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NO. 93315-4

THE SUPREME COURT THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRITTANIE OLSEN,

Petitioner.

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State, who are responsible for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, which have wide-ranging impact on the ability to effectively monitor compliance with the terms of probation, particularly when the crime of conviction involves the operation of a motor vehicle while impaired by alcohol and/or drugs.

II. ISSUE PRESENTED

Whether warrantless random searches of urine, breath or sweat for drug and/or alcohol testing is constitutionally permissible as a condition of probation when the crime of conviction involved the use of alcohol and/or drugs?

III. STATEMENT OF FACTS

Ms. Brittanie Olsen was convicted of driving while under the influence (DUI). She was sentenced on June 11, 2014, to a combination of jail time and probation. Ms. Olsen’s sentence included three provisions related to alcohol and/or drug monitoring:

Things You Must NOT Do:

☒ Consume alcohol, marijuana, or non-prescribed drugs –

(random urine analysis screens will be used to ensure compliance with conditions regarding the consumption of alcohol and controlled substances).

...

refuse PBT, UA, or BAC

...

Drive any vehicle without ignition interlock^[1] for _____ months or as DOL requires.^[2]

CP 2.

Ms. Olsen challenged the random urine tests (UA) at sentencing,

¹An ignition interlock device is a “breath alcohol analyzing ignition equipment or other biological or technical device . . . designed to prevent a motor vehicle from being operated by a person who has consumed an alcoholic beverage.” RCW 46.04.215. The Washington Legislature embraced IIDs after finding that:

(1) There is a need to reduce the incidence of drivers on the highways and roads of this state who, because of their use, consumption, or possession of alcohol, pose a danger to the health and safety of other drivers;

(2) One method of dealing with the problem of drinking drivers is to discourage the use of motor vehicles by persons who possess or have consumed alcoholic beverages;

(3) The installation of an ignition interlock breath alcohol device or other biological or technical device will provide a means of deterring the use of motor vehicles by persons who have consumed alcoholic beverages;

(4) Ignition interlock and other biological and technical devices are designed to supplement other methods of punishment that prevent drivers from using a motor vehicle after using, possessing, or consuming alcohol;

(5) It is economically and technically feasible to have an ignition interlock or other biological or technical device installed in a motor vehicle in such a manner that the vehicle will not start if the operator has recently consumed alcohol.

RCW 46.20.710. The legislature has utilized IIDs to allow some individuals, who would previously been precluded from operating any motor vehicles, to drive. *See generally* RCW 46.20.385 (ignition interlock driver’s licenses).

²The Department of Licensing (DOL) requires everyone who has been convicted of DUI, RCW 46.61.502, to “drive only a motor vehicle equipped with a functioning ignition interlock device” for not less than one year. RCW 46.20.720(1)(d)(i) and (3)(c)(i).

stating that “random urinalyses are a violation of the right against unreasonable searches and seizures and privacy in Washington.” RP (Jun. 11, 2014), at 9. Although she did not challenge the ignition interlock (IID) condition in the trial court, Ms. Olsen asserted in the superior court that the prohibition against random UAs would extend to all random testing:

Random testing of a probationer’s breath, urine, or other body fluids, does not comport with this requirement of a well-founded suspicion of a violation of the conditions of a sentence. A “random” test is an indiscrimina[te] search for potential violation solely on the basis of someone’s status as a probationer—not a test to investigate a violation for which there is a preexisting well-founded suspicion.

CP 10.

IV. ARGUMENT

The supplemental briefs of the parties have focused mainly on the legal standards for taking breath and urine samples from probationers convicted of alcohol or drug-related offenses. This amicus brief will, instead, outline the nature and efficacy of such testing to illustrate the limited intrusion involved and the strong need for this particular type of monitoring of probationers.

A. **Random Drug and Alcohol Testing Saves Lives by Reducing Recidivism and by Promoting Rehabilitation.**

Impaired driving is one of the leading contributors to highway deaths and major injuries. *See* Washington State Department of Transportation,

Washington State Strategic Highway Safety Plan 2013, at 5 and 27-37;³ Washington Traffic Safety Commission, *Washington Impaired Driving Strategic Plan* (July 2013).⁴ Despite years of efforts to reduce the number of impaired-driver related fatalities, the numbers have increased in recent years. See Tom Banse, *Traffic Fatalities in the Northwest Rising at Fastest Rate in Country* (May 26, 2016).⁵

Fortunately, technology has provided judges with new sentencing options that aid rehabilitation by providing a deterrent to drinking or drugging. These technological devices include IIDs⁶ and transdermal or remote alcohol monitors.⁷ Use of these devices protect the public while

³This document may be found at <http://wsdot.wa.gov/NR/rdonlyres/5FC5452D-8217-4F20-B2A9-080593625C99/0/TargetZeroPlan.pdf> (last visited Jan. 5, 2017).

