

NO. 93845-8

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CURTIS LAMONT CORNWELL, APPELLANT

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Appeal from the Superior Court of Pierce County No. 13-1-04618-2  
The Honorable Jack J. Nevin

Court of Appeals No. 47444-1-II

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**Court Requested Supplemental Brief of Respondent on Art.1 § 7**

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**Table of Contents**

A. HOW Art. 1 § 7 PERTAINS TO APPELLANT'S ASSIGNMENTS OF ERROR. .... 1

Was the compliance search of defendant's car lawful under article 1, § 7 when the significantly reduced privacy interest attending his community custody status was not disturbed by a violation-triggered search for contraband according to the authority of law vested in DOC by RCW 9.94A.631?.. 1

B. ARGUMENT..... 1

THE COMPLIANCE SEARCH OF DEFENDANT'S CAR WAS LAWFUL UNDER ARTICLE 1, § 7 BECAUSE THE REDUCED PRIVACY INTEREST ATTENDING HIS COMMUNITY CUSTODY WAS NOT DISTURBED BY A VIOLATION-TRIGGERED CHECK OF HIS CAR FOR CONTRABAND ACCORDING TO THE AUTHORITY OF LAW RCW 9.94A.631 VESTS IN DOC TO PROTECT THE PUBLIC WHILE IT TRIES TO REHABILITATE OFFENDERS PRONE TO RECIDIVISM. .... 1

C. CONCLUSION..... 7

## Table of Authorities

### State Cases

<i>Hertog v. City of Seattle</i> , 88 Wn.App. 41, 63, 943 P.2d 1153 (1997) (Agid, J., concurring), <i>aff'd sub nom.</i> , 138 Wn. 2d 265, 979 P.2d 400 (1999).....	6
<i>Hocker v. Woody</i> , 95 Wn.2d 822, 826, 631 P.2d 372 (1981) .....	2
<i>In re Personal Restraint of Dalluge</i> , 162 Wn.2d 814, 818, 177 P.3d 675 (2008).....	3, 5
<i>January v. Porter</i> , 75 Wn.2d 768, 776-78, 453 P.2d 876 (1969)...	2, 3, 4, 5
<i>Kellog v. State</i> , 94 Wn.2d 851, 856, 621 P.2d 133 (1980) .....	2, 4
<i>Matter of Juveniles, A, B, C, D, E</i> , 121 Wn.2d 80, 96, 847 P.2d 455 (1993).....	2
<i>Mempa v. Rhay</i> , 68 Wn.2d 882, 887, 416 P.2d 104 (1966).....	4
<i>Pierce v. Smith</i> , 31 Wn.2d 52, 57-59, 195 P.2d 112 (1948).....	2, 4
<i>Shea v. Olson</i> , 185 Wash. 143, 153, 53 P.2d 615 (1936).....	5
<i>State v. Campbell</i> , 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984).....	2
<i>State v. Coahran</i> , 27 Wn.App. 664, 666-67, 620 P.2d 372 (1981).....	2
<i>State v. Gunwall</i> , 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986) .....	5
<i>State v. Olsen</i> , (No. 93315-4, August 3, 2017) (2017 WL 3382300,*3).....	1, 2, 3, 5, 6
<i>State v. Reeder</i> , 184 Wn.2d 805, 814, 365 P.3d 1243 (2015) .....	2
<i>State v. Simms</i> , 10 Wn.App. 75, 84-85, 516 P.2d 1088 (1973) .....	2

*State v. Smith*, 111 Wn.2d 1, 8, 759 P.2d 372 (1988) ..... 5

*State v. Surge*, 160 Wn.2d, 70, 74-78, 156 P.3d 208 (2007)..... 2

*State v. Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009) ..... 1

**Federal and Other Jurisdictions**

*Griffin v. Wisconsin*, 483 U.S. 868, 875, 107 S.Ct. 3164 (1987) ..... 1

*Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972) ..... 2

*Samson v. California*, 547 U.S. 843, 852-53, 126 S.Ct. 2193 (2006) ..... 3

**Constitutional Provisions**

Article 1, § 7 ..... 1, 2, 7

Fourth Amendment ..... 1, 7

**Statutes**

Laws of 1939, ch. 142 ..... 4

Laws of 1967, ch. 134 ..... 4

RCW 9.94A.631 ..... 1, 5, 7

RCW 9.94A.631(1) ..... 3, 5, 6

RCW 9.95.110 ..... 3

RCW 9.95.220 ..... 4

**Other Authorities**

WA State Institute for Pub. Pol., Washington's Offender Accountability  
Act: Final Report on Recidivism Outcomes, pg. 5 (Jan. 2010) ..... 4

A. HOW ART. 1 § 7 PERTAINS TO APPELLANT'S ASSIGNMENTS OF ERROR.

Was the compliance search of defendant's car lawful under article 1, § 7 when the significantly reduced privacy interest attending his community custody status was not disturbed by a violation-triggered search for contraband according to the authority of law vested in DOC by RCW 9.94A.631?

