No. 93315-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRITTANIE OLSEN,

Petitioner.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

The collection of a person's bodily fluids by requiring that she expose her genital area and urinate in a cup while being watched intrudes upon a private affair, indeed, a highly private act. A probationer cannot, in light of art. 1, sec. 7 of the Washington State Constitution, be forced to submit to this process without a well-founded suspicion that she violated a condition of sentence by consuming alcohol, marijuana, or non-prescribed drug.

II. INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of art. 1, sec. 7, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties.

III. STATEMENT OF THE CASE

This case asks whether a condition of sentence that requires a probationer to submit to random, suspicionless urinalysis (UA) violates the right to privacy under art. 1, sec. 7. Brittanie Olsen pled guilty to one count of driving while under the influence (DUI), a gross misdemeanor

under RCW 46.610.502. As a condition of a suspended sentence, the district court ordered her to refrain from consuming alcohol, marijuana, and non-prescribed drugs. The district court also ordered Olsen to submit to random UAs "to ensure compliance" with this condition. *State v. Olsen*, 194 Wn. App. 264, 267, 374 P.3d 1209 (2016). Olsen objected to the imposition of random UAs, and the Superior Court found the condition unconstitutional, vacated the sentence and ordered the district court to resentence Olsen. The State appealed, and the Court of Appeals found that Olsen had no constitutional privacy interest in the collection and testing of her urine because she was on probation for DUI. *See State v. Olsen*, 194 Wn. App. 264, 374 P.3d 1209 (2016).

IV. ARGUMENT

A. Under art. 1, sec. 7, collection of a probationer's urine constitutes a disturbance of one's private affairs and no authority of law justifies its suspicionless collection.

Washington's constitution "offer[s] heightened protection for bodily functions compared to the federal courts." *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 307, 178 P.3d 995 (2008). "Article I, section 7, is explicitly broader than that of the Fourth Amendment as it clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy." *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999) (footnote and quotations omitted).

Federal precedent allowing random UAs of probationers has minimal value in considering the same question under art. 1, sec. 7. "There are stark differences in the language of the two constitutional protections; unlike the Fourth Amendment, article I, section 7 is not based on a reasonableness standard." *York*, 163 Wn.2d at 303 (citation omitted).

> Art. 1, sec. 7 requires a two-part analysis:
>
> > First, [the court] must determine whether the state action constitutes a disturbance of one's private affairs.… Second, if a privacy interest has been disturbed, the second step in [the court's] analysis asks whether authority of law justifies the intrusion.

Id. at 306.

Here, the first question is whether requiring a DUI probationer to urinate into a cup while being watched intrudes upon the probationer's private affairs, and the second question is whether authority of law exists for random, suspicionless collection of the probationer's urine. The Court of Appeals incorrectly decided "that offenders on probation for DUI convictions do not have a privacy interest in preventing the random collection and testing of their urine when used to insure compliance with a probation condition prohibiting the consumption of alcohol, marijuana, and/or non-prescribed drugs." *Olsen*, 194 Wn. App. at 272. As such, the Court of Appeals never addressed the second question.

1. Private affairs: The constitutional right to privacy guaranteed by art. 1, sec. 7 in the collection of one's bodily fluids, e.g., monitored urination into a cup, is not abolished by probation.

When inquiring about private affairs protected under art. 1, sec. 7, a court "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Urination, undoubtedly, is a private affair. *See York*, 163 Wn.2d at 334-35 (J. M. Johnson, J., concurring).

While "student athletes have a lower expectation of privacy," *id.* at 307, they "do not shed their constitutional rights at the schoolhouse door," *id.* at 303 (internal quotations omitted). Similarly, while probationers have diminished privacy rights, probation does not wholesale abolish constitutional rights and certainly not the highly protected privacy right in the collection of one's bodily fluids. Rather, probationers, including persons on probation for DUI[1] and other alcohol and drug related offenses, retain a constitutionally protected right to privacy in the collection of their urine through monitored UAs.

