

No. 91642-0

RECEIVED ELECTRONICALLY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CORTNEY L. BLOMSTROM,
BROOKE M. BUTTON,
CHRISTOPHER V. COOPER,

Petitioners,

v.

The Honorable GREGORY J. TRIPP,
in his official capacity as a Spokane County District Court Judge,
and the SPOKANE COUNTY DISTRICT COURT,

Respondents.

PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTRODUCTION

The amicus curiae brief from the Washington Association of Prosecuting Attorneys (WAPA) ignores directly controlling authority, draws a false analogy, and distorts the proper constitutional analysis. This court should reject WAPA's contentions for the following reasons.

II. ARGUMENT

A. Applicable law includes more than just the Fourth Amendment; it also includes article I, section 7 as well as *Scott* and *Rose*.

WAPA ignores article I, section 7 of the Washington State Constitution, limiting its discussion to the Fourth Amendment to the United States Constitution. Because article I, section 7 provides greater protection than the Fourth Amendment, and because this court begins its analysis with the state constitution when both provisions are involved, this court should resolve the issues without considering WAPA's arguments on the federal constitution.¹

¹ WAPA claims "[i]f a condition passes muster under the Fourth Amendment, the condition is also lawful under Const. art. I, sec. 7." (Br. of Amicus Curiae Wash. Ass'n of Prosecuting Att'ys at 6.) As support, WAPA cites *State v. Puapuaga*, 164 Wn.2d 515, 521-22, 192 P.3d 360 (2008), with a parenthetical explanation that "pretrial detainees have no greater right to privacy under the state constitution than under the Fourth Amendment." (Br. of Amicus Curiae Wash. Ass'n of Prosecuting Att'ys at 6.) But WAPA misrepresents what *Puapuaga* says. There, this court stated, "When presented with arguments under both the state and federal constitutions, we review the state constitution arguments first. We have found that article I, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment." *Puapuaga*, 164 Wn.2d at 521-22 (citations omitted). This court then terminated all constitutional analysis when it concluded no disturbance of private affairs occurred under article I section 7;

Further, WAPA ignores *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), and *State v. Rose*, 146 Wn. App. 439, 191 P.3d 83 (2008). It does not cite these cases or even acknowledge they exist. WAPA therefore makes no attempt to distinguish these cases, or otherwise explain why they did not constitute binding precedent in the district court. Yet its own website contradicts its argument on the current state of the caselaw: “Pre-Trial Release. Because a urinalysis (UA) is a warrantless search and there is not any evidence that a weekly UA would increase the likelihood of appearance, the imposition of a UA as a standard condition of pretrial release is inappropriate. *State v. Rose*, COA No. 36269-4-II (August 26, 2008).” *WAPA’s Legal Notes*, Wash. Ass’n of Prosecuting Att’ys, <http://www.waprosecutors.org/archive/archive2008.html> (last visited May 12, 2017).

B. Pretrial releasees are dissimilar to pretrial detainees because the government loses a great degree of control over a criminal defendant once it releases him or her pending trial.

WAPA conflates pretrial releasees with pretrial detainees, suggesting they have equal expectations of privacy and levels of

such a conclusion necessarily meant no reasonable expectation of privacy existed under the Fourth Amendment. *See id.* at 521-24. After all, if a subject of litigation satisfies the state constitutional ceiling, it necessarily satisfies the federal constitutional floor. *See State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010) (discussing the ceiling-floor relationship between the state and federal constitutions); *State v. Surge*, 160 Wn.2d 65, 83, 86, 156 P.3d 208 (2007) (Owens, J., concurring in result) (discussing the interplay between state and federal constitutional analysis). WAPA’s argument suggests it does not grasp this concept.

constitutional protections. But this court has previously distinguished accused persons from convicted persons, stating “[b]oth circumstances raise different expectations of privacy and levels of constitutional protections.” *State v. Fisher*, 145 Wn.2d 209, 225, 35 P.3d 366 (2001). And, this court has explained “a person’s privacy rights under article I, section 7 may vary based on that person’s status as an arrestee, pretrial detainee, prisoner, or probationer.” *State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208 (2007) (C. Johnson, J., lead opinion).

