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NO. 93315-4

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IN THE SUPREME COURT OF WASHINGTON

BRITTANIE J. OLSEN,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

**RESPONDENT'S REPLY TO AMICUS CURIAE BRIEF
PROVIDED BY AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON**

Court of Appeals No. 46886-7-II
Jefferson County Superior Court No. 14-1-00120-2

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I. INTRODUCTION

Amicus Curiae, American Civil Liberties Union of Washington, relying on *York v. Wahkiakum Sch. Dist. No. 200*¹, which dealt with student athletes, not convicted criminals on court supervised probation, declares that probationers suffer no diminished privacy rights in their urine even when they have been ordered not to consume alcohol and/or drugs following a criminal conviction that involved alcohol and/or drugs; and that the decision of the Court of Appeals must be reversed. Amicus asserts that because a probationer has a privacy interest in their urine, attempts to collect their urine must be accompanied by either some level of suspicion or authority of law. Adopting the ALCU's position would seriously undermine the rehabilitative efforts of probation officers by taking away a valuable tool used in monitoring the progress of their probationers and negatively impact public safety. The position advocated by Amicus would needlessly expand the rights of probationers at the cost of rehabilitation and seriously undermine the authority of trial courts on how to best handle their offenders.

The following brief is a response to selected points raised in the brief submitted by Amicus. Points not discussed are not conceded. The State believes them to be adequately addressed in its Supplemental Brief,

¹ 163 Wn.2d 297, 178 P.3d 995 (2008).

the brief of Amicus Curiae Washington Association of Prosecuting Attorneys, and the authorities cited.

II. ISSUES PRESENTED

1. Whether probationers, having been found guilty of a crime following the due process of law, retain pre-adjudicatory levels of privacy in their urine so as to constitute a “search” and fall under the full protection of article 1, section 7 of the Washington State Constitution thereby necessitating suspicion or separate authority of law to legally collect their urine for the purpose of determining compliance with their sentence?
2. Whether a special needs exception exists for probationers under article 1, section 7 of the Washington State Constitution if the collection of urine is otherwise determined to be a “search”?

III. ARGUMENT

1. **Collecting a Probationer’s urine is not a “search” because probationers do not retain a privacy interest in their urine.**
 - a) **Amicus confuses student athletes with convicted criminals and argues without supporting citation that probationers possess undiminished constitutional rights.**

Article 1, section 7, provides no greater protections than the Fourth Amendment with respect to probationers. *State v. Reichert*, 158 Wn. App. 374, 386, 242 P.3d 44 (2010). Probationers have reduced privacy rights “because of the State’s continued interest in supervising them”. *Id.* The

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reduced privacy rights of the probationer rest on the fact that a probationer is a “person judicially sentenced to confinement but released on probation” and therefore “remain in the custody of the law”². *Id.* (citing *State v. Simms*, 10 Wn. App. 75, 82, 516 P.2d 1088 (1973)). The *Reichert* court further explained that “probation is a *criminal sanction* imposed by the court,” that it is “one point ... on a *continuum of possible punishments* ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service”. *Id.* at 387 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 874, 107 S. Ct. 3164, 97 L.Ed.2d 709 (1987)) (emphasis added).

Amicus makes the incredible assertion that a probationer, a person that has been “judicially sentenced” for a violation of the criminal law and is under the custody of the law, has the same level of diminished privacy as a student who wishes to play for a school sponsored athletic team. Amicus Brief at 2-8. Students are not under the jurisdiction of the courts, they have not had the opportunity to avail themselves to due process of law, and they certainly have not been convicted of a criminal offense by operation of the combined virtues of being a student and playing on a school sports team. The comparison, which Amicus makes repeatedly, is

² The Petitioner was sentenced to 364 days of confine with 354 days suspended on the condition that the Petitioner, among other things, was to refrain from the consumption of alcohol and non-prescribed drugs; and that she submit to random urinalysis to determine her compliance with this condition. CP at 5.

supported by neither law nor common sense. “Students ‘do not shed their rights at the school house door,’” whereas criminal defendants, in contrast, do “shed” some of their rights following a criminal conviction. *York*, 163 Wn.2d at 303 (citing *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)).

