

COURT OF APPEALS
CLERK OF COURT
STATE OF WASHINGTON
2019
JUN 11 11:19
[Signature]

NO. 35701-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HARRY YBARRA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn Stolz, Judge
The Honorable Linda Lee, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant
WSBA# 20955

LAW OFFICES OF LISE ELLNER
P.O. Box 2711
Vashon, WA 98070

2019-09-07

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. Procedural Facts	1
2. Substantive Facts.....	2
C. <u>ARGUMENTS</u>	3
1. COUNSEL'S REFUSAL TO ASSIST APPELLANT WITHDRAW HIS PLEA BEFORE SENTENCING VIOLATES CONSTITUTIONAL RIGHT TO COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS.....	3
2. THE COMPELLED DNA SAMPLE VIOLATED YBARRA'S FOURTH AMENDMENT AND ARTICLE 1, § 7 RIGHTS.....	5
1. <u>The Search Violated the Fourth Amendment</u>	6
2. <u>The search violated the Washington Constitution</u>	14
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Garrison v. Rhay</u> , 75 Wn. App. 98, 449 P.2d 92 (1968).....	4
<u>Keuhn v. Renton School District</u> , 103 Wn.2d 594, 694 P.2d 1078 (1985).....	16
<u>Robinson v. City of Seattle</u> , 102 Wn. App. 795, 10 P.3d 452 (2000).....	15-17
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	14, 15
<u>State v. Davis</u> , 125 Wn. App. 59, 104 P.3d 11 (2004).....	3
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	14
<u>State v. Harell</u> , 80 Wn. App. 802, 911 P.2d 1034 (1996).....	4,5
<u>State v. Haynes</u> , 16 P.3d 1288 (2001).....	4,5
<u>State v. Jackson</u> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	14-15
<u>State v. Jones</u> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	14
<u>State v. Lucas</u> , 56 Wn. App. 236, 783 P.2d 121, <u>rev. denied</u> , 114 Wn.2d 1009 (1989).....	15

<u>TABLE OF AUTHORITIES (CONT'D)</u>	Page
 <u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Mierz</u> , 127 Wn.2d 460, 901 P.2d 286 (1995).....	4
<u>State v. Olivas</u> , 122 Wn.2d 73, 856 P.2d 1076 (1993)	7, 9, 14
<u>State v. Raskin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004)	14
<u>State v. Surge</u> , 122 Wn. App. 448, 94 P.3d 345 (2004), <u>rev. granted</u> , No. 76013-6 (February 1, 2005)	8, 9, 11-14
<u>State v. White</u> , 135 Wn.2d 761, 958 P.2d 982 (1998)	15
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994)	14, 15
 <u>FEDERAL CASES</u>	
<u>City of Indianapolis v. Edmond</u> , 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).....	13
<u>Ferguson v. City of Charleston</u> , 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001).....	13
<u>Green v. Berge</u> , 354 F.3d 675 (7th Cir. 2004)	9,10
<u>Illinois v. Lidster</u> , 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004).....	13

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

<u>Jones v. Barnes,</u> 63 U.S. 745, 103 S.Ct 3308, 77 L.Ed.2d 987 (1983).....	4
<u>New Jersey v. T.L.O.,</u> 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).....	6
<u>Rise v. State of Oregon,</u> 59 F.3d 1556 (9th Cir. 1995)	9, 11-13
<u>Schmerber v. California,</u> 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).....	5
<u>Skinner v. Railway Labor Executives Ass'n,</u> 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).....	5
<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	4
<u>United States v. Kincade,</u> 379 F.3d 813 (9th Cir. 2004)	13,14
<u>United States v. Knights,</u> 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001).....	11, 12
<u>United States v. Miles,</u> 228 F. Supp. 2d 1130 (E.D. 2002)	8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
Const. art. 1, § 7	1, 5, 6,14, 15
Laws of 1989, ch. 350, § 1	8
Laws of 1999 ch. 329 § 1	8
RCW 43.43.753	6,7,10
RCW 43.43.754	6,7,10, 17
U.S. Const. amend. 4.....	4
CrR 4.2(f).....	3

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered appellant to submit a biological sample for submission to deoxyribonucleic acid (DNA) databanks.

2. Appellant was denied effective assistance of counsel when his attorney failed to pursue Mr. Ybarra's CrR 4.2(f) motion to withdraw his plea.