WAPA denies any constitutionally relevant distinction between pretrial releasees and pretrial detainees. This position is untenable because the government loses a great degree of control over a criminal defendant once it releases him or her pending trial. *See Scott*, 450 F.3d at 866 n.5, 873 n.14, 874.

As the *Scott* majority reasoned, “[i]t is no answer to point out . . . that ‘individuals confined in prison pending trial have no greater privacy rights than other prisoners.’” *Id.* at 873 n.14 (quoting *id.* at 878 (Bybee, J., dissenting)). Jail officials are justified in searching a pretrial detainee, or his or her cell, based on unique institutional needs such as maintaining jail security and preventing escape from jail. *Id.* (citing *Hudson v. Palmer*, 468 U.S. 517, 529, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)). However, “[t]hese justifications are inapplicable when a defendant is awaiting trial

outside of a detention facility.” *Id.* Thus, “[o]nce a state decides to release a criminal defendant pending trial, the state may impose only such conditions as are constitutional.” *Id.* at 866 n.5; *accord Butler v. Kato*, 137 Wn. App. 515, 530, 154 P.3d 259 (2007).

WAPA’s suggestion that pretrial releasees nonetheless have reduced expectations of privacy essentially parrots the *Scott* dissent. The *Scott* majority rejected this argument because “[p]eople released pending trial . . . have suffered no judicial abridgment of their constitutional rights.” 450 F.3d at 872. *Compare id.* at 885 (Bybee, J., dissenting) (agreeing that “pretrial releasees have not had a *judicial* abridgment of their constitutional rights,” but arguing “they have a lesser expectation of privacy than an ordinary citizen” because “[a] pretrial releasee suffers great burdens and is ‘scarcely at liberty’” (quoting *Albright v. Oliver*, 510 U.S. 266, 279, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (Ginsburg, J., concurring))), *with id.* at 872 n.11 (majority opinion) (noting that while “pretrial releasees must suffer certain burdens that ordinary citizens do not,” such requirements “are unquestionably related to the government’s special need to ensure that the defendant not abscond” and do not resolve “[w]hether the accused may be made to suffer other burdens that are *not* designed to ensure his appearance in court”).

Pretrial release conditions certainly impose restraints on liberty.

See Albright, 510 U.S. at 279 (Ginsburg, J., concurring). But pretrial release conditions nonetheless remain subordinate to the Fourth Amendment. *See id.* at 274 (plurality opinion) (“The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it. . . . We have in the past noted the Fourth Amendment’s relevance to the deprivations of liberty that go hand in hand with criminal prosecutions.”); *see also Dela Cruz v. Kauai Cnty.*, 279 F.3d 1064, 1068 (9th Cir. 2002) (“[O]ne who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures.”).

C. Ordering suspicionless urine and breath tests as conditions of pretrial release is neither narrowly tailored nor the least restrictive means to prevent crime and ensure public safety.

WAPA argues “[c]onditions of release pass muster under the Fourth Amendment if they are reasonably related to a legitimate governmental objective and do not amount to punishment.” (Br. of Amicus Curiae Wash. Ass’n of Prosecuting Att’ys at 6.) As support, WAPA cites *Westerman v. Cary*, 125 Wn.2d 277, 293, 892 P.2d 1067 (1994), and *United States v. Salerno*, 481 U.S. 739, 748, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). But neither case says what WAPA claims.

Each case dealt with forms of pretrial detention, rather than the pretrial release conditions involved here. *See Westerman*, 125 Wn.2d at

292-94 (addressing detention without bail pending a judicial determination of probable cause); *Salerno*, 481 U.S. at 748-51 (addressing detention without bail pending trial on the basis of future dangerousness). Each case dealt with substantive due process principles, rather than the search and seizure principles involved here. *See Westerman*, 125 Wn.2d at 292-94 (finding no due process violation because the pretrial detention complied with established Fourth Amendment precedents and did not constitute impermissible punishment); *Salerno*, 481 U.S. at 748-51 (finding no due process violation without analyzing the pretrial detention under the Fourth Amendment). But neither case set forth any test for determining whether pretrial release conditions satisfy the Fourth Amendment.