⁴This document may be found at http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2015/03/2013-WA-Impaired-Driving-Strategic-Plan.pdf (last visited Jan. 5, 2017).

⁵Available at <http://ijpr.org/post/traffic-fatalities-northwest-rising-fastest-rate-country#stream/0> (last visited Jan. 5, 2017).

⁶The use of IIDs in Washington is associated with reductions in recidivism and reductions in crashes. See Anne T. McCartt, William A. Leaf, et al, *Washington State's Alcohol Ignition Interlock Law: Effects on Recidivism Among First-Time DUI Offenders*, 14 *Traffic Injury Prevention* 215 (2013). The results seen in Washington have been replicated in other states. See generally Disease Control and Prevention, *Injury Prevention & Control: Motor Vehicle Safety, Increasing Alcohol Ignition Interlock Use*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/ignition_interlock_states.html (last visited Jan. 5, 2017).

⁷There are two transdermal measuring devices--the Wrist Transdermal Alcohol Sensor (WrisTAS) by Giner, Inc., and the Secure Continuous Remote Alcohol Monitor (SCRAM) bracelet by Alcohol Monitoring Systems, Inc. The SCRAM system "is attached to the ankle and detects alcohol from continuous samples of vaporous or insensible perspiration (sweat) collected from the air above the skin and transmits that data via the web." Victor E. Flango

allowing offenders to remain employed, to fulfill family obligations, and to participate in treatment. These technological devices complement other strategies, including therapeutic courts,⁸ 24/7 sobriety programs,⁹ and intensive probation supervision.¹⁰

A cornerstone of both the technological interventions and the other interventions is drug and alcohol testing.¹¹ Drug testing can “serve as a

and Fred Chessman, *When Should Judges Use Alcohol Monitoring as a Sentencing Option in DWI Cases?*, 44 *Court Review* 102 (2007-2008). Studies reveal that very few arrests for new DUI offenses occur while participants wear SCRAM bracelets. *Id.*

⁸Therapeutic courts, including DUI court, juvenile and adult drug courts, and family dependency treatment courts, are specifically authorized by the legislature. See RCW 2.30.010(4).

⁹A “24/7 sobriety program” is a “program in which a participant submits to testing of the participant’s blood, breath, urine, or other bodily substance to determine the presence of alcohol or any drug as defined in RCW 46.61.540.” RCW 36.28A.330(1). An individual who has been charged or convicted of DUI may be ordered by the court to participate in a 24/7 sobriety program. RCW 36.28.330(2); RCW 10.21.055 (pre-trial release); RCW 46.61.5055 (penalty schedule). 24/7 sobriety programs have also proven effective in reducing recidivism. See Paul J. Larkin, Jr., *Swift, Certain and Fair Punishment: 24/7 Sobriety and Hope: Creative Approaches to Alcohol and Illicit Drug-Using Offenders*, 105 *Journal of Criminal Law & Criminology* (2015) (hereinafter cited as “24/7 Sobriety and Hope”).

¹⁰Under intensive supervision, offenders retain their freedom but are subject to requirements such as electronic monitoring, drug testing, and daily contacts. See National Highway Traffic Safety Administration and the National Institute on Alcohol Abuse and Alcoholism, *A Guide to Sentencing DWI Offenders*, at 8-9 (2nd ed. 2005).

