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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DORCY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION TWO**  
**NO. 36269-4-II**

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**STATE OF WASHINGTON,**  
Respondent,  
Vs.  
**AMBER DEE ROSE,**  
Petitioner.

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**BRIEF OF RESPONDENT**

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From the Superior Court of the State of Washington for Mason County  
Case No. 07-1-00123-9

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## **I. ASSIGNMENT OF ERROR**

Did the court below commit error when it imposed conditions of pretrial release including, among others, a prohibition against using unprescribed drugs and alcohol and a requirement for weekly urinalysis to ensure compliance therewith when those conditions were imposed as a package of conditions designed to ensure responsiveness to the court's jurisdiction and the safety of the community at large?

## **II. STATEMENT OF THE CASE**

The State accepts Petitioner's recitation of the procedural and substantive facts for the purpose of this response.

## **III. ARGUMENT**

The trial court may (and should) in its discretion impose conditions of release designed to ensure the safety of the community as well as the future appearance of the accused, and is specifically authorized to that end to prohibit the possession and/or consumption of intoxicating liquors or drugs not prescribed to the accused. CrR 3.2(2)(3). Once, under the circumstances of the case, the court has so determined that possession and/or use of alcohol or unprescribed drugs by the accused poses a danger to the community, Respondent State of Washington submits that pretrial drug testing is the least restrictive means to ensure compliance with that condition before such a danger can be realized.

Consequently, the issue before this Court is whether the trial court has abused its discretion in imposing the conditions at issue here under the facts of this particular case. Once a trial court determines that bail and/or other conditions of release are necessary, the amount of the bail and the nature of the other conditions are within the discretion of the trial court and are only disturbed on appeal for manifest abuse of that discretion. State v. Reese 15 Wash. App. 619, 620 (Div. 3, 1976); State v. Goodwin, 4 Wash. App. 949, 951 (Div. 3, 1971).

One charged with a crime is entitled by court rule to a *presumption* of release on personal recognizance, but is not *entitled to release* without any conditions. CrR 3.2; Goodwin, 4 Wash. App. at 950-51; State v. Perez, 16 Wash. App. 154, 157 (Div. 3, 1976). The law and court rules are clear that the trial court may, in its discretion and upon some evidentiary showing at the preliminary appearance, order the release of the accused upon certain conditions.

**A. The trial court is authorized to impose conditions of pretrial release deemed in its discretion to be appropriate to protect the community and to assure the presence of the accused at future court proceedings.**

Petitioner argues that the weekly submission to urinalysis constitutes a search lacking probable cause and is, therefore, unconstitutional as a condition of pretrial release. For this premise, Petitioner principally relies upon general legal definitions of the term

“search” and upon State v. Surge, 122 Wash. App. 448 (Div. 1, 2004). The Respondent does not disagree with the general proposition that a urinalysis is a search.

The court in Surge was faced with consideration of the constitutionality of state law requiring submission of a DNA sample upon conviction of a felony offense. Surge, 122 Wash. App. at 451. Relying in part on a “special needs” analysis, that court ultimately concluded that the post-conviction collection of DNA by means of a blood draw or a cheek swab, although a search, was neither precluded by the Fourth Amendment to the US Constitution nor by Article I, Section 7 of the Washington Constitution. Surge, 122 Wash. App. at 459-60.

Petitioner also relies upon the Ninth Circuit case of United States v. Scott, 450 F.3d 863 (9<sup>th</sup> Cir. 2006), for the proposition that pretrial urinalysis is a search that must be supported by probable cause (and presumably a warrant) and that, therefore, the conditions at issue here are unconstitutional. The Scott case specifically rejected a “special needs” analysis as to pretrial drug testing as a condition of release, but did so on facts completely distinguishable from the condition complained of in this case.

In Scott, the defendant was released upon conditions, including “random” drug testing “anytime of the day or night by any peace officer without a warrant” and that his home may be searched for drugs “by any

peace officer anytime[,] day or night[,] without a warrant.” Scott, 450 F.3d at 865. Such a search and seizure in fact took place, without a warrant or probable cause, and a separate criminal prosecution was instituted based upon evidence seized during the search of his home. Scott, 450 F.3d at 865.

The court in Scott recognized the “special needs” principal, the same used to uphold the post-conviction collection of DNA in Surge, discussed above. *Id.* at 868-70. Under a “special needs” analysis, the normal proof thresholds prior to a search and seizure are relaxed “when special needs, beyond the normal need for law enforcement, make an insistence on the otherwise applicable level of suspicion impracticable.” Scott, 450 F.3d at 868 (internal quotations omitted; citing in part, Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)). However, that court went on to hold that the condition at issue in that case did not satisfy the special needs analysis because it was related to the normal need for law enforcement and had a tenuous and speculative connection to appearance at court proceedings. Scott, 450 F.3d at 870.

The Scott court specifically reasoned that the condition of release at issue there was designed to prevent arrestees from committing crime, and that “crime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need.” Scott, 450 F.3d at 870. The condition at issue in Scott was sufficiently broad that the

defendant whose release was subject to that condition subjected his home and person to random searches by any peace officer without limitation as to time of day and/or location. That condition could, and in fact did, yield evidence of a criminal law violation used to support a separate investigation and prosecution.