The Court of Appeals held that DUI probationers have zero privacy interests in the "collection and testing of their urine," *Olsen*, 194

[1] The Court of Appeals' analysis turned solely on the status of Olsen as a DUI probationer. *See generally*, *Olsen*, 194 Wn. App. 264.

Wn. App. at 272, but improperly relied on two cases that focused only on the privacy implications of *analyzing* (or testing) bodily fluids. In both *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993) and *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007), the Court's analysis focused on the information revealed through testing, HIV status or DNA profile respectively, and not the collection process itself. *See Juveniles A, B, C, D, E*, 121 Wn.2d at 93[2] and *Surge*, 160 Wn.2d at 77-79. Indeed, the Court found that the "procedures" to collect DNA were "minimally invasive," *Surge*, 160 Wn.2d at 79—unlike the collection of urine, which is a "significant intrusion." *York*, 163 Wn.2d at 308; *see also Robinson v. City of Seattle*, 102 Wn. App. 795, 818, 10 P.3d 452 (2000) ("It is difficult to imagine an affair more private than the passing of urine.").

Surge and *Juveniles A, B, C, D, E* analyses thus do not control this Court's decision; however, the Court's decision in *York* is on point. *York* noted that collection and testing are different issues: "A student athlete has a genuine and fundamental privacy interest in controlling his or her own bodily functions. The urinalysis test is by itself relatively unobtrusive. Nevertheless, a student is still required to provide his or her bodily fluids." *York*, 163 Wn.2d at 308. While acknowledging that students have

[2] Additionally, as pointed out by this Court, "not only was *In re Juveniles A, B, C, D, E* decided under Fourth Amendment jurisprudence, but the types of privacy interests referred to originate from Fourteenth Amendment jurisprudence right to privacy, not article I, section 7." *Surge*, 160 Wn.2d at 78.

diminished privacy rights, the *York* Court found that when a student is required to provide his or her bodily fluids, "[e]ven if done in an enclosed stall, this is a significant intrusion on a student's fundamental right of privacy." *Id*. The Court's analysis hinged on "a student's privacy in the context of compelling him or her to provide a urine sample," i.e., the privacy intrusion caused by the collection process itself. *Id.*

As acknowledged by *York*, the core privacy interest implicated by UAs relates to the means of collection. As a probationer subjected to a UA, Olsen is forced to expose her genital area and excrete her bodily fluids into a cup, a process which is monitored under the watchful eye of a probation officer (or similar agent of the state). The means of collection of urine in *York* required student athletes to urinate in a cup "in an enclosed bathroom stall and a health department employee outside." *York*, 163 Wn.2d at 301. Here, *amicus* understands that a probationer is required to urinate in a cup without the privacy of a bathroom stall; in order to prevent adulteration of the urine sample, the probationer is watched as she exposes herself and urinates into a cup.[3]

[3] The record does not contain details of the procedure to be used in this case, but direct observation of urination is a common requirement for UAs conducted in the criminal justice system. *See, e.g.*, Bureau of Justice Assistance, *American Probation and Parole Association's Drug Testing Guidelines and Practices for Adult Probation and Parole Agencies* 42-43 (1991) (providing for "direct observation of the collection process"); King County Drug Diversion Court, *Participant Handbook* 8 ("The *observed* collection and scientific testing of your urine for drugs, alcohol, and other mood-altering substances is an important part of DDC.") (emphasis added).

The collection process of requiring a probationer to urinate in a cup while being watched invades one's private affairs recognized by art. 1, sec. 7. As such, the Court must determine whether authority of law exists for random UA testing of probationers.

2. Authority of law: Random UAs violate art. 1, sec. 7, which requires that the State have a well-founded suspicion of a probation violation prior to searching a probationer.