¹¹See, e.g., United States Department of Justice, Office of Justice Programs, Drug Courts Resource Series, *Drug Testing in a Drug Court Environment: Common Issues to Address*, at 1 (May 2000) (hereinafter cited as “*Drug Testing in a Drug Court Environment*”) (“The effective operation of a drug court program is premised upon having the capacity to: conduct frequent (often two to three times per week) and random drug tests of participants); Center for Court Innovation, Amanda B. Cissner, *The Drug Court Model and Persistent DWI: An Evaluation of the Erie and Niagara DWI/Drug Courts*, at 3 (Sept. 2009) (hereinafter cited as “*The Drug Court Model and Persistent DWI*”) (“Typically, DWI court defendants are required to participate in some type of treatment for their addiction to alcohol and drugs, submit to random drug and alcohol testing, and attend regular court appearances.”).

deterrent to substance use and increase the likelihood of successful abstinence, especially if specimens are collected at random intervals.”¹² Positive tests results can be useful in intervening with a probationer or therapeutic court participant to implement timely alterations in the treatment plan.¹³ Random drug testing is necessary because the “liver will metabolize alcohol over a few hours and most drugs over a few days, so an offender can ‘beat’ a test simply by refraining from substance use for a brief period before the test.”¹⁴

B. Random Drug and Alcohol Testing of Probationers is Constitutional Under a Special Needs/Probationer Exception to the Warrant Requirement.

Within the criminal justice environment, drug and alcohol testing can be conducted for a variety of purposes: prosecution, supervision of a defendant’s compliance with a pretrial release or probation order, or monitoring a participant’s progress in treatment and compliance with a

¹²American Society of Addiction Medicine, Public Policy Statement on Drug Testing as a Component of Addiction Treatment and Monitoring Programs and in Other Clinical Settings, available at <http://www.asam.org/docs/default-source/public-policy-statements/1-drug-testing---clinical-10-10.pdf?sfvrsn=0> (last visited Jan. 5, 2017).

¹³*Id.*; *Drug Testing in a Drug Court Environment*, at 2 (“The drug test result may be used as a basis for imposing sanctions and/or enhancing treatment service requirements, on the one hand, or reducing treatment service requirements, on the other. Drug test results may also indicate a participant’s progress in reducing drug use when he or she has not eliminated it altogether.”).

¹⁴*24/7 Sobriety and Hope*, at 124-25 (footnotes omitted). See also *Drug Testing in a Drug Court Environment*, at 9-10 (listing detection time for drugs of abuse and stating that “Random testing prevents participants from planning ahead and avoiding detection.”).

therapeutic court's program conditions.

Drug and alcohol testing for prosecution may only be conducted pursuant to a search warrant or a recognized exception to the warrant requirement. A recognized exception to the warrant requirement applies in the probation context. This exception allows for "spot testing" for alcohol or drug usage to obtain evidence to prosecute an alleged violation of a "no alcohol" or "no drugs without a prescription" provision when there is reasonable suspicion that the probationer is currently under the influence of a drug or alcohol. *See, e.g., State v. Massey*, 81 Wn. App. 198, 200-01, 913 P.2d 424 (1996).

In this case, however, the reason for the random drug and alcohol testing is not to collect evidence to prosecute a violation of the probation requirement. Instead, the random drug and alcohol testing is designed to monitor compliance with the conditions of probation and to assist Ms. Olsen in "starting a new life" that is less "unmanageable" than before. RP (Jun. 11, 2014) 7. When random drug or alcohol testing is conducted for the purposes of monitoring a defendant's compliance with a pretrial release or probation order, or monitoring a participant's progress in treatment and compliance with a therapeutic court's program conditions, reasonable suspicion of current use is not required.

Random drug and alcohol testing to monitor compliance, reduce recidivism, protect the public and encourage rehabilitation are directed toward “special needs, beyond the normal need for law enforcement.” *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Blackmun, J., concurring in judgment)). The special needs exception to the warrant requirement under the Fourth Amendment includes probation monitoring. *Griffin*, 483 U.S. at 873. A warrantless search of a probationer is permissible under the Fourth Amendment when it reasonably serves the goals of rehabilitation and community protection. *Griffin*, 483 U.S. at 875. *See also United States v. Knights*, 534 U.S. 112, 119-120, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). Random drug and alcohol tests are a reasonable means of enforcing a probation term of abstinence established by the sentencing judge. *See, e.g., United States v. Duff*, 831 F.2d 176 (9th Cir. 1987).

Article I, section 7 of the Washington Constitution prohibits some special needs searches authorized by the Fourth Amendment. *See generally York v. Wahkiakum School District No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (suspicionless drug testing of student athletes prohibited by the Washington Constitution). With respect to probationers and parolees, however, article I, section 7 provides no greater protection than the Fourth

Amendment. *See generally State v. Jardinez*, 184 Wn. App. 518, 523, 338 P.3d 292 (2014); *State v. Reichert*, 158 Wn. App. 374, 386-87, 242 P.3d 44 (2010), *review denied*, 171 Wn.2d 1006 (2011).