In contrast, the condition at issue before this Court directly relates to the specifically authorized interest charged to the trial court of protecting the community from a risk posed by one under its jurisdictional authority. The court made a finding that “there exists a substantial danger that the defendant will commit a serious crime, or that defendant’s physical condition will jeopardize the defendant’s personal safety or that of others, or that defendant will seek to intimidate the witnesses or otherwise unlawfully interfere with the administration of justice...”. (See Appendix A to Petitioner’s Motion for Discretionary Review, Item Nos. 8.e, f, g, h.) The trial court prohibited use of alcohol and unprescribed drugs as part of a package of conditions of release, all designed to take into consideration the court’s two primary concerns: safety of the community and future appearance of the defendant at required proceedings. CrR 3.2(a). This is far more specific than general crime prevention, it implicates a compelling interest of the government, is directly related to efficient judicial administration, and it is narrowly drawn to meet that end.

The defendant in this case presented at her preliminary appearance with no known prior criminal convictions or history of failing to appear in court. The court determined that there was probable cause to believe the defendant had committed the crimes of Manufacture of a Controlled Substance (Marijuana) and Possession of a Controlled Substance (Marijuana) with Intent to Deliver. In determining the conditions of release appropriate to protect the community and the administration of justice, and despite the defendant's failure to initially appear at the arraignment upon issuance of a summons, the trial court authorized release upon personal recognizance coupled with specific conditions including a prohibition of use of alcohol and unprescribed drugs and weekly urinalysis to assure compliance therewith.

For the reasons stated above, the facts here are distinguishable from those in the Scott case, and serve a compelling governmental interest beyond that of the normal need for law enforcement and criminal investigation. The trial court is charged with evaluating whether an accused poses a risk to the safety of the community and to the efficient administration of justice and, if so, with protecting that safety. CrR 3.2(a), (d). The trial court may impose any one or more of a nonexclusive list of conditions designed to protect the community and the administration of justice if, in its discretion, they are the least restrictive means of so doing. CrR 3.2(d). That nonexclusive list of conditions designed to protect the

safety of the public and the administration of justice includes prohibiting the consumption of intoxicating liquor and/or drugs not prescribed to the accused. CrR 3.2(d)(3). Once, in its discretion, the trial court has prohibited the consumption of unprescribed drugs, a weekly scheduled urinalysis is the least restrictive means by which to monitor compliance with that compelling governmental interest. The condition of pretrial release involved here is narrowly tailored to meet that end, and should be upheld.

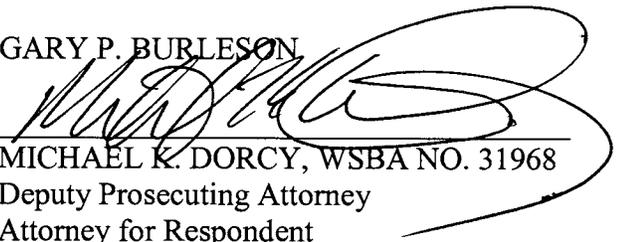
#### IV. CONCLUSION

Based upon the foregoing, the Court should uphold the trial court's denial of Petitioner Amber Rose's motion to vacate the condition of pretrial urinalysis testing based upon the arguments in Part III and uphold the conditions of pretrial release as imposed in the discretion of the trial court.

DATED this 23<sup>rd</sup> day of January, 2008 at Shelton, Washington.

**RESPECTFULLY SUBMITTED**

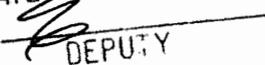
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Attorney for Respondent

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STATE OF WASHINGTON  
BY  DEPUTY

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

STATE OF WASHINGTON,

Case No.: 36269-4-II

Respondent,

vs.

DECLARATION OF MAILING

AMBER ROSE,

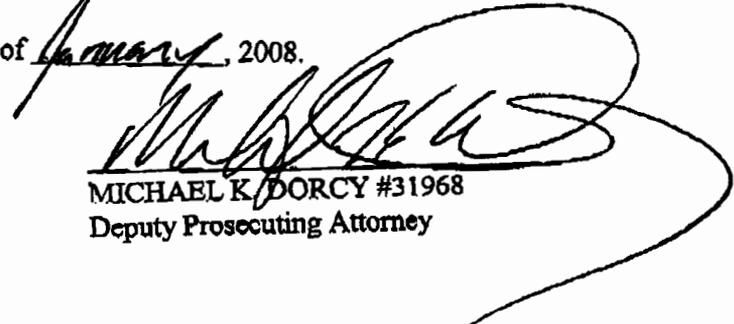
Petitioner.

Michael K. Dorcy makes the following declaration in accordance with RCW 9A.72.085: that I deposited in the mails of the United States of America postage prepaid, an envelope addressed to the person listed below, containing a copy of the BRIEF OF RESPONDENT filed herein.

TO: BRUCE FINLAY  
Attorney at Law  
P.O. BOX 3  
SHELTON, WA 98584

I certify and declare under penalty of perjury, under the laws of the State of Washington, that the foregoing facts are true and correct.

DATED this 27<sup>th</sup> day of January, 2008.

  
MICHAEL K. DORCY #31968  
Deputy Prosecuting Attorney