B. ARGUMENT.

THE COMPLIANCE SEARCH OF DEFENDANT'S CAR WAS LAWFUL UNDER ARTICLE 1, § 7 BECAUSE THE REDUCED PRIVACY INTEREST ATTENDING HIS COMMUNITY CUSTODY WAS NOT DISTURBED BY A VIOLATION-TRIGGERED CHECK OF HIS CAR FOR CONTRABAND ACCORDING TO THE AUTHORITY OF LAW RCW 9.94A.631 VESTS IN DOC TO PROTECT THE PUBLIC WHILE IT TRIES TO REHABILITATE OFFENDERS PRONE TO RECIDIVISM.

Probationers do not enjoy privacy protection to the same degree as ordinary citizens. *State v. Olsen*, (No. 93315-4, August 3, 2017) (2017 WL 3382300,\*3). Probationers have significantly reduced privacy as they are serving a period of confinement outside prison walls. *Id.* at 3-4. They may be supervised to the extent necessitated by a system of probation that must protect the public while trying to rehabilitate people prone to recidivism. *Id.* at 3-5. Although article 1, § 7 provides greater protection than the Fourth Amendment "in some areas," supervision of convicted felons has prudently not been counted among those areas. *See Olsen*, \*4 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 875, 107 S.Ct. 3164 (1987)).<sup>1</sup>

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<sup>1</sup> *State v. Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); *State v. Surge*, 160

Article 1, § 7 analysis asks if state action "disturbed" a person's private affairs and, if so, whether it was undertaken with authority of law. *Olsen, supra* at \*2; *State v. Reeder*, 184 Wn.2d 805, 814, 365 P.3d 1243 (2015). If a private affair was not disturbed, there is no violation. *Id.* And authority of law can justify proven disturbances. *Id.* Defendant forfeited an art. 1, § 7 claim by failing to raise it below.

1. Defendant's significantly reduced privacy interests were not disturbed by the DOC search of his car.

This private affairs analysis focuses on the privacy probationers have held or should hold safe from state trespass absent a warrant in light of their significantly reduced expectation of privacy. *Olsen, supra* at \*4; *Surge*, 160 Wn.2d at 72. The property of probationers has been historically subject to compliance searches when there is reason to believe they violated a term of supervision. *Campbell*, 103 Wn.2d at 22 (citing *Hocker*, 95 Wn.2d at 866; *State v. Coahran*, 27 Wn.App. 664, 666-67, 620 P.2d 372 (1981); *State v. Simms*, 10 Wn.App. 75, 84-85, 516 P.2d 1088 (1973). This limit was to avoid violating the Fourth Amendment. *Simms*, 10 Wn.App. at 84. But the United States Supreme Court determined suspicionless probation

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Wn.2d, 70, 74-78, 156 P.3d 208 (2007); *Matter of Juveniles, A, B, C, D, E*, 121 Wn.2d 80, 96, 847 P.2d 455 (1993); *State v. Campbell*, 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984); *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981); *Kellog v. State*, 94 Wn.2d 851, 856, 621 P.2d 133 (1980) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972)); *January v. Porter*, 75 Wn.2d 768, 776-78, 453 P.2d 876 (1969); *Pierce v. Smith*, 31 Wn.2d 52, 57-59, 195 P.2d 112 (1948).

searches are constitutional. *Samson v. California*, 547 U.S. 843, 852-53, 126 S.Ct. 2193 (2006). This Court has limited them to narrowly tailored monitoring tools directly linked to supervised behavior. *Olsen, supra*, at \*5.

RCW 9.94A.631(1) predicates compliance searches of an offender's property on reasonable cause to believe a condition of supervision has been violated. The statute therefore meets, if not exceeds, minimal constitutional standards. Requiring no more to authorize a compliance search accords with this Court's understanding of supervised release dating back to at least 1969:

[A]lthough releasing a convicted felon on parole may be beneficent and rehabilitative and in the long run produce a genuine social benefit, it is also a risky business. The parole may turn loose upon society individuals of the most depraved, sadistic, cruel and ruthless character who may accept parole with no genuine resolve for rehabilitation nor to observe the laws and customs promulgated by the democratic society, which in the process of self-government granted parole.

*Porter*, 75 Wn.2d at 774 (effect given to RCW 9.95.110 through executive discretion). Privacy rights enjoyed by offenders *in custodia legis* outside prison walls are reduced to strike the precarious balance between protecting the public and providing opportunities for rehabilitation. *Olsen, supra* at \*3, 5. Their "movement and activities" are "subject to controls placed on [them] by [DOC,]" which our Legislature has explicitly and broadly empowered to maintain that control. *In re Personal Restraint of Dalluge*, 162 Wn.2d 814, 818, 177 P.3d 675 (2008).