3. The trial court erred when it refused to entertain Mr. Ybarra's 4.2(f) motion to withdraw his plea.

Issues Pertaining to Assignment of Error

1. Involuntary DNA sampling is a search, which must be reasonable under the Fourth Amendment and the greater right to privacy protected by Article 1, § 7 of the Washington Constitution. Suspicionless searches are not reasonable unless they are justified by "special needs," which must not primarily be for normal law enforcement purposes and, under the Washington Constitution, must also be narrowly tailored to meet a compelling state interest. Were appellant's state and federal rights violated by the involuntary, suspicionless DNA sampling he was required to undergo?

2. A defendant is entitled to effective representation at a 4.2(f) motion to withdraw a plea. Is appellant denied effective assistance of counsel when his attorney refuses to represent him in bringing this motion?

B. STATEMENT OF THE CASE

1. Procedural Facts

On April 21, 2006, the state charged appellant Harry Eugene Ybarra with Unlawful possession of a firearm in the first degree and unlawful

possession of a controlled substance and making a false statement to a public servant. CP 1-2. On June 27, 2006, Ybarra pled guilty to as charged Supp C.P. (Statement of Defendant on Plea of Guilty 6-27-06). Ybarra was sentenced on November 29, 2006. CP 25-29. Ybarra stipulated to his record and offender score. CP 9-11. As part of the sentence, the court ordered Ybarra to provide a biological sample for submission to DNA databanks. CP 25-29. On December 29, 2006 Ybarra filed a motion to modify his sentence. CP 31-41. The court denied his motion to modify his sentence. Ybarra filed this timely appeal. CP 30.

2. Substantive Facts

Ybarra was advised of the rights he was waiving during the plea colloquy with the trial judge. RP 4-11. During the sentencing hearing, the defense recommended a DOSA. 1RP 13-14. The Court refused to order a DOSA instead imposing the high end of the standard range. 1RP 17-18. In the middle of the judge's pronouncement of her sentence but before she was done, Mr. Ybarra asked if he could withdraw his plea. RP 19. The Court responded "Not at this time". Mr. Ybarra asked for help withdrawing his plea and his attorney told him "I talked to you about the legal basis, but we'll talk about it further. Right now, we've got to get --" . Id. The Judge interjected: "Just because you don't like a sentence isn't a reason to --." Id. Mr. Ybarra responded, "It wasn't the --part of the sentence part, ma'am." Id. Defense counsel stated that he had a job to do and would answer questions later. 1RP

19-20. The judge then told Mr. Ybarra to be quiet because his comments were being recorded. Id.

C. ARGUMENTS

I. COUNSEL'S REFUSAL TO ASSIST APPELLANT WITHDRAW HIS PLEA BEFORE SENTENCING VIOLATES CONSTITUTIONAL RIGHT TO COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS.

CrR 4.2(f) controls motions to withdraw a guilty plea before a judgment and sentence is finalized. CrR 4.2(f); State v. Davis, 125 Wn. App. 59, 68, 104 P.3d 11 (2004). A judgment is finalized when the judgment and sentence is signed by the trial judge and filed with the law clerk. Id. A defendant need not make a motion in writing under 4.2(f), rather an oral motion is sufficient. A defendant is also entitled to counsel during a 4.2(f) motion to withdraw a plea because this is considered a critical stage of the proceedings. Davis, 125 Wn. App. at 68. A judgment is finalized when the judgment and sentence are filed with the law clerk. Davis, 125 Wn. App. at 68. In Davis, the Court of Appeals held that the trial court erred by refusing to consider the merits of his motion to withdraw his guilty plea. Id. The Court of Appeals reversed and remanded for a hearing on the merits of Davis's motion. Id.

In the instant case, Mr. Ybarra asked to withdraw his plea during the sentencing hearing. He was interrupted by the court and his own attorney and told to be quiet. His own attorney failed to bring the motion before the court.

This denied Mr. Ybarra his right to a determination of the merits of his motion and denied him his constitutional and statutory right to counsel at a critical stage of the proceedings. *Id.*

A criminal defendant has the constitutional right to effective assistance of counsel. The state and federal constitutions guarantee defendants reasonably effective representation by counsel at all critical stages of a proceeding. U.S. Const., amend 6; Wash. Const. art 1 sect. 22; Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); State v. Haynes, 16 P.3d 1288 (2001), citing, State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). A stage of a proceeding is considered critical if it “presents a possibility of prejudice to the defendant.” State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996), citing, Garrison v. Rhay, 75 Wn. App. 98, 102, 449 P.2d 92 (1968). It is defense counsel’s effective representation that is supposed to ensure that the defendant is able “to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal.” Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct 3308, 77 L.Ed.2d 987 (1983).