"The 'authority of law' required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions." *York*, 163 Wn.2d at 306. A search of a probationer does not always require a warrant but "art. 1, § 7 *requires* a well-founded suspicion of a [probation] violation" in order to conduct a warrantless search of a probationer. *State v. Lucas*, 56 Wn. App. 236, 243, 783 P.2d 121 (1989) (emphasis added); *see also State v. Massey*, 81 Wn. App. 198, 201, 913 P.2d 424 (1996) ("regardless of whether the sentencing court includes such language in its order … [s]earches must be based on reasonable suspicion").[4]

The State makes the novel argument that a judgment and sentence can substitute for the protections of a warrant. *See* Supp. Br. Of Resp't at 10-11. This position not only ignores *Massey's* holding that reasonable

[4] In addition to the Court of Appeals, this Court has also effectively adopted the well-founded suspicion standard. *See State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009) (recognizing parties' agreement on the standard); *see also State v. Fisher*, 145 Wn.2d 209, 35 P.3d 366 (2001) (using *Lucas* as support to adopt the well-founded suspicion standard for issuance of bench warrants for violation of conditions of presentencing release).

suspicion is required regardless of the language of the condition in the sentence, it also fails to withstand logical scrutiny. In essence, the State rests its argument on the fact that the "beyond a reasonable doubt" standard necessary for conviction is a higher standard than probable cause—an irrelevancy that, while true, ignores what is being determined in each case.

A warrant must be supported by probable cause to believe "that evidence of the criminal activity can be found at the place to be searched." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Similarly, even well-founded suspicion of a probation violation only authorizes a search if there is a nexus between the property to be searched and the violation. *See State v. Jardinez,* 184 Wn. App. 518, 338 P.3d 292 (2014). A conviction, on the other hand, says nothing about the likelihood of specific future criminal activity or probation violations, or the likelihood of finding evidence in a particular place. As such, the judgment and sentence cannot be authority of law to support an invasion of private affairs. Following the State's argument would allow unlimited invasion of probationers' privacy, with no degree of suspicion required for even the most intrusive searches.

In fact, this Court recently reaffirmed that an intrusion into the body, such as urine testing, requires not only the protections of a warrant

or a valid exception, but must *also* meet additional standards. The search method must be reasonable and be performed reasonably, and there must be a "clear indication" that evidence will be found. *State v. Baird*, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 7421395 at *5 n.3 (2016) (citations omitted). Here, it is highly questionable whether forced urination under the eyes of a third party is reasonable. And there is no indication at all, certainly no "clear" indication, that any evidence will be found because the probation condition specifies "random" urinalysis, i.e., with no suspicion of any wrongdoing. The State's position is that collection should be permitted even in the absence of any reasonable suspicion.

The State argues that Olsen lost her right to be free from governmental intrusion because she was afforded due process of law and found guilty. *See* Supp. Br. of Resp't at 11-12. This argument, if accepted, would eviscerate the exception to the warrant requirement authorizing searches of probationers only upon a well-founded suspicion, since all probationers have been afforded due process and found guilty.

Students, like probationers, have diminished privacy rights, yet this Court found that subjecting high school student athletes to random UAs violated art. 1, sec. 7. *See York*, 163 Wn.2d at 316 ("no argument has been presented that would bring the random drug testing within any reasonable interpretation of the constitutionally required 'authority of law'").

In contrast to *York's* detailed constitutional analysis of student urinalysis, the Court of Appeals has not previously considered the constitutional ramifications of random probationer UAs. *State v. Acevedo*, 159 Wn. App. 221, 248 P.3d 526 (2010) and *State v. Vant*, 145 Wn. App. 592, 186 P.3d 1149 (2008)[5] did uphold the condition of random urinalysis as part of felony sentences, but neither involved any constitutional analysis. Rather, the two courts of appeal analyzed only the statutory authority under Chapter 9.94A RCW (Sentencing Reform Act (SRA)) to impose the conditions. *See Acevedo*, 159 Wn. App. at 234 and *Vant*, 145 Wn. App. at 603-04.

Washington has not, and should not, authorize suspicionless searches of probationers by means of random UA testing.

