

---

IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

---

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

*Petitioners,*

v.

THE HONORABLE GREGORY TRIPP, SPOKANE COUNTY  
DISTRICT COURT JUDGE,

*Respondent.*

---

BRIEF AMICUS CURIAE OF  
WASHINGTON FOUNDATION FOR CRIMINAL JUSTICE

---

**RYAN BOYD ROBERTSON**

WSBA No. 28245  
Robertson Law PLLC  
1000 Second Avenue Suite #3670  
Seattle, Washington 98104  
P: (206) 395-5257  
F: (206) 905-0920  
[ryan@robertsonlawseattle.com](mailto:ryan@robertsonlawseattle.com)

**GEORGE BIANCHI**

WSBA No. 12292  
The Bianchi Law Firm  
2000 112<sup>th</sup> Ave NE  
Bellevue, WA 98004  
P: (206) 728-9300  
F: (206) 728-9305  
[george@thebianchilawfirm.com](mailto:george@thebianchilawfirm.com)

**JONATHAN RANDS**

WSBA No. 32793  
Attorney at Law  
1200 Old Fairhaven Pkwy. Suite 303  
Bellingham, WA 98225  
P: (360) 306-8136  
F: (306) 656-8316  
[jrand@jonathanrands.com](mailto:jrand@jonathanrands.com)

**HOWARD STEIN**

WSBA No. 14114  
Stein Lotzkar & Starr PS  
2840 Northup Way Suite #140  
Bellevue, WA 98004  
P: (425) 576-0026  
F: (425) 576-0039  
[howards@slsps.com](mailto:howards@slsps.com)

**JASON LANTZ**

WSBA No. 42873  
Sullivan Law Group  
3209 Rockefeller Ave.  
P: (425) 322-1076  
F: --  
[jason@sullivanpllc.com](mailto:jason@sullivanpllc.com)

## TABLE OF CONTENTS

	<u>Page No.</u>
I. IDENTITY AND INTEREST OF AMICUS	1
II. ISSUES PRESENTED	1
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	2-20
1. Legislative enactments mandating urine and/or breath testing to monitor alcohol and drug abstinence as a condition of pre-trial release violates separation of powers because the power to set bail and determine conditions of release is a judicial function controlled by court rules promulgated by this Court.	2-6
2. This Court recognizes under Art. I, §7 a person has a right of privacy in their body and bodily functions. A trial court’s authority to impose conditions of release does not include the ability to violate Art. I, §7.	6-14
3. The State’s argument for a “special needs” exception to permit suspicionless testing fails to meet the standards for such an exception as described in <i>York v. Wahkiakum Sch. Dist. No. 200</i> .	14-20
V. CONCLUSION	20

## TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page No.</u>
<i>Butler v. Kato</i> , 137 Wn. App. 515, 154 P.3d 259 (2007)	10, 11, 12
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994)	3
<i>In Re the Detention of W.C.C.</i> , 193 Wn.2d 783, 372 P.3d 179 (2016)	4
<i>McNabb v. Dept of Corrections</i> , 163 Wn.2d 393, 180 P.3d 1257 (2008)	7
<i>Robinson v. City of Seattle</i> , 102 Wn. App. 795, 10 P.3d 452 (2000)	8
<i>Seattle v. Mesiani</i> , 110 Wn.2d 454, 755 P.3d 775 (1988)	13, 18
<i>State v. Baird</i> , 187 Wn.2d 210, 386 P.3d 239 (2016)	8
<i>State v. Baity</i> , 140 Wn.2d 1, 991 P.2d 1151 (2000)	18
<i>Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993)	18
<i>State v. Quaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014)	18
<i>State v. Ringer</i> , 100 Wn.2d 686, 674 P.2d 1240 (1983)	7
<i>State v. Smith</i> , 84 Wn.2d 498, 527 P.2d 674 (1974)	4, 5
<i>State v. Stroud</i> , 106 Wn.2d 144, 720 P.2d 436 (1986)	7
<i>State v. Valdez</i> , 167 Wn.2d 761, 224 P.3d 751 (2009)	7
<i>Westerman v. Cary</i> , 125 Wn.2d 277, 892 P.2d 1067 (1994)	4
<i>York v. Wahkiakum Sch. Dist. No. 200</i> , 163 Wn.2d 297, 178 P.3d 995 (2008)	1, 7, 13, 14, 15, 16, 18