Former approaches to supervision were probably more deferential to executive control. *E.g.*, **Kellogg**, 94 Wn.2d at 85; **Porter**, 75 Wn.2d at 774-75 (citing Laws of 1967, ch. 134); **Pierce**, 31 Wn.2d at 55, 58 (citing Laws of 1939, ch. 142). On at least one occasion, the United States Supreme Court proved more protective of probationers than Washington. **Mempa v. Rhay**, 68 Wn.2d 882, 887, 416 P.2d 104 (1966) (interpreting former RCW 9.95.220) *reversed* 389 U.S. 128, 88 S.Ct. 254 (1967) (right to counsel at revocation hearing). Reversal on the right to counsel aside, **Rhay** evinces the limited rights probationers have held in Washington:

[W]hile the probationer is not confined to a penal institution, he remains in "semi-custody...." [P]robation [] must be kept in proper perspective. [] It is a matter of privilege or Grace, authorized by the state legislature[.] [P]robationers [] are criminal offenders[.] [S]ociety has a substantial interest in guiding or conforming their future conduct-if not in terms of [] punishment, [] clearly in terms of [] rehabilitation .... [T]he matter of their liberty [] as well as limitations and termination thereof, are not to be placed in the same category with the quantum of rights the average law-abiding citizen possesses[.] [P]robationers ... have exhibited in the past a tendency [] to engage in [] antisocial conduct.

*Id.* at 885. None of the concerns driving down their privacy rights have changed. A general rise in recidivism among the more violent offenders of our era cautions against creating a new right to nexus between suspected violations and searched property that will help conceal transgressions.<sup>2</sup>

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<sup>2</sup> WA State Institute for Pub. Pol., Washington's Offender Accountability Act: Final Report on Recidivism Outcomes, pg. 5 (Jan. 2010).

2. RCW 9.94A.631(1) provides authority of law for violation-triggered compliance searches.

The state may intrude into private affairs with authority of law, which may derive from a warrant, an exception to the warrant requirement or valid (*i.e.*, constitutional) statute, common law rule or rule of this Court. *Olsen, supra* at \*3; *State v. Smith*, 111 Wn.2d 1, 8, 759 P.2d 372 (1988); *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986). A statute's validity depends on the validity of its source. *Smith*, 111 Wn.2d at 8-9.

"Police power is [] an essential element of the power to govern[.] [T]he only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any [] mandate of the constitution." *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615 (1936). "A large discretion is therefore vested in the Legislature to determine what [] public interest demands and what measures are necessary to secure [] the same." *Id.* at 154. The Legislature and this Court have long deferred to the department's implementation of probation. *Dalluge*, 162 Wn.2d at 818; *Porter*, 75 Wn.2d at 774. As probation aims at rehabilitating felons amid a public entitled to protection, the state has a compelling need for practical monitoring tools to accurately assess compliance. *Olsen, supra* at \*5.

RCW 9.94A.631 searches of offender property are a valuable tool for determining whether the twin goals of rehabilitation and community

safety are being met. As probation officers' role is rehabilitative rather than punitive—supervisory not investigatory, requiring them to investigate a nexus between reasonably suspected violations and offender property to be searched is antithetical to probation's regulatory function. *See Olsen, supra* at \*4. Missed appointments or violations unconnected to property may be symptomatic of less detectable recidivism. Compliance searches triggered by reasonably suspected violations enable the discovery of latent problems. Probation is not a game of *catch me if you can*. The competitive enterprise of ferreting out violations with costly surveillance and informant operations is police work. *Id.* It is not a function that should be expected of probation officers charged with the rehabilitative task of supervision.<sup>3</sup>

RCW 9.94A.631(1) prevents probation officers from harassing the offenders they supervise with arbitrary-exploratory searches by predicating search authority on reasonable cause to believe a violation has occurred. Once one violation is reasonably suspected, effective supervision entails the authority to accurately determine if it is an isolated incident or indicative of a larger threat to safety or rehabilitation without resorting to the expensive

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<sup>3</sup> "[H]uge caseloads and limited resources available to supervising [] state officials simply do not permit them to keep track of, much less control, every potentially dangerous defendant." *Hertog v. City of Seattle*, 88 Wn.App. 41, 63, 943 P.2d 1153 (1997) (Agid, J., concurring), *aff'd sub nom.*, 138 Wn. 2d 265, 979 P.2d 400 (1999).

investigative techniques of police. The scope of intrusion is further limited to the offender's own property and by his or her term of supervision. Yet in this case, it should be recalled that there was a nexus between the searched car and defendant's flight from it, even though such a nexus is not required by art. 1, § 7, the Fourth Amendment or RCW 9.94A.631.

C. CONCLUSION.

If this Court exercises its prerogative to reach a constitutional issue that was not preserved at trial, it should hold a probationer's significantly reduced privacy rights are not disturbed by RCW 9.94A.631 compliance searches despite the absence of a nexus between a reasonably suspected violation and offender property to be searched. A contrary holding would expand the rights of probationers likely to reoffend without a corresponding benefit to the people destined to bear the brunt of that recidivism.

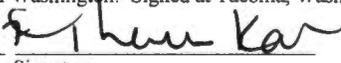
RESPECTFULLY SUBMITTED: August 28, 2017.

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The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.28.17   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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