Imposition of random drug or alcohol testing as a condition of probation is reasonable when the defendant is convicted of an offense in which the public's safety was imperiled by the defendant's use of drugs or alcohol. *Cf. In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 92-93, 847 P.2d 455 (1993) (collection of blood to test for the human immunodeficiency virus (HIV) proper when the offenders engaged in a class of criminal behavior that had the potential of exposing others to HIV).

Imposition of random drug and alcohol testing upon individuals convicted of DUI is reasonable in light of the high recidivism rate for impaired driving.¹⁵ *See, e.g. Samson v. California*, 547 U.S. 843, 854, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (a high recidivism rate renders a suspicionless search of a parolee reasonable when the search is conducted, "in a manner that aids, rather than hinders, the reintegration of parolees into

¹⁵Nationally, estimates indicate that between 20% and 35% of first-time alcohol-impaired offenders will repeat. *See The Drug County Model and Persistent DWI*, at 2. Recidivism rates in Washington have increased since 1998, with 22% to 52% of defendants committing a subsequent DUI offense. *See generally* Washington State Institute for Public Policy, *Deferred Prosecution of DUI Cases in Washington State: Evaluating the Impact on Recidivism* (August 2007) (available at http://www.wsipp.wa.gov/ReportFile/992/Wsipp_Deferred-Prosecution-of-DUI-Cases-in-Washington-State-Evaluating-the-Impact-on-Recidivism_Full-Report.pdf (last accessed on Jan. 5, 2017)).

productive society”).

Imposition of random alcohol and drug testing is reasonable because scheduled testing allows probationers to violate conditions of release with impunity. *Hudson v. Palmer*, 468 U.S. 517, 529, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (observing that it would be “naive” to institute a system of “planned random searches” as that would allow prisoners to “anticipate” searches, thus defeating the purpose of random searches); *24/7 Sobriety and Hope*, at 124-25 (because “an offender can ‘beat’ a test simply by refraining from substance use for a brief period before the test ... scheduled drug testing works better as an IQ test than as a deterrent to substance use”).

Imposition of a breath alcohol test¹⁶ through an IID every time the probationer attempts to drive is reasonable as it offers immediate protection to the public by disabling the probationer’s vehicle when the probationer has

¹⁶This Court has previously recognized that breath alcohol tests are fairly unintrusive and provide minimal information about a person:

A breath test is much less intrusive than other blood alcohol tests and produces only a limited amount of information. *Cf Maryland v. King*, ___ U.S. ___, 133 S. Ct. 1958, 1969, 186 L. Ed. 2d 1 (2013). A blood draw, for instance, entails a “physical intrusion beneath [the] skin and into [the] veins to obtain a sample of ... blood.” *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (20 13). Beyond this puncturing of the skin, a blood test can produce a much wider array of information than a breath test, such as a person's DNA (deoxyribonucleic acid) or the presence of certain diseases. In contrast, a breath test simply captures one’s breath and produces a scope of information that is limited solely to a calculation of the alcohol content of the breather's blood.

State v. Baird, ___ Wn.2d ___, ___ P.3d ___, 2016 Wash. Lexis 1377 at *26-27, ¶ 48 (Dec. 22, 2016) (González, J., concurring).

consumed alcohol. Imposition of continuous alcohol testing through a SCRAM bracelet ensures that home detention does not provide an opportunity for continued drinking.

V. CONCLUSION

Random drug and alcohol testing of DUI probationers saves lives while allowing probationers to remain employed, to fulfill family obligations, and to participate in treatment. This testing is reasonable under both the Fourth Amendment and article I, section 7. The Court of Appeals' decision should be affirmed.

Respectfully submitted this 6th day of January, 2017.



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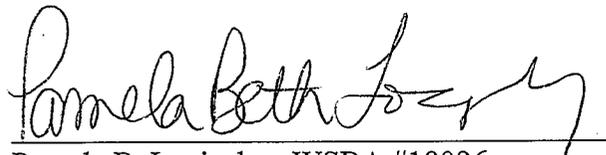
PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On January 6, 2017, pursuant to the agreement of the parties, I e-mailed a copy of this document to

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Signed under the penalty of perjury under the laws of the state of Washington this 6th day of January, 2017, at Olympia, Washington.



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