In *York*, the Washington Supreme Court applied article 1, section 7 of the Washington State Constitution to the question of whether a school could conduct suspicionless urinalysis on student athletes who are required to agree to refrain from the use of drugs or alcohol in order to play on school sponsored athletic teams. *Id.* at 299-300. The Court acknowledged both that the Fourth Amendment of the United State’s Constitution permitted such searches and that student’s have a diminished right to privacy. *Id.* at 303-304. However, the Court held that article 1, section 7 of the Washington State Constitution affords individuals greater protection from government intrusion and that this greater protection meant that the school district could not require student-athletes to undergo suspicionless urinalysis. *Id.* at 310. While the United States Supreme Court held that a special needs exception to the Fourth Amendment does exist, the Court declined to the create such an exception for the purposes of conducting random urinalysis on student athletes. *Id.* at 314. It is important to note that did not hold that a special needs doctrine did not or could not exist under article 1, section 7, but rather that one had not been

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created and the Court not did see the opportunity presented by *York* as an appropriate time to create one. *Id.*

- b) ***Amicus* presupposes that probationers have intact privacy rights and confounds the definitions “intrusive” and “invasive” by suggesting that asking a probationer to provide a urine sample is somehow more “invasive” than penetrating the body with a tool to collect evidence.**

The proper constitutional analysis is not “an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold.” *City of Seattle v. McCready*, 123 Wn.2d 260, 271, 868 P.2d 134 (1994). The Court of Appeals correctly held that a random urinalysis for a DUI probationer is not a search because DUI probationers no longer hold a privacy interest in their urine. *State v. Olsen*, 194 Wn. App. 264, 272-74, 374 P.3d 1209 (2016). This is due to the fact that a person’s privacy interest can vary based on their “status as an arrestee, pretrial detainee, prisoner, or probationer.” *Id.* at 272 (citing *State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208 (2008)).

DNA is collected from convicted criminals pursuant to RCW 43.43.754. *Surge*, 160 Wn.2d at 69-70. RCW 43.43.754 specifies that a “biological sample” is to be collected from certain individuals for the purposes of DNA identification. Biological samples are to be collected by buccal swab which involves sticking a probe into one’s oral cavity and scraping off a collection of skin cells. WAC 446-75-010. This, *Amicus*

claims, is less invasive than having someone urinate in a cup. *Amicus* Brief at 5. Another method that *Amicus* asserts³ is less invasive than urinating in a cup is drawing a blood sample for the purposes of determining whether a person is HIV positive, presumably by piercing the skin with a sharp object. *Id.* In contrast, a urine sample does not involve penetrating the body with an object designed to extract biological specimens. Rather, what the collection of urine intrudes upon is the sense of modesty of the person providing the sample, shrouded by a sense of privacy that the probationer is not entitled to due to their status. For this reason the very action of collecting urine does not constitute a search.

Finally, the record is completely silent on the means of urine collection, however that did not stop *Amicus* from engaging in speculation about how this process was to unfold. *Amicus* Brief at 6. The issue on appeal is whether the random, suspicionless collection of urine violates article 1, section 7, of the Washington State Constitution, *not* whether the *means* of collecting urine unduly violates the Petitioner's privacy rights. The issue of whether certain aspects or means of collection are overly invasive is a separate matter that, should it be addressed, needs be brought before the Court on a direct challenge to the aspect of urinalysis.

³ Referring to *In Re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993).

c) ***Amicus* incorrectly cites to the *Sentencing Reform Act* as an authority granting district court probationers a privacy right.**

Amicus asserts that a well founded suspicion is necessary before a probationer can be searched, in support of this assertion Amicus cites *State v. Massey*⁴ and *State v. Lucas*⁵ as authority. Amicus Brief at 7. Both cases⁶ deal individuals that had been convicted of felonies and had been sentenced under the *Sentencing Reform Act*⁷ (hereafter referred to as the SRA). The SRA only applies to felony convictions, it does not apply to misdemeanor convictions. RCW § 9.94A.010, *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003). Furthermore, the cases cited by Amicus do not cover the use of *monitoring tools*⁸ by probation officers. See Fn. 3. The difference is important because the SRA acts as a *limitation* on a court's authority to impose sentences for felony convictions. *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009). In the *Anderson*, the Court of Appeals observed that while the SRA limits a court's discretion in imposing a felony sentence, no such limitation exists for misdemeanor sentences. *Id.*

⁴ 81 Wn. App. 198, 913 P.2d 424 (1996).