<b><u>Federal Cases</u></b>	<b><u>Page No.</u></b>
<i>Barlow v. Ground</i> , 943 F.2d 1132 (9th Cir. 1991)	16
<i>Frost &amp; Frost Trucking Co. v. R.R. Comm'n</i> , 271 U.S. 583, 46 S.Ct 605, 70 L.Ed. 1101 (1926)	10
<i>Nat'l Treasury Employees Union v. Von Raab</i> , 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)	15, 17
<i>Skinner v. Ry. Labor Executives' Ass'n</i> , 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)	17
<i>Stack v. Boyle</i> , 342 U.S. 1, 6, 72 S.Ct. 1, 96 L.Ed. 3 (1951)	6
<i>United States v. Scott</i> , 450 F.3d 863 (9 <sup>th</sup> Circ. 2006)	11, 12
<i>Vernonia School District 47J v. Acton</i> , 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)	17

<b><u>Washington Constitution</u></b>	<b><u>Page No.</u></b>
Art. I, §7	passim
Art. I, §20	3

<b><u>Federal Constitution</u></b>	<b><u>Page No.</u></b>
Fourth Amendment	7, 14, 15

<b><u>Washington Statutes</u></b>	<b><u>Page No.</u></b>
RCW 2.04.190; Laws of 1925 ex. s. c. 118 §1	3
RCW 2.04.200; Laws of 1925 ex. s. c. 118 §2	3
RCW 7.16	2
RCW 10.21.030	5, 6
RCW 10.21.055	5, 6
RCW 46.61.5055	5
RCW 46.61.5055(5)	13
RCW 46.04.215	8

**Washington Court Rules**

**Page No.**

CrRLJ 3.2	passim
CrRLJ 3.2(a)	5
CrRLJ 3.2(b)	9
CrRLJ 3.2(d)	6, 9, 10, 13
CrRLJ 3.2(j)	17
CrRLJ 3.2(k)	17

**Other**

**Page No.**

AMENDMENT 104, 2010 Engrossed Substitute House Joint Resolution No. 4220, p 3129. Approved November 2, 2010.	3
--	---

<a href="http://app.leg.wa.gov/billsummary?BillNumber=5912&amp;Year=2013">http://app.leg.wa.gov/billsummary?BillNumber=5912&amp;Year=2013</a>	5
---	---

<a href="http://www.courts.wa.gov/caseload/?fa=caseload.showReport&amp;level=d&amp;freq=a&amp;tab=&amp;fileID=rpt07">http://www.courts.wa.gov/caseload/?fa=caseload.showReport&amp;level=d&amp;freq=a&amp;tab=&amp;fileID=rpt07</a>	18
---	----

## **I. IDENTITY AND INTEREST OF AMICUS**

The Washington Foundation for Criminal Justice (“WFCJ”) is a non-profit organization dedicated to educating criminal defense attorneys on representation of citizens accused of impaired driving crimes. Since 1983, the WFCJ has held an annual seminar to educate lawyers on pertinent issues related to the defense of citizens accused of DUI.

The WFCJ has an interest in ensuring that trial courts impose appropriate and fair release conditions against citizens accused of DUI. This appeal presents this Court with the opportunity to instruct trial courts how to impose release conditions in a manner consistent with constitutional protections and established court rules.

