of lockers and desks are considered permissible upon reasonable suspicion to believe they contain illegal items
  - Lockers and desks are jointly held property, the school may limit student expectation of privacy. In *Shoemaker*, the court noted that the school had a policy

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that warned students that their lockers could be opened at any time.

- If board policy permits general searches, students should be notified through the student code of conduct. Students also should be put on notice that any illicit items "in plan view" will be confiscated and may subject the student to disciplinary measures. (NO Fishing Expeditions)

⊙ OR

⊙ For periodic inspection purposes

- Overdue library books
- Spoiled food at the end of the semester
- Facts: Assistant principal had cause to search a student's locker after she had left a student alone in the office for a few minutes, only to discover a short time after that the assistant principal's purse was missing (*Shoemaker v. State, Tex, 1998*). The student had a record of thefts and was the only one in the office prior to the theft.

## 28 **SNIFFER DOGS**

⊙ Common canine policy REVIEWED

- ⊙ H.S. students in Austin ISD were required to leave their property in a classroom and wait in the hall while police officers instructed trained dogs to sniff the items left behind.
- ⊙ The dogs reacted to the backpack of D.H., a sixteen-year-old student. The officers then called D.H. back into the classroom and searched her backpack, where they discovered marijuana. Criminal charges were pressed, and D.H. was placed on probation.
- ⊙ The court in D.H. cited a three-part test from *Board of Education v. Earls*, a 2002 case in which the United States Supreme Court upheld suspicionless drug testing as a prerequisite to participation in extra-curricular activities. The *Earls* test looks at "the nature of the implicated privacy interest, . . . the character of the intrusion, and finally . . . the nature and immediacy of the government's concerns and the efficacy of the [school's action] in meeting them."
- ⊙ Applying this standard, the search of D.H.'s backpack was reasonable because D.H.'s privacy interest as a public school student was relatively low while the inspection was minimally intrusive and addressed an "important governmental concern."
- ⊙ The case is *In the Matter of D.H.*, \_\_\_ S.W.3d \_\_\_, 2010 WL 744117 (Tex. App. – Austin, 2010).

⊙

## 29 **Sniffer Dogs**

- ⊙ U.S. Ct of Appeals, 5<sup>th</sup> Circuit, ruled that the use of sniffer dogs generally to inspect lockers and automobiles on school property is NOT a "search."
  - However, if the dog's alert on a car or locker is used as a basis for "reasonable suspicion" to conduct a search, then the dog must be sufficiently reliable to detect such contraband at the time the sniff occurs (*Horton v. Goose Creek I.S.D.*, 1982)
  - 5<sup>th</sup> Circuit observed in footnote that sniffer dogs could be analogized to the use of magnetometers in airports and electronic scanners in libraries. In neither case is the person being touched. Whether sniffer dogs could be used in the same way has yet to be determined.
- ⊙ *Jennings v. Joshua I.S.D.*, 5<sup>th</sup> Cir. 1989.
  - Sniffer dogs alerted school officials to the presence of substances in a car in the school parking lot during a general sweep. The student's father had directed his daughter not to permit a search. When he was contacted, the father also refused

to consent, and then the school officials turned the matter over to the police.

- A search warrant was obtained, but nothing illegal surfaced when the car was searched. Father filed suit; 5<sup>th</sup> Circuit upheld dismissal of district and officials. Because the matter was turned over to the police, school officials cannot be liable for a constitutional violation that followed – also upheld dismissal of the dog handlers and upheld a jury verdict in favor of the policeman.

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### 30 **STUDENT DRUG TESTING**

#### ◎ *Vernonia School District v. Acton* (U.S. 1995) 6-3

- In face of serious drug problem among student athletes, district implemented testing program in 1989.
- Only UIL ATHLETES were tested; consent form; testing done at the beginning of season, randomly on a weekly basis thereafter.
- Adult monitors of the same sex accompanied students to the locker room. Male students produced a sample at a urinal with their backs to the testing agency. Testing results were made available only to selected school personnel and were 99.94 % accurate.
- Penalties were limited. If the first test was positive, the 2<sup>nd</sup> test was administered. If it was positive, the students was given a choice of participating in a 6-week assistance program that included weekly urinalysis or being dropped from athletics for the remainder of the current season and the next athletic session.
- 2<sup>nd</sup> and 3<sup>rd</sup> offenses resulted in longer suspension from athletics. Testing results were not used for internal school disciplinary measures and were not turned over to the police.
- Reasonable search under 4<sup>th</sup>, even though it lacked individualized suspicion. 3 factors:
  - o 1. Diminished right of privacy
  - o Procedures adequately protected student privacy
  - o Strong interest of school district in deterring drug use among athletes.