⁵ 56 Wn. App. 236, 783 P.2d 121 (1989).

⁶ In *Massey*, the defendant had been convicted of Delivery of a Controlled Substance: Cocaine (RCW 69.50.401, a Class B Felony) . 81 Wn. App. at 199. In *Lucas*, the defendant had been convicted of Assault in the Third Degree (RCW 9A.36.031, a Class C Felony).

⁷ RCW 9.94A

⁸ See *State v. Riles*, 135 Wn.2d 326, 339, 957 P.2d 655 (1998).

An individual placed on community custody may be subject to searches of his or her person, car, or home, by a community custody officer when *reasonable cause* exists to believe a violation of the offender's community custody conditions have occurred. RCW 9.94A.631⁹. No such affirmative grant of privacy exists for misdemeanants on probation.

d) Sentences imposed by a court as well as the conditions of probations are limited in principal by statute, criminal procedure, and the limited authority of probation officers.

Every crime under Washington law falls into one of five categories, each with its own limitations on maximum punishment. RCW 9A.20.021. While the vast majority of crimes fall under this scheme, some do not¹⁰. Depending on whether one is convicted of a misdemeanor or a gross misdemeanor an individual faces a maximum sentence of 90 or 364 days respectively, and may face respective fines of up to \$1000 or \$5000. *Id.* Following a conviction of a misdemeanor, or gross misdemeanor, a court may impose a suspended sentence for up to 24 months, but a notable exception exists for crimes of domestic violence or alcohol/drug traffic related crimes which may be suspended up to 60 months. RCW 3.66.068. Probation may be ordered for a period not to exceed 24 months. RCW 3.66.067. Probation officers, unlike community custody officers do not go

⁹ Previously codified as RCW 9.94A.195

¹⁰ For example RCW 28A.635.030 declares that disturbing a school activity is a misdemeanor, but that it is only punishable by a fine not to exceed \$50.

into the field to search homes or make arrests, but rather conduct “interviews”. RCW 9.94A.716(2), ARLJ 11.2(b). At a probation hearing a defendant may have his or her sentence modified, however, the defendant is entitled to be informed of the nature of the violation and to representation by counsel. RCW 3.66.069, CrRLJ 7.6.

The State’s position¹¹ is that a finding of guilt suspends certain rights. Amicus contends that this has no limiting principal. This completely ignores the fact that all crimes have their limits with respect to punishments. It is true, that the limiting principals in our criminal justice system tend to be front loaded, such that the protections afforded to a criminal defendant mostly occur prior to conviction. However, once convicted of a misdemeanor or gross misdemeanor the sentencing court has the authority to impose the maximum sentence without any limitation other than the caps emplaced by the legislature. *See Anderson*, 151 Wn. App. at 402. Or, as an act of judicial grace, the courts may opt to suspend a portion (or all) of a sentence and place an individual on probation as a less restrictive alternative. *See Reichert*, 158 Wn. App. at 386-87. Should an individual violate the conditions of their probation they are entitled to a hearing where the individual is represented by counsel and is informed of the nature of the violation. *These are limiting principals*. Before an individual has been even placed on probation, they must, by operation of

¹¹ Respondent’s Supplemental Brief at 11

law and court rule, have been afforded to the opportunity to avail themselves to all of the rights afforded to criminal defendants within our justice system. Following the imposition of sentence, a probationer no longer enjoys all of the rights he or she had prior to the finding of guilt, rather what they possess are residual rights granted either by the legislature in their definition of crime and punishment¹² or by the judge in determining sentence.

- e) **Assuming *arguendo*, that a probationer retains a privacy interest in their urine, Amicus claims that a Judgment and Sentence cannot substitute for a warrant as *authority of law* because a warrant offers greater protection**

The Washington State Constitution requires “authority of law” before a government intrusion into one’s privacy takes place. *State v. Ladson*, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999) (citing article 1, section 7 of the Washington State Constitution). “Authority of law” *may* be a search warrant. *McCready*, 123 Wn.2d at 271 (citing *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986)). “Authority of law” *may* also be provided by some of the “well-established principals of the common law”, the Court has never created though an exhaustive of list of what may or may not constitute “authority of law”. *Ladson*, 138 Wn.2d at 343.