WAPA's proposed test—that pretrial release conditions satisfy the Fourth Amendment if they are reasonably related to a legitimate governmental objective and do not amount to punishment—finds no support in caselaw. Indeed, WAPA's proposed test belies *Scott* and *Rose*. In short, WAPA has misframed the issue by conflating pretrial release with pretrial detention and concocting a proposed test without legal justification. This court should examine the suspicionless urine and breath tests for what they are—disturbances of private affairs—and should determine whether they occur without authority of law when ordered as conditions of pretrial release.

WAPA's claim that suspicionless pretrial testing is not punitive ignores the fact that an identical form of testing is often ordered as a condition of probation, thus rendering pretrial releasees' experiences virtually indistinguishable from that of probationers. *See generally State v. Olsen*, 194 Wn. App. 264, 374 P.3d 1209 (considering the constitutionality of random urinalyses ordered as a condition of DUI probation), *review granted*, 186 Wn.2d 1017 (2016). There is a "constitutionally relevant distinction between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent." *Scott*, 450 F.3d at 873 (internal quotation marks and citation omitted); *accord Butler*, 137 Wn. App. at 531. "[P]retrial releasees are not probationers. Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." *Butler*, 137 Wn. App. at 531 (alteration in original) (quoting *Scott*, 450 F.3d at 872). Thus, imposing pretrial release conditions that too closely resemble probation conditions erodes pretrial rights in general, most notably the presumption of innocence. *See id.* at 531-32 (quoting *Scott*, 450 F.3d at 873-74).

WAPA argues the rate of DUI recidivism justifies suspicionless pretrial testing. Blomstrom and Cooper have no prior DUI offenses. While Button has one prior DUI offense, there is no reason to think she will

reoffend again. Besides, “[t]he mere fact that an individual belongs to a suspect group . . . is not sufficient, in and of itself, to permit any intrusion upon that individual’s fourth amendment rights.” Cathryn Jo Rosen & John S. Goldkamp, *The Constitutionality of Drug Testing at the Bail Stage*, 80 J. Crim. L. & Criminology 114, 167 (1989). Again, *Scott*’s analysis is apt:

The arrest alone did not establish defendant’s dangerousness; it merely triggered the ability to hold a hearing during which such a determination might be made. It follows that if a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by a showing that defendant poses a heightened risk of misbehaving while on bail. *The government cannot . . . short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required.*

450 F.3d at 874 (emphasis added).

Still, WAPA cites anecdotes of DUI recidivism to foment rage and provide moral justification for the unconstitutional pretrial release conditions involved here. This sentiment has no place in constitutional analysis, which should be principled and dispassionate. This sentiment is especially dangerous because it distorts the balancing of interests. “The easiest and most common fallacy in ‘balancing’ is to place on one side the entire, cumulated ‘interest’ represented by the state’s policy and compare it with one individual’s interest in freedom from the specific intrusion on

the other side” *City of Seattle v. Mesiani*, 110 Wn.2d 454, 459, 755 P.2d 775 (1988) (omission in original) (internal quotation marks omitted). A faithful analysis under article I, section 7 would conclude that legitimate concerns about the public threat of impaired driving do not justify ordering wholly suspicionless disturbances of private affairs. *See id* at 459-60.

Considering all, WAPA overstates the governmental interest involved here. First, “[t]he government’s interests in surveillance and control as to a pre-trial releasee are . . . considerably less than in the case of a probationer.” *Scott*, 450 F.3d at 874. Second, while “the ‘government’s interest in preventing crime by arrestees is both legitimate and compelling’ . . . the government’s interest in preventing crime by *anyone* is legitimate and compelling.” *Id.* at 870 (quoting *id.* at 883-84 (Bybee, J., dissenting)). This is so because “[c]rime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need.” *Id.*; *see Rose*, 146 Wn. App. at 456-58.

WAPA also overstates the efficacy of suspicionless pretrial testing in preventing crime and ensuring public safety. First, WAPA makes no argument linking urinalyses with reductions in recidivism. Such data may not exist because urinalyses occur remote in time to impaired driving, and are thus inefficacious in separating impairment from driving. *Cf. York v.*

Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 328, 178 P.3d 995 (2008) (Madsen, J., concurring) (noting suspicionless urinalyses were not likely to accomplish their goal regarding student athletes because “[a] urine test remote in time from the event does not detect present drug use that might affect performance.”). Second, WAPA argues that ignition interlock devices correlate with reductions in recidivism. But correlation does not imply causation. And the documents WAPA cites have limited value because they seem to relate solely to post-conviction ignition interlock devices. Further, ignition interlock devices are “easier to circumvent, as an individual can simply drive a different vehicle not equipped with such a device.” (Br. of Resp’ts at 19.)