3. The State's position has no limiting principle and would permit suspicionless searches of all probationers.

There is no rational basis to distinguish between random UA searches of DUI probationers and suspicionless searches of probationers convicted of other crimes. Most misdemeanor and all felony conditions of probation have a "direct nexus with the [probationer's] previous criminal conduct." Supp. Br. of Resp't at 7. A person convicted of a weapons

[5] These were the only cases cited by the Court of Appeals that upheld random UAs. *See Olsen*, 194 Wn. App. at 274.

offense is typically prohibited from possessing firearms as a condition of probation, but suspicionless pat-downs of the probationer's person and intensive searches of her residence are not permitted in order to ensure that she doesn't have a firearm. A person convicted of a domestic violence offense is typically prohibited from contacting the victim as a condition of probation, but suspicionless stops of the probationer while driving and suspicionless searches of his home are not permitted to ensure the victim isn't present. A person convicted of a drug offense is typically prohibited from possessing drugs and from associating with known drug dealers, but suspicionless stops of the probationer while driving, suspicionless searches of his home, and suspicionless body cavity searches are not permitted to ensure no drugs are present.

Finally, a near universal condition of probation is the requirement that one refrain from committing criminal acts. If this Court were to adopt the Court of Appeals' reasoning or the State's argument that the power to impose a probation condition also implies the power to order suspicionless searches to enforce the condition, the bases for suspicionless searches of a probationer's person, effects and home would be endless.

Upholding suspicionless searches by means of random UAs for DUI probations would create a new exception to the warrant requirement, but "this court has consistently expressed displeasure with random and

suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition." *State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007).

B. The State has no "special need" to conduct suspicionless UAs of probationers.

Washington has never adopted a "special needs" rationale as "authority of law." *See York*, 163 Wn.2d at 312. Specifically, Washington has "not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement." *Id.* at 314. In *York*, this Court found "no reason to invent such a broad exception to the warrant requirement as such an alleged exception cannot be found in the common law." *Id.* After conducting a 'special needs' analysis, this Court held,

> We cannot countenance random searches of public school student athletes with our article I, section 7 jurisprudence. As stated earlier, we require a warrant except for rare occasions, which we jealously and narrowly guard. We decline to adopt a doctrine similar to the federal special needs exception in the context of randomly drug testing student athletes.

Id. at 316.

The common law in Washington has always required that governmental officials have some level of individualized suspicion before

searching persons for drugs or alcohol. "[W]e have a long history of striking down exploratory searches not based on at least reasonable suspicion." *Id.* at 314. As documentation of this history, the *York* Court cited two cases:

> *State v. Jorden*, 160 Wn. 2d 121, 127, 156 P.3d 893 (2007) ("[T]his court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition."); *Robinson*, 102 Wn. App. at 815 ("Our Supreme Court has thus not been easily persuaded that a search without individualized suspicion can pass constitutional muster.").

Id.

Those two cases are just part of a long history; as stated decades ago by this Court, "we never authorize general, exploratory searches." *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). This Court has held that the police may not search belongings of passengers in a car without individualized suspicion that the passenger possesses a prohibited item, *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999); that suspicionless pat-down searches by police officers, conducted for safety reasons, as a condition for admission to a concert were "highly intensive"[6] and unconstitutional, *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 674, 658 P.2d 653 (1983); and that school officials violated art. 1, sec. 7 when they

[6] Undoubtedly, exposing one's genital area and urinating in a cup while being monitored is even more intensive and invasive.

mandated each student submit to an across-the-board search of her luggage as a condition to participate in a band concert tour, without having a particularized suspicion that contraband would be found, *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985). A general, suspicionless search "is anathema to Fourth Amendment and Const. art. 1, § 7 protections." *Kuehn*, 103 Wn.2d at 601-02.