¹² See *State v. Gresham*, 173 Wn.2d 405, 431, 269 P.3d 207 (2012) (holding that the legislature has the constitutional authority to pass substantive law, which is the determination of what constitutes a crime, and what the applicable punishment is).

It stands to reason that if an ex-parte search warrant based upon probable cause constitutes authority of law, as well some common law exceptions, then a Judgment and Sentence with its much higher burden of proof must also constitute authority of law. Amicus expresses concern that search warrants are limited in time and space whereas a sentence is not. Amicus brief at 8. This is untrue. As previously stated, probation is limited to two years, and what can be searched is limited to conditions of the sentence as well whatever is available at the probation office during the course of an "interview". RCW 3.66.067; ARLJ 11.2(b). The fact that the conditions of the "search" under a sentence are broader reflects the fact that a probationer has lost some of their constitutional rights by operation of due process of law, whereas the subject of a search warrant has lost *none*.

2. **Washington law permits the creation of a special needs exception to the warrant requirement *for probationers*.**
 - a) **A probationer's right to be free from government intrusion is reduced, bringing it down to a level similar to the Fourth Amendment where a special needs exception to the warrant requirement exists.**

Probationers, who have a diminished right to privacy under Washington law, can be searched absent a warrant so long as the search is reasonable. *State v. Lampman*, 45 Wn. App. 228, 233, 724 P.2d 1092 (1986). This is similar to the search doctrine under the Fourth Amendment of the United States Constitution, but is unlike the search doctrine of

article 1, section 7 of the Washington State Constitution. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751, (2009). Sometimes a *special need* arises for a search outside the typical scope of law enforcement, this is considered a valid search under the Fourth Amendment. *Surge*, 160 Wn.2d at 79-81.

By operation of a simple syllogism, there is no doctrine or case law explicitly forbidding searches of probationers under the special needs doctrine. Probationers have a diminished expectation of privacy where searches turn on reasonableness. Basing the legality of government intrusion on reasonableness means that probationers a level of protection at least as robust as the Fourth Amendment (if not less so, owing to their status as probationers), a special needs exception exists under the Fourth Amendment, therefore a special needs exception is not explicitly prohibited under the Washington State Constitution *for probationers*. The cases¹³ cited by Amicus arguing that Washington has no special needs exception do not involve probationers and do not fall with the syllogism explained above. None of the individuals involved were in the post-adjudication phase of their cases, meaning that their rights were still fully

¹³ In *York*, the case centered on the suspicionless searches of student athletes. 163 Wn.2d at 299-300. In *State v. Jordan*, the case dealt with warrantless searches of motel registries. 160 Wn.2d 121, 123, 156 P.3d 893 (2007). In *State v. Helmka*, the case centered on the scope of search warrants. 86 Wn.2d 91, 91-92, 542 P.2d 115 (1975). *State v. Parker* dealt with searches of passengers in the suspect's vehicle. 139 Wn.2d 486, 489, 987 P.2d 73, (1999). *Jacobsen v. City of Seattle* the issue was the legality of searches on concertgoers. 98 Wn.2d at 669-70. In *City of Seattle v. Mesiani*, the issue was the legality of DUI checkpoints. 110 Wn.2d 454, 455-56, 755 P.2d 775 (1988).

intact, *meaning* that Washington courts have never held that there is no special need doctrine where one's right to privacy already depends on reasonableness.

b) Random urinalysis is an important monitoring tool utilized by the courts during the rehabilitative process of probation and therefore constitutes a special need under the constitution.

Unlike traditional forms of punishment probation is meant to be rehabilitative in nature rather than punitive. *Roberts v. United States*, 320 U.S. 264, 272, 64 S. Ct. 113, 88 L.Ed 41 (1943). The role of the probation officer is likewise "rehabilitative rather than punitive in nature." *Reichert*, 158 Wn. App. at 387 (citing *Simms*, 10 Wn. App. at 85, (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948))). It follows then that "a probation officer's search¹⁴ according to his supervisory duties is distinguishable from that of a police officer competitively 'ferreting out crime.' " *Id.* Indeed, the urinalysis conducted a by probation officer on a probationer is a monitoring tool, not an outright search. *Riles*, 135 Wn.2d at 339 (holding that polygraph and plethysmograph testing are necessary and effective monitoring tools to ensure that probationers are in compliance with the conditions of probation) (abrogated on other grounds).