### 31 **STUDENT DRUG TESTING**

*Board of Education v. Earls*, U.S. 2002. 5-4 Decision extended *Vernonia* to all UIL activities such as choir, band, academic teams, and National Honor Society.

- Justice Stephen Breyer, in supplying the 5<sup>th</sup> vote for the majority noted in his concurring opinion that the testing program had limited impact on student privacy rights because it involved only extracurricular activities and not the entire student body. Further the conscientious objector could refuse testing and forfeit participation in the extracurricular, a penalty that "is less severe than expulsion from the school."
- ◎ Thus, a U.S. district court's 2001 decision against a general drug-testing program involving all students in the Lockney I.S.D. as unjustified by exigent circumstances is still the law. (*Tannahill v. Lockney ISD*).
- ◎ *Marble Falls ISD v. Shell* (2003) Upheld mandatory drug testing of all junior and senior high students who participated in extra curricular activities (for alcohol, barbiturates, cocaine, and steroids) Students could choose whether to submit urine, hair, or saliva samples for testing.
- ◎ Steroid Testing: Texas students who participate in UIL athletic competitions now must agree to submit to random testing for illegal steroids, and parents must sign a

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statement acknowledging as much (TEC Section 33.091).

- ⦿ The Texas Attorney General has advised that school districts may not offer cash awards to students who participate in a school drug testing program as such payment is not an authorized school district expenditure under TEC Section 45.105 (Att’y Gen. L)-097-024).

32 **Technology-Based Searches**

Surveillance Cameras

- ⦿ *Brannum v. Overton County School Board*, 516 F.3d 489 (6<sup>th</sup> Cir. 2008). 34 middle school students brought suit against school officials for installing and *operating* surveillance cameras in areas of boys and girls school locker rooms designated for changing their clothing into athletic uniforms. Students claimed privacy rights violated when school officials viewed and retained the captured images.
- ⦿ Citing *Vernonia* and *T.L.O.*, the Court concluded there was no due process claim, only a 4<sup>th</sup> Amendment right to privacy and upheld the installation of surveillance cameras for security purposes. However, the placement of the cameras and subsequent operations was inconsistent with the purpose of enhanced security and denied qualified immunity.
- ⦿ 6<sup>th</sup> Circuit affirmed the decision against the principal and vice-principal denying qualified immunity and overturned the summary judgment for the board members and director of schools. (Settled out of court – school district paid damages).

33 **Technology-Based Searches**

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34 **CONCLUSION**

- ⦿ The 4<sup>th</sup> Amendment to the U.S. Constitution has provided some degree of protection for students in the context of searches and seizures
  - Courts have found a personal right of privacy for both students and teachers in the word “liberty” of the 14<sup>th</sup> Amendment
  - These rights are limited
  - Courts in recent years have recognized the responsibility of school officials to maintain an ordered and safe educational environment and have not been sympathetic to student claims of invasion of personal privacy in the context of locker searches, interscholastic sports drug testing, and use of metal detectors.
  -

## CASES

### Consent

*Garcia v. State*, 887 S.W.2d 846 (Tex.Cr.App. 1994)(3<sup>rd</sup> party may consent if he has control and authority).

*State v. Ibarra*, 953 S.W.2d 242 (Tex.Cr.App. 1997)(Student consent must be voluntary and not the result of duress or coercion).

*Bilbrey v. Brown*, 738 F.2d 1462 (9<sup>th</sup> Cir. 1984)(5<sup>th</sup> graders too young to give consent).

*Reasnor v. State*, 12 S.W.3d 813 (Tx.Crim.App. 2000)(Consent factors include circumstances, reaction of accused, youth and education and intelligence of accused, length of detention, and repetitiveness of questioning)

*In re: R.J.*, 2004 Tex.App. LEXIS 9672 (Consent involuntary where student denied search of car and officer threatened to call canine unit and told student consent was not needed whereupon student gave consent to officer).

*In the Matter of R.S.W.*, 2006 Tex. App. Lexis 1925 (Tex. App.-Austin, 2006)(Officer padded down student, felt lump, asked one time for consent to search and court held search was voluntary).

*Alameda v. State*, 235 S.W. 3d 218 (Tex. Crim. App. 2007)(Parent may give vicarious consent to search student).

*In the Matter of D.D.B.*, 2000 Tex. App. Lexis 2222 (Probation officer does not need warrant or probable cause to search probationer).

### Establishment of 4<sup>th</sup> Amendment Right for Student to be free of Unreasonable Search

*Jersey v. T.L.O.*, 469 U.S. 325 (1985)

*Shoemaker v. State*, 971 S.W. 2d 178 (Tx. App.-Beaumont, 1998); *Tarkington ISD v Ellis*, 200 S.W. 3d 794, (Tx. App.-Beaumont, 2006)(Schools providing notice via the student code of conduct with signed forms, and with posted signs have complied with constitutional due process for administrative suspicionless searches of lockers and backpacks as they address “expectation of privacy” issues).