Perhaps most instructive is *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988). This Court first held that the imposition of a roadblock to check for persons driving under the influence did not come "within any possible interpretation of the constitutionally required authority of law'" under art. 1, sec. 7. *Id.* at 458. In dicta, this Court also found the "checkpoint program fails a Fourth Amendment balancing test," using a different test than that used for its analysis under art. 1, sec. 7. *Id.* at 460. *Mesiani* did not consider a special needs exception to the Fourth Amendment, as that doctrine was not yet well established. Two years later, the U.S. Supreme Court did use a special needs analysis and held that such roadblocks are "consistent with the Fourth Amendment." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). Thus, *Mesiani's* dicta on the Fourth Amendment has been invalidated, but its holding under art. 1, sec. 7—a holding that is incompatible with a special needs exception—remains good law. *See, e.g.*,

York, 163 Wn.2d at 314-15; *Jorden*, 160 Wn.2d at 127 (both citing *Mesiani*). No special needs exception exists under art. 1, sec. 7, nor should this Court use this case to create one.

Perhaps recognizing that the "special needs" exception does not exist under art. 1, sec. 7, the State argues that only Fourth Amendment standards apply to searches of probationers. *See* Supp. Br. of Resp't at 9. Not surprisingly, there is no citation to authority to support this claim, because no such authority exists. Although the standards for some situations (e.g., *Terry* stops) are similar—not identical—under art. 1, sec. 7 and the Fourth Amendment, that does not mean that the Fourth Amendment is all that applies. This Court has been steadfast in "applying article I, section 7 over federal cases applying the Fourth Amendment" even in cases that turn on a determination of reasonableness. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008) (finding no reasonable belief of danger to support a frisk during a *Terry* stop). Art. 1, sec. 7 protects all persons in Washington, including probationers.

It should be noted that even if there were a "special needs" exception under art. 1, sec. 7—and to be clear, there is no such exception—it would not allow random UAs for probationers. When this Court evaluated whether the federal "special needs" doctrine allowed for nonconsensual HIV testing, the threshold question was "whether the blood

testing scheme arises from a 'special need' beyond the needs of ordinary law enforcement." *Juveniles A, B, C, D, E*, 121 Wn.2d at 91. Answering in the affirmative, the Court analyzed several factors:

> First, the testing statute is not part of the criminal code; it is designed to protect the victim, the public, and the offender from a serious public health problem. Second, unlike the typical Fourth Amendment situation, the appellants are not being tested in an effort to gain evidence for a criminal prosecution. Third, a positive HIV test does not place the appellants at risk for a new conviction or a longer sentence. Finally, traditional standards which require individualized suspicion are impractical because HIV infected sexual offenders often have no outward manifestations of infection.

Id. at 92. [7]

Here, the factors result in the opposite conclusion—ordering random UAs as a condition of probation is *not* a "special need" beyond the needs of ordinary law enforcement. First, the district court imposed random UAs following conviction for DUI pursuant to criminal statutes, RCW 3.66.067 and RCW 46.61.5055 (the SRA, applying to felonies, is also part of the criminal code). Second, while a revocation hearing is not precisely a criminal prosecution, Olsen, like any probationer being searched to determine compliance with a condition of probation, would be

[7] Notably, factors one, two and three, if applied to the facts of *York*, would tend to weigh in favor of finding a special need beyond ordinary law enforcement; nonetheless, this Court did not find a "special needs" exception in *York*. If no special need existed in *York*, certainly one cannot exist here.

tested to collect evidence that could lead to her incarceration. Third, a positive UA does place Olsen at risk for a longer sentence, as her suspended sentence could be revoked. Fourth, traditional standards of individualized suspicion are (contrary to the State's argument) practical, because, unlike HIV infection, persons under the influence of alcohol or drugs do manifest signs of intoxication, if not indefinitely, at least for hours—and the results of actions taken while intoxicated may demonstrate their irrational basis indefinitely. And finally, there are other effective means to obtain individualized suspicion that one consumed alcohol or drugs. Once that individualized suspicion has been obtained, a UA can be required; since evidence of alcohol and drug consumption remains in urine for days, a UA allows the State to confirm its suspicion of a probation violation days after the probationer consumed the alcohol or drug.