WAPA argues pretrial detention is “[t]he only sure method of protecting the public from the risks posed by a person charged with impaired driving.” (Br. of Amicus Curiae Wash. Ass’n of Prosecuting Att’ys at 12.) It then suggests suspicionless urine and breath tests are a type of reasonable accommodation for DUI defendants, designed to provide this same measure of control. But CrRLJ 3.2 is written in terms of “reasonabl[e] assur[ance]” rather than absolute assurance. CrRLJ 3.2(a)(1), (b), (c), (d)(6), (e), (g), (o). And, CrRLJ 3.2 is written in terms of the “least restrictive” or “less restrictive” conditions rather than the most controlling conditions. CrRLJ 3.2(b), (d)(6). When it comes to

pretrial release conditions, the presumption of innocence should mean something, especially for people like Blomstrom and Cooper, who have no prior DUI offenses, and for people like Button, who have one prior DUI offense but give no reason to think he or she will reoffend again.

Current research suggests WAPA's heavy-handed approach will backfire because it does not respect DUI defendants' pretrial rights. "Most people care more about procedural fairness—the kind of treatment they receive in court—than they do about 'distributive justice,' *i.e.*, winning or losing the particular case." Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 Ct. Rev., issue 1/2 at 5. Procedural fairness requires "[r]espectful treatment," where "individuals are treated with dignity and *their rights are obviously protected.*" *Id.* at 6 (emphasis added). Procedural fairness has profound impacts on recidivism:

Procedural fairness *reduces recidivism* because fair procedures cultivate the impression that authorities are both legitimate and moral. Further, once the perception that legal authorities are legitimate has been shaped, compliance with the law is enhanced, even when it conflicts with one's immediate self-interest. Legitimacy is created by respectful treatment, and legitimacy affects compliance. This is not to say that judges are unable to sanction defendants, but sanctions, when imposed in such a manner as to insult the dignity of persons, can also function to increase rather than reduce future offending.

Id. at 7 (emphasis added) (footnotes omitted) (internal quotations marks omitted).

A recent study “showed that the *strongest predictor* of reduced future criminality was a defendant’s attitude toward the judge.” Greg Berman & Emily Gold, *Procedural Justice from the Bench*, 51 *Judges’ J.*, no. 2, Spring 2012 at 20 (emphasis added). This is so because “procedural justice enhances the legitimacy of the entire justice system and promotes a general adherence to the law.” *Id.* at 20-21. Thus, “[c]ourts that exhibit procedural justice elements produce more satisfied and compliant litigants.” *Id.* at 21. “This impact was seen across all demographics, regardless of race, gender, or criminal history. Even defendants with extensive prior involvement in the system . . . reported reduced criminality when they perceived the judge to have treated them fairly and respectfully.” *Id.* at 20.

Essentially, WAPA is incorrect for the same reasons stated in the petitioners’ reply brief. Suspicionless urine and breath tests ordered as conditions of pretrial release are highly intrusive, and particularly destructive of privacy and offensive to personal dignity. While all pretrial testing should be prohibited, a suspicion-based testing regime is certainly workable, not impracticable. The suspicion required would be an individualized suspicion that a DUI defendant is using alcohol or drugs in

violation of his or her pretrial release conditions. Suspicionless pretrial testing casts dragnets capturing far more physical samples and confidential information than is necessary to prevent crime and ensure public safety. Such testing has limited efficacy, as discussed above. Because it is random, such testing provides no clear indication that evidence will be found. Thus, suspicionless pretrial testing is a general, exploratory search.

Therefore, ordering suspicionless urine and breath tests as conditions of pretrial release is neither narrowly tailored nor the least restrictive means to achieve its intended purpose.

D. Cases from other jurisdictions are distinguishable because they do not capture the analysis required under article I, section 7 or *Scott* and *Rose*.