### Reasonable Suspicion Standard

*U.S. v. Arvizu*, 534 U.S. 266 (2002)(Officer may draw upon experience and training in making deductions).

## School Search and Seizure Cases

*Illinois v. Wardlow*, 528 U.S. 119 (2000)(Reasonable suspicion is considerably less than a preponderance of evidence standard and must be based on common sense).

### Scope of Search

*Coronado v. State*, 835 SW2d 636 (Tx. Crim App. 1992)(Court held scope of search of vehicle was not reasonable where student was suspected of skipping school).

### Strip Search

*Cornfield v. CHSD*, 991 F.2d 1316(7<sup>th</sup> Cir. 1993)(Strip search upheld where student had unusual bulge in crotch and male teacher who suspected drugs searched in locker room where student told teacher about drug use, previously tested positive for drugs and admitted to hiding drugs in crotch previously).

*Oliver v. McClung*, 919 F.Supp. 1206 (N.D. In. 1995)(Court held unreasonable search for stolen \$4.40).

*SUCD v. Redding*, 577 U.S. \_\_\_\_ (2009) (Landmark case establishing that searches must be reasonable in light of the danger and age of student).

*In re: A.T.H.*, 106 SW3d 338 (Tex. App.-Austin 2003)(Anonymous tip with no corroboration was insufficient to create reasonable suspicion without other evidence).

*In re: K.C.B.*, 141 SW3d 303 (Tex. App.-Austin, 2004)(Anonymous tip without corroboration was insufficient).

*In re: B.R.P.*, 2007 Tex. App. LEXIS 6805 (Austin)(Tip was from reliable informant and was specific, court held search was reasonable).

*Russell v. State*, 74 S.W.3d 887 (Tx.App.-Waco-2002)(Pat down was upheld where administrator had reasonable suspicion that students were smoking and student was acting suspicious about pocket).

*Landry v. State*, 2005 Tex. App. LEXIS 2388 (Court upheld pat down where student returned to campus after previous pat down and administrator feared student had returned with gun).

*Wilcher v. State*, 876 S.W.2d 455 (Tx. App.-El Paso 1994)(Court held search was reasonable where administrator feared student had gun but was not brought in until day after).

### Reasonable search of Purse/Backpack/Locker/Dogs

*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)(Search of purse upheld where student was suspected of smoking).

## School Search and Seizure Cases

*Coffman v. State*, 782 S.W. 2d 249 (Tx. App.-Houston, [14<sup>th</sup> Dist], 19 ) (Student acted suspiciously clutching bag when approached by administrator and search that found gun was upheld).

*Shoemaker v. State*, 971 SW2d 178 (Tx. Crim. App. 1998) (Locker search for stolen wallet was upheld).

*In the Interest of P.E.A.*, 754 P.2d 382 (Co. 1988) (Trunk of car was searched based on tip of drug possession and search was upheld).

*Coronado v. State*, 835 SW2d 636 (Tex. Crim. App. 1992) (Search of vehicle not upheld where student was suspected of truancy).

*Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. In. 1979); *Horton v Goose Creek ISD* 690 F.2d 470 (5<sup>th</sup> Cir. 1982) (Suspicionless sniff by dog of student is not reasonable).

*In the Matter of D.H.*, 2010 Tex. App. LEXIS 1610 (Tex.App. Austin [3<sup>rd</sup> Dist.]) ((Suspicionless search of backpacks, desks, and purses was upheld).

## **SEARCH & SEIZURE SCENARIO**

Shortly after Klep leaves the Assistant Principal's office, the AP Ms. Nosey notices that several items from her desk are missing including a cell phone previously confiscated from another student. No one has been in the office since Klep left and only a few moments have elapsed since her departure. Analyze each of the following actions of Nosey using relevant case law to support your position. Be sure to determine if you believe the search was reasonable.

1. Nosey searches Klep's locker without her permission.
2. Nosey searches Klep's backpack without her permission.
3. Nosey asks Klep to turn out her pockets (one time) and Klep complies. The cell phone was in her pocket.
4. Nosey goes and gets the Campus Resource Office who strip searches Klep (without permission). What changes if it is a city police officer not employed by the school?

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7. Name three factors in the standard for strip searches of students.
  - a. \_\_\_\_\_
  - b. \_\_\_\_\_
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  - a. \_\_\_\_\_
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10. Technology-based searches have created the latest wave of litigation. These cases often involve both the \_\_\_\_\_ and \_\_\_\_\_ amendments.