A defendant has a constitutional right to appointed counsel at all critical stages of a criminal prosecution.” State v. Haynes, 16 P.3d 1288 (2001), citing, State v. Harell, 80 Wn. App. at 804. “A plea withdrawal

hearing is a critical stage of a criminal prosecution.” *Id.* “An outright denial of the right to counsel is presumed prejudicial and warrants reversal without a harmless error analysis.” *Haynes*, citing, *Harell*, 80 Wn. App. at 805. In *Harell*, the defendant was denied the right to counsel outright because his attorney refused to assist him with his motion to withdraw his guilty plea, and the attorney testified as a witness for the State at the plea withdrawal hearing. *Harell*, 80 Wn. App. at 805.

In the instant case as in *Harell*, counsel refused to assist Mr. Ybarra with his motion to withdraw his guilty plea. As in *Harell*, this was an outright denial of counsel at a critical stage of the proceedings. The remedy is reversal and remand for a new hearing with the appointment of counsel. *Id.*

2. COMPELLED DNA SAMPLE VIOLATED
YBARRA'S FOURTH AMENDMENT
AND ARTICLE 1, § 7 RIGHTS.

Where a person is required to submit to a blood draw or a cheek swab for DNA analysis, the procedure amounts to a search under the Fourth Amendment and Article I, § 7 of the Washington Constitution. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *State v. Surge*, 122 Wn. App. 448, 452, 94 P.3d 345 (2004), *rev. granted*, No. 76013-6 (February 1, 2005). Such a seizure is unconstitutional unless it is constitutionally "reasonable." *See Schmerber v.*

California, 384 U.S. 757, 767, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

In general, a search is not reasonable in the absence of individualized suspicion of wrongdoing. New Jersey v. T.L.O., 469 U.S. 325, 340, 105 S. Ct. 733, 748, 83 L. Ed. 2d 720 (1985). A limited exception exists if there are "special needs" which make the warrant and probable cause requirements impractical. Id., at 351. The "special needs" exception does not apply, however, when the search is for normal law enforcement purposes. Skinner, 489 U.S. 602.

In this case, Ybarra was ordered to submit to a suspicionless sampling of his DNA under RCW 43.43.754, which provides, in relevant part, "[e]very adult or juvenile individual convicted of a felony . . . must have a biological sample collected for purposes of DNA identification analysis." This Court should reverse that order, order the samples which have been taken destroyed and order all records of those samples or the results of testing of those samples purged from every database and other location in which they are currently stored, because the order violated Ybarra's Fourth Amendment rights and his rights under Article I, § 7 of the Washington Constitution.

1. The Search Violated the Fourth Amendment

First, this Court should hold that the order violated Ybarra's Fourth Amendment rights to be free from unreasonable searches and seizures, because it forced him to submit to a suspicionless search which was not

authorized by the "special needs" exception. The stated purposes of such searches under RCW 43.43.754, and the resulting compiling of information for a data bank as set forth when the statute was first enacted, were "for future identification and prosecution." See State v. Olivas, 122 Wn.2d 73, 90-91, 856 P.2d 1076 (1993). More recent enactments of the legislature have declared the purpose of the searches and the data bank as providing an important tool "in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts," as well as to "assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons." RCW 43.43.753.

In addition, the legislature has specifically indicated that biological samples collected under the statute "be used only for purposes related to criminal investigation, identification of human remains or missing persons," or improvement of the collection system itself. Id. RCW 43.43.754 states that the collected samples are to "be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons." RCW 43.43.754(2). In greatly expanding the types of offenders who must give biological samples for the data bank in 1999, the Legislature declared:

The legislature finds it necessary to expand the current pool of convicted offenders who must have a blood sample drawn for purposes of DNA identification analysis. The legislature

further finds that there is a high rate of recidivism among certain types of violent and sex offenders and that drawing blood is minimally intrusive. Creating an expanded DNA data bank bears a rational relationship to the public's interest in enabling law enforcement to better identify convicted violent and sex offenders who are involved in unsolved crimes, who escape to reoffend, and who reoffend after release.