## **II. ISSUES PRESENTED ON AMICUS**

1. Legislative enactments mandating urine and/or breath testing to monitor alcohol and drug abstinence as a condition of pre-trial release violates separation of powers because the power to set bail and determine conditions of release is a judicial function controlled by court rules promulgated by this Court.
2. This Court recognizes under Art. I, §7 a person has a right of privacy in their body and bodily functions. A trial court’s authority to impose conditions of release does not include the ability to violate Art. I, §7.
3. The State’s argument for a “special needs” exception to permit suspicionless testing fails to meet the standards for such an exception as described in *York v. Wahkiakum Sch. Dist. No. 200*.<sup>1</sup>

---

<sup>1</sup> *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008).

### **III. STATEMENT OF THE CASE**

Blomstrom, Button, and Cooper were each charged with DUI and became subject to pre-trial release conditions imposed by the trial court.<sup>2</sup> Each was ordered to abstain from consuming alcohol and drugs and were further ordered to undergo random urinalysis testing to monitor compliance.<sup>3</sup> The trial court justified these conditions on the grounds, due to the facts of each case, that each defendant posed a risk to re-offend which constituted a risk to public safety and/or danger to the community.<sup>4</sup>

Defendants sought a statutory writ of Review per RCW 7.16 in the Superior Court to challenge these conditions. The writ was denied,<sup>5</sup> and this Court granted discretionary review.

### **IV. ARGUMENT**

- 1. Legislative enactments mandating urine and/or breath testing to monitor alcohol and drug abstinence as a condition of pre-trial release violates separation of powers because the power to set bail and determine conditions of release is a judicial function controlled by court rules promulgated by this Court.**

---

<sup>2</sup> CP 37 (Blomstrom); CP 90 (Button); CP 25 (Cooper).

<sup>3</sup> Blomstrom RP 3; Button RP 5-6; Cooper RP 5-6.

<sup>4</sup> Id. Additionally, defendant Button was initially required to install an ignition interlock device in any vehicle she might drive. The court removed this requirement. Button RP 1-2.

<sup>5</sup> CP 98

The separation of powers doctrine is one of the most fundamental principles of the American Constitutional system.<sup>6</sup> The doctrine ensures that the fundamental functions of each branch remain inviolate.<sup>7</sup>

The concept of bail to secure release from custody pending trial derives from the State Constitution, Art. I, §20.<sup>8</sup> Since 1925, the Legislature has recognized the judiciary's authority to create rules of procedure.<sup>9</sup> Where a legislative act conflicts with a judicial rule; the judicial rule controls and the statute has no further force or effect.<sup>10</sup>

This Court has held that the judicial branch possesses the power to regulate court procedures while the legislative branch possesses the power to enact substantive law:

If the right is substantive, the statute prevails. If the right is procedural, the court rule prevails. This reflects the division of power between the legislative and judicial branches. "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus

---

<sup>6</sup> *Carrick v. Locke*, 125 Wn.2d 129, 134, 882 P.2d 173 (1994).

<sup>7</sup> *Id.*

<sup>8</sup> All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature. AMENDMENT 104, 2010 Engrossed Substitute House Joint Resolution No. 4220, p 3129. Approved November 2, 2010.

<sup>9</sup> RCW 2.04.190. Laws of 1925 ex. s. c. 118 §1.

<sup>10</sup> RCW 2.04.200; Laws of 1925 ex. s. c. 118 §2. (When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.)

creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." Where a procedural right is involved, CR 6(a) expressly supersedes RCW 1.12.040."<sup>11</sup>

This Court has ruled that statutes which conflict with the Court's Rules on bail and conditions of release are unconstitutional.<sup>12</sup> When the Legislature attempted to change the rule for bail in criminal cases on appeal this Court found that it conflicted with the court's procedural rules under CrR 3.2.<sup>13</sup> This Court went on to analyze the separation of powers and exclusive judicial functions concluding that:

[T]he fixing of bail and the release from custody traditionally has been, and we think is, a function of the judicial branch of government, unless otherwise directed and mandated by unequivocal constitutional provisions to the contrary. The power of the courts at common law is very well paraphrased in 8 Am.Jur.2d Bail & Recognizance, § 8 (1963), pp. 787—88.