The Court should reach the conclusion that there is no "special need" for random UAs under even the federal doctrine, and certainly not under our stronger state constitution.

C. Suspicionless UAs are unnecessary.

Ordering probationers to submit to random UAs might be common practice, but that does not make it constitutional. The State argues that random UAs are the easiest way to obtain evidence of violation of probation conditions. But ease does not equate, or even correlate, with

constitutional viability.

Rather than ordering random UAs as a condition of probation, sentencing courts can instead permit a UA if a probation officer has a well-founded suspicion that the probationer has violated a nonconsumption condition. Probation officers may view visible signs of impairment (which last for hours), or observe erratic behavior that may indicate drug or alcohol usage; if the probationer has an alcohol or substance abuse problem, these signs are likely to be noticed by a trained probation officer. In addition, probation officers can establish suspicion for a UA in all the ways available for establishing grounds to search for other violations of probation. Probation officers can receive a tip, including information from other law enforcement officers. They can interview witnesses themselves. And they can take note of drug paraphernalia or alcohol while visiting the probationer.

For example, in *Lucas*, the court ordered a probationer to "submit to a search of [his] person, residence, vehicle and other belongings when ordered to do so by the community corrections officer." *Lucas*, 56 Wn. App. at 237-38. The officers developed reasonable suspicion to search his home after officers saw marijuana plants in plain view and noted Lucas's nervous, uneasy behavior. *See id.* at 244-45. The officers in *Lucas* lawfully obtained evidence and abided by the constitutional requirements

necessary to search a probationer without any compromise of the State's interest in preventing violation of conditions.

Further, after well-founded suspicion has been established, a UA remains a powerful tool to uncover evidence for an extended period of time. If a probationer violated her conditions of probation by consuming alcohol or drugs, a UA would be able to detect the presence of those substances for days after consumption. And, regardless of the amount of alcohol or drugs detected, the probationer would be in violation with a positive UA. A UA search is by nature more expansive than a home search, which can uncover only evidence that exists at the time of the search and more fruitful than a bodily fluids search following arrest for DUI.[8] Any proclaimed need for suspicionless UA searches is even less compelling than the need to search a probationer's home, which the court found required well-founded suspicion. *See Lucas,* 56 Wn. App. at 243.

Random, suspicionless searches of one's person or home will always provide a significantly greater opportunity to uncover wrongdoing, including violations of probation. However, this rationale has never

[8] Unlike blood and breath tests, which measure current levels of substances in the bloodstream, urinalysis can detect trace chemicals that persist longer and indicate past consumption of substances. This is particularly true for detecting alcohol; rather than looking for the presence of alcohol itself, which dissipates quickly, urinalysis can test for ethyl glucuronide (EtG), a metabolite of alcohol which is widely reported to persist in urine for up to 80 hours. *See, e.g., EtG Test - EtG / EtS - Ethyl Glucuronide Ethyl Sulfate Alcohol Drug Test* (visited Dec. 30, 2016) < http://etg-test.com/>.

provided a basis for a search; indeed, it is this very type of reasoning that art. 1, sec. 7 forestalls. No authority of law exists to allow suspicionless UAs of probationers, including DUI probationers, under art. 1, sec. 7 and Washington precedent.

V. CONCLUSION

"No matter the drawbacks or merits of [probationer] random drug testing, we cannot let the policy stand if it offends our constitution." *See generally, York*, 163 Wn.2d at 302–03. The policy of collecting and testing probationers' urine through random UAs cannot stand, as it offends art. 1, sec. 7. We respectfully request this Court to reverse the Court of Appeals, recognize that probationers retain a privacy right in their urination, reject the establishment of a special needs exception under art. 1, sec. 7, and hold that a condition of probation can only order urinalysis if a probation officer has a well-founded suspicion that the probationer has violated a condition of nonconsumption of alcohol or drugs.

DATED this 6th day of January, 2017.

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