Laws of 1999 ch. 329 § 1.

Thus, the purposes of the searches and the resulting data bank are not unusual "special needs," but rather the normal law enforcement goals of solving crimes, as well as a more ancillary goal of identifying missing persons. Because the statute does not require particularized, individualized suspicion before the blood draw search and because the purposes served by the statute are not "special needs," the searches under the statute are unconstitutional under the Fourth Amendment. United States v. Miles, 228 F. Supp. 2d 1130, 1139 (E.D. 2002) (purpose of federal DNA statute is normal law enforcement; statute therefore unconstitutional because no showing of individualized suspicion is required). Therefore, the foundational justification for a "special needs" analysis does not exist here.

Recently, this Court has held that the suspicionless DNA searches under Title 43 RCW were justified under the "special needs" exception to the warrant and probable cause requirements, because the search was not "primarily for the normal law enforcement purpose of prosecuting current crimes." Surge, 122 Wn. App. at 459. As an alternate theory, the Court

upheld suspicionless compelled DNA testing based on a "totality of the circumstance" analysis, taking into account "the multiple factors of reduced expectations of privacy held by convicted felons, minimal intrusiveness of blood drawing, and [the] public's incontestable interest in deterring recidivism and identifying persons who commit crimes[.]" Surge, 122 Wn. App. at 459 (citing Rise v. State of Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995)).

Surge was wrongly decided, for several reasons.¹ First, the conclusion that the "special needs" exception supported the statute was erroneous. Surge reached this conclusion by relying on Green v. Berge, 354 F.3d 675 (7th Cir. 2004), a case in which the 7th Circuit upheld the Wisconsin statute under the "special needs" analysis because it believed the statute's purpose was to "obtain reliable proof of a felon's identity." 354 F.3d at 677-78.

Surge's reliance on Green was misplaced. Green did not interpret the Washington statute, nor did it apply the Washington Legislature's declared purpose in enacting the statute, which is not solely getting "reliable proof of a felon's identity" but rather the "normal need" of law enforcement "to assist in the investigation and prosecution of criminal offenses." State v. Olivas, 122 Wn.2d 73, 101, 856 P.2d 1076 (1993) (Utter, J., concurring); Laws of 1989,

¹ The Washington Supreme Court has accepted review of this Court's opinion in Surge. State v. Surge, 122 Wn. App. 448, 94 P.3d 345 (2004), rev. granted, No. 76013-6 (February 1, 2005). The case was argued on May 26, 2005.

ch. 350, § 1 (enacting the earlier version of the DNA statute because it will provide "a reliable and accurate tool for investigation" of certain offenses); RCW 43.43.754(2) (current statute is "solely for . . . identification, analysis and prosecution of a criminal offense"); RCW 43.43.753 (purpose is to provide an important tool "in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts," as well as to "assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons").

Indeed, Green did not even discuss the Wisconsin Legislature's purpose in enacting the statute, nor cite any authority for its declaration that that state's Legislature had the purpose of obtaining "reliable proof of a felon's identity" in enacting Wisconsin's statute. See Green, 345 F.3d at 677-78. Further, Green failed to take the next, required step in the analysis: determining whether obtaining proof of identity is, in fact, a normal law enforcement purpose such that the "special needs" exception to the warrant requirement did not apply. Id.

Thus, Green did not interpret the statute at issue in this case, did not properly determine the purpose of the statute it purported to interpret, and did not examine whether the purpose it said the statute served was a normal

law enforcement purpose, prior to holding that the Wisconsin statute was constitutional. Surge's heavy reliance on Green was therefore misplaced.

In addition, the "totality of the circumstances" test used as a fallback position in Surge was erroneous. Surge declared that, even if the decision in Olivas regarding the "special needs" analysis was no longer good law, and even if Green was somehow wrongly decided, the Washington statute was constitutional under a "totality of the circumstances" analysis. Surge, 122 Wn. App. at 459-60. According to Surge, application of that standard was proper under United States v. Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), and Risc, supra. Surge, 122 Wn. App. at 459-60.