¹⁴ By using this quote the State does not concede that a random urinalysis of a probationer constitutes a "search" for the reasons explained in *State v. Olsen*, 194 Wn. App. 264.

Probation is meant to be a rehabilitative process rather than a punitive one. However, probation officers can only execute their jobs if they possess a means to monitor the conditions of a probationer. One way to effectively monitor one's drug and alcohol intake is to perform random urinalysis. In fact, it is so effective that it is employed in drug courts as a monitoring tool for participants. King County Drug Diversion Court, *Participant Handbook*, p. 5-7. The urinalyses are not used to "ferret out crime" because it is not a crime to have alcohol or drugs in one's system absent other attendant circumstances. Rather it is a tool to monitor compliance during the rehabilitative process of probation.

Amicus suggests that a probation officer should rely on observed signs of intoxication or perhaps wait for the probationer to commit a new offense to supply evidence justifying the collection of urine. Amicus Brief at 18-19. It is well known that alcohol naturally dissipates in the blood stream to the point where it completely disappears; indeed this has even served as a basis for the exigent circumstances exception to the warrant requirement for a blood draw. *See Schmerber v. California*, 384 U.S. 757, 770-72, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966). Alcohol and its metabolite ethyl glucuronide can last in the body for up five days following consumption, well past any time period in which a person may exhibit

signed of intoxication¹⁵. Simply hoping that a probationer who has been consuming drugs or alcohol in violation of their sentence will show up to an interview visibly intoxicated will not suffice in assisting the probation officer's efforts in rehabilitating the individual. *See Hudson v. Palmer*, 468 U.S. 517, 529, 104 S. Ct. 3194, 82 L. Ed.2d 393 (1984) (holding that "planned random searches" would allow individuals to anticipate and thus defeat the purpose of the search). Finally, Amicus suggests that random searches of probationers are unnecessary because a probationer obtaining a subsequent criminal law violation would provide ample evidence that a violation of their probation had occurred. *See* Amicus Brief at 17. This suggestion completely defeats the entire rehabilitative intent of probation, places public safety at great risk, and merits no further mention.

IV. CONCLUSION

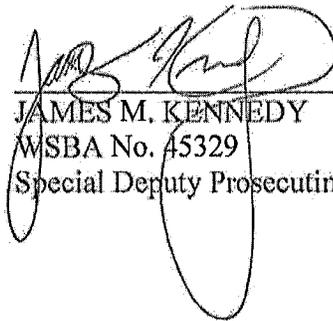
For the aforementioned reasons the Respondent respectfully requests that the Court affirm the Court of Appeals decision and reject the arguments made by Amicus Curiae American Civil Liberties Union of Washington.

¹⁵ This information can be found at - http://www.mayomedicallaboratories.com/interpretive-guide/?alpha=E&unit_code=63421

Dated this 2 day of February, 2017

Respectfully submitted,

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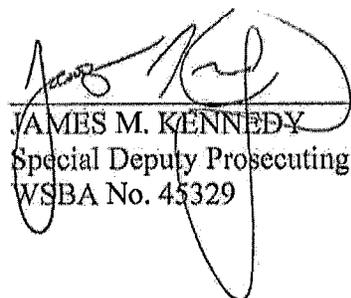
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I certify under the penalty of perjury of the law of the State of Washington that the foregoing is true and correct, signed on the 2nd day of February, 2017 in Port Angeles, WA.



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Subject: RE: State v. Olsen, Cause No. 93315-4 Respondent's Reply to Amicus ACLU of Washington

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From: Kennedy, James [mailto:jkennedy@co.clallam.wa.us]
Sent: Thursday, February 02, 2017 10:15 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Subject: State v. Olsen, Cause No. 93315-4 Respondent's Reply to Amicus ACLU of Washington

Please see the attached Respondent's Reply to Amicus Curiae ACLU of Washington

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