WAPA relies on *In re York*, 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804 (1995), which held that requiring pretrial releasees to submit to warrantless drug testing and search and seizure conditions did not violate the Fourth Amendment. But the California Supreme Court decided *York* before the United States Court of Appeals for the Ninth Circuit decided *Scott*. It seems plain that *York* lacks precedential value after *Scott* because they contradict each other and the latter is supreme over the former. See U.S. Const. art. VI, cl. 2. Further, *Scott* questioned whether *York* would have stood the test of time anyway, doubting if it “would come out the same way today, as [it was] decided before *United States v.*

Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) . . . and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001).” *Scott*, 450 F.3d at 864 n.1.

WAPA cites four more cases from other jurisdictions as exemplars of “the correct framework” for constitutional analysis. (Br. of Amicus Curiae Wash. Ass’n of Prosecuting Att’ys at 14.) Two of those cases were decided before *Scott*. See *Oliver v. United States*, 682 A.2d 186 (D.C. 1996); *Ex parte Elliott*, 950 S.W.2d 714 (Tex. App. 1997). One of those cases was decided after *Scott*, but did not acknowledge *Scott*, presumably because it arose from Wisconsin, a state outside the Ninth Circuit’s appellate jurisdiction. See *State v. Wilcenski*, 2013 WI App 21, 346 Wis. 2d 145, 827 N.W.2d 642. The last case was decided after *Scott*, yet inexplicably did not acknowledge *Scott* even though it arose from Montana, a state within the Ninth Circuit’s appellate jurisdiction. See *State v. Spady*, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

The Wisconsin case relied on authorities decided before *Scott* and contained terse reasoning that did not really grapple with whether pretrial alcohol and drug testing is reasonable under the Fourth Amendment. See *Wilcenski*, 2013 WI App 21, ¶¶ 14-15 (citing *State v. Guzman*, 166 Wis. 2d 577, 588 & n.6, 480 N.W.2d 446 (1992); *Oliver*, 682 A.2d 186; *York*, 9 Cal. 4th 1133). The Montana case dealt with the relatively novel issue of

pretrial breath testing in the context of a state constitution that is coextensive with the federal constitution on search and seizure issues, and that expressly condones individual privacy invasions upon showing of a compelling state interest. *See Spady*, 2015 MT 218, ¶¶ 21-31 (citing Mont. Const. art. II, §§ 10-11).

Moreover, the Wisconsin and Montana cases are distinguishable because those jurisdictions permit ordering substance abuse or chemical dependency treatment as a condition of pretrial release—something Washington state has rejected as unconstitutional. *Compare Wilcenski*, 2013 WI App 21, ¶¶ 3-5, 13, and *Spady*, 2015 MT 218, ¶ 36, with *Butler*, 137 Wn. App. at 519, 532. Washington state is unique in rejecting pretrial treatment as unconstitutional.² It follows that Washington state may be unique in rejecting, as unconstitutional, suspicionless urine and breath tests ordered as conditions of pretrial release.

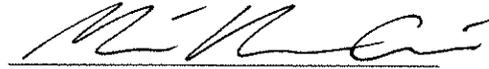
III. CONCLUSION

In sum, this court should reverse the superior court, holding (1) the petitioners are entitled to a statutory writ of review, and (2) the district court violated article I, section 7 and the Fourth Amendment.

DATED this 23rd day of May, 2017.

² Even federal courts permit ordering substance abuse or chemical dependency treatment as a condition of pretrial release. 18 U.S.C. § 3142(c)(1)(B)(x). Still, Washington state rejects pretrial treatment as unconstitutional. *Butler*, 137 Wn. App. at 519, 532.

Respectfully submitted,

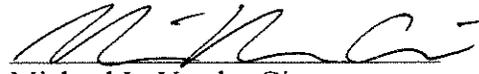
A handwritten signature in black ink, appearing to read "M. Vander Giessen", written over a horizontal line.

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Declaration of Service

I, Michael L. Vander Giessen, declare under penalty of perjury under the laws of the state of Washington that on May 23, 2017, I e-mailed a copy of the foregoing Petitioners' Answer to Brief of Amicus Curiae Washington Association of Prosecuting Attorneys to Brian C. O'Brien, Gretchen E. Verhoef, and Samuel J. Comi of the Spokane County Prosecuting Attorney's Office, and to Pamela B. Loginsky of the Washington Association of Prosecuting Attorneys.

May 23, 2017 Spokane, Washington
Date and Place


Michael L. Vander Giessen
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