But those cases do not support application of a "totality of the circumstances" standard to determining whether the statute here was proper, instead of applying the well-established "special needs" analysis. In Knights, the person subjected to the search was not a prisoner but a probationer, who had agreed to a condition of probation which required him to submit to searches. 534 U.S. at 119. The Knights Court looked at the issue under the "general Fourth Amendment approach of examining the totality of the circumstances" in order to determine whether a search was lawful, based upon the "reasonable suspicion" that had supported it. Id.

Thus, the Knights Court was not holding, as Surge indicates, that it is proper to simply look at the "totality of the circumstances" to see whether a

suspicionless search is justified, despite the clear "special needs" standard; it was applying the "totality of the circumstances" test as it has traditionally been applied – to determine whether suspicions supporting a search were sufficient.

Indeed, the Knights Court specifically refused to hold that a person's status as a probationer supported suspicionless searches, declaring:

We do not decide whether the probation condition so diminished, or completely eliminated, Knights's reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. . . We do not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

534 U.S. at 119-20 n.6 (emphasis added).

Surge's reliance on Rise is also misplaced. In Rise, the majority held it did not need to determine if the Oregon DNA statute served legitimate penal interests, because the statute was justified by "law enforcement purposes." 59 F.3d at 1558-59. The Rise majority went on to hold that sticking a needle in someone's arm and taking their blood without suspicion was "reasonable," because it was not really a "significant intrusion" into their privacy and the government had produced "uncontroverted evidence" of a high rate of recidivism of the limited classes of people subjected to the intrusion, *i.e.*, convicted murderers and certain sex offenders. 59 F.3d at 1561. In reaching its conclusion, the Rise Court did consider the reasonableness of the search by looking at the "minimal" degree of the intrusion, the lesser expectation of

privacy an inmate enjoyed, and the public interests involved, as noted in Surge. See Rise, 59 F.3d at 1562; Surge, 122 Wn.2d at 459-60.

Rise, however, was decided before recent relevant U.S. Supreme Court decisions on the "special needs" exception to the warrant requirement. See City of Indianapolis v. Edmond, 531 U.S. 32, 42-43, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000); Ferguson v. City of Charleston, 532 U.S. 67, 83, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); Illinois v. Lidster, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004). In Edmond, Ferguson, and Lidster, the U.S. Supreme Court clarified that the "special needs" exception cannot be applied unless the search is designed to serve needs other than just law enforcement. See, e.g., Ferguson, 532 U.S. at 82-83 (purpose must be to serve needs "beyond the normal need for law enforcement"). Rise did not apply that limitation when analyzing the validity of the Oregon statute, instead specifically holding the statute reasonable because it was justified by "law enforcement purposes." 59 F.3d at 1558. Thus, Rise is no longer good law under the proper "special needs" analysis standard.

In any event, under the new "totality of the circumstances" standard of Surge, anyone with anything less than the full panoply of privacy rights is subject to having the government involuntarily draw their blood for testing. As four of the judges dissenting in the recent Kincade decision in the 9th Circuit noted, people who meet that standard include students in public high schools or universities, people seeking driver's licenses, people applying for federal employment, people having federal identification, or people desiring to travel

by airplane. United States v. Kincade, 379 F.3d 813, 844 (9th Cir. 2004) (Reinhardt, J., dissenting). The Fourth Amendment simply cannot support such an expansive analysis in cases where there is a reduced expectation of privacy, rather than requiring the proper "special needs" analysis to apply. This Court should so hold and reverse.

2.The search violated the Washington Constitution

Even if the search was not unconstitutional under the Fourth Amendment, this Court should hold it unconstitutional under this state's constitution. The Washington Constitution expressly guarantees the right to privacy:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Const. art. 1, § 7. The Washington Supreme Court has not addressed the validity of the DNA statute under Article 1, § 7. See Olivas, 122 Wn.2d at 82. Nor did the Court in Surge. Surge, supra.

It is by now well settled that the Washington Constitution provides broader protection of individual privacy than does the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004); State v. Jackson, 150 Wn.2d 251, 260-61, 76 P.3d 217 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); State v. Young, 123 Wn.2d 173, 182-83, 867 P.2d 593 (1994); State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990). No separate Gunwall analysis is necessary. Rankin, at 694

(citing State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)); Jackson, 150 Wn.2d at 259.

Washington law recognizes that probationers and parolees retain at least a minimal expectation of privacy under Article 1, § 7. See State v. Lucas, 56 Wn. App. 236, 244, 783 P.2d 121, rev. denied, 114 Wn.2d 1009 (1989). Further, as this Court has recognized, Washington has provided "consistent protection" of the privacy of the body and bodily functions, including the passing of urine and the provision of bodily samples for analysis. Robinson v. City of Seattle, 102 Wn. App. 795, 810, 10 P.3d 452 (2000). As Robinson declared, "[t]here is . . . no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from government trespass." 102 Wn. App. at 819.

Indeed, there can be no question that the information revealed under the DNA testing statute is not the type normally exposed to the public or observable without enhancement devices from an unprotected area. It involves the forced extraction of DNA, the microscopic and chemical analysis and typing of that DNA, and the currently unlimited retention of that information in government databases. Therefore, the information is unquestionably subject to protection under the state constitution. See c.g., Young, at 182-83 (thermal imaging device, when directed at a person's house, is an invasion of privacy protected by the state constitution); see also, Jackson, 150 Wn.2d at 260-64 (government's planting of a global positioning device is an invasion requiring probable cause and a warrant); Boland, 115 Wn.2d at

577-78 (government's search of garbage cans placed at the curb is an invasion requiring a warrant).

As this Court has noted, the Washington Supreme Court has "not been easily persuaded that a search without individualized suspicion can pass constitutional muster." Robinson, 102 Wn. App. at 816. Indeed, the Court has held that, in the absence of individualized suspicion of wrongdoing, a search is a "general" search which is never authorized under our constitution except for in the most compelling circumstances. Keuhn v. Renton School District, 103 Wn.2d 594, 601-602, 694 P.2d 1078 (1985). Such circumstances only exist if the purpose of the search satisfies the "special needs" exception, defined in Washington not only in light of Fourth Amendment jurisprudence but also by looking at whether the statute authorizing the search is very narrowly drawn and supported by such compelling state interests that it justifies the invasion into the cherished privacy protections Washington guarantees. See Robinson, 102 Wn. App. at 816-17.

In Robinson, this Court struck down a law requiring applicants for employment to submit to urine testing. The Court noted that the government's interest is only "compelling" if there is very serious, real potential jeopardy to the public which will occur if the testing was not done and a person on drugs performed their government job, and concluded that the "breathhtakingly broad" testing of all applicants was far from narrowly tailored, requiring testing of everyone regardless whether there was any evidence that performing their jobs drunk or on drugs would cause a serious risk of public

safety. 102 Wn. App. at 823-24. Put simply, the Court said, there is no explanation for testing accountants, ushers, librarians or public relations specialists when there is no evidence their duties are "implicating public safety." Id. In addition, this Court noted, the reasons behind the testing were not simply those of "public safety" concerns but also included concerns about absenteeism, work difficulties, substandard work, more frequent turnover, and liability to third parties caused by drug use on the job. Id. The Court stated that, despite the important efficiency and cost concerns involved, the need to protect the "fragile values" of privacy was "acute," noting that, for example, "police procedure would be vastly less costly and more efficient were it not for the constraints of the constitution." 102 Wn. App. at 827. The Court concluded that the testing was far too broad and not "narrowly tailored" to meet the public safety interest, and thus struck down the law. 102 Wn. App. at 827-28.

Similarly, here, RCW 43.43.754 does not meet the "special needs" requirement as applied under the greater protection of our state constitution. Far from being "narrowly tailored," the statute requires everyone, even non-violent offenders, to submit to a suspicionless search in order to provide the police with a general tool to do their every day jobs. There is no question they may be more efficient in doing those jobs. But the interests of efficiency furthered by the statute simply do not justify the intrusion into the protected privacy rights guaranteed by the Washington Constitution. This Court should so hold and should reverse.

D. CONCLUSION

This Court should reverse the order requiring Ybarra to submit to DNA testing. It should also order the samples which have been taken destroyed and order all records of those samples or the results of testing of those samples purged from every database and other location in which they are currently stored.

DATED this 9th day of April, 2007.

Respectfully submitted

LAW OFFICES OF LISE ELLNER



Lise Ellner, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Harry Ybarra, DOC # 928230 MICC PO Box 88900 Steilacoom, WA 98388-0900 a true copy of the document to which this certificate is affixed, on April 9, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

FILED
COURT OF APPEALS
TACOMA, WA
07 APR 10 PM 1:20
STATE OF WASHINGTON
BY _____
DEPUTY