Authority to grant bail generally is incidental either to the power to hold a defendant to answer, or to the power to hear and determine the matter in which the defendant is held. At common law courts had inherent power to grant bail to prisoners before them and over whom they had

---

<sup>11</sup> *In Re the Detention of W.C.C.*, 193 Wn.2d 783, 791, 372 P.3d 179 (2016) (internal citations omitted).

<sup>12</sup> *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). See also *Westerman v. Cary*, 125 Wn.2d 277, 290-291, 892 P.2d 1067 (1994) (“[T]he fixing of bail and the release from custody traditionally has been, and we think is, a function of the judicial branch of government, unless otherwise directed and mandated by unequivocal constitutional provisions to the contrary.”)

<sup>13</sup> *Smith*, at 501.

jurisdiction. Granting bail and fixing its amount is generally a judicial or quasi-judicial function; . . .<sup>14</sup>

While *Smith* dealt with post-conviction bail on appeal and affirmed the revocation of bail, it did so by concluding that the bail provisions of the court rules are procedural and superseded the statutory provisions.

With the enactment of RCW 10.21.055<sup>15</sup> requiring mandatory alcohol and/or drug testing, and the enactment of RCW 10.21.030(2)(i)<sup>16</sup> authorizing alcohol and/or drug testing, the Legislature invaded the authority of the judicial branch.<sup>17</sup> CrRLJ 3.2 is the procedural rule that this Court created to authorize conditions of pre-trial release.<sup>18</sup> The rule

---

<sup>14</sup> *Smith*, at 502.

<sup>15</sup> When any person charged with a violation of [DUI offenses], in which the person has a prior offense as defined in RCW 46.61.5055 and the current offense involves alcohol, is released from custody at arraignment or trial on bail or personal recognizance, the court authorizing the release shall require, as a condition of release that person comply with one of the following four requirements: . . . (Emphasis added)

<sup>16</sup> The defendant may be prohibited from possessing or consuming any intoxicating liquors or drugs not prescribed to the defendant. The defendant may be required to submit to testing to determine the defendant's compliance with this condition;

<sup>17</sup> Amicus authors reviewed all documents and videos associated with the ultimate initial passage of RCW 10.21.055 (2013 2nd sp.s.c.c 35 § 1, eff. 9/28/13) and can assure this Court that no mention or concern with separation of powers or RCW 2.04.190, RCW 2.04.200 is made concerning this enactment.

<http://app.leg.wa.gov/billsummary?BillNumber=5912&Year=2013>

<sup>18</sup> Under CrRLJ 3.2(a) the district or municipal courts start with the presumption that the accused person shall be released on their personal recognizance pending trial unless: (1) the court determines that such recognizance will not reasonably assure the defendant's appearance, when required, or (2) there is shown a likely danger that the defendant (a) will commit a violent crime, or (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice. The rule lays out several factors to guide the trial court's determinations of whether bail or conditions of release should be

requires fact-intensive individualized determinations before it allows only the least restrictive conditions to be imposed. In contrast, with RCW 10.21.055, the legislature created a generalized blanket approach that applies without any individualized inquiry inherent in CrRLJ 3.2.<sup>19</sup>

The command that the court “shall” require these conditions creates an unresolvable separation of powers conflict. Accordingly, the statute must give way to the court rule. Therefore, RCW 10.21.055 and RCW 10.21.030 (to the extent it authorizes alcohol and/or drug testing) should have no further force or effect.

**2. This Court recognizes under Art. I, §7 a person has a right of privacy in their body and bodily functions. A trial court’s authority to impose conditions of release does not include the ability to violate Art. I, §7.**

It is universally recognized that Art. I, §7 extends greater privacy protections to the citizens of this State than the federal constitution.<sup>20</sup> This Court no longer requires litigants to articulate an independent state

---

required. It then articulates the specific types of conditions of release that may be imposed in CrRLJ 3.2(d).

<sup>19</sup> See *Stack v. Boyle*, 342 U.S. 1, 6, 72 S.Ct. 1, 96 L.Ed. 3 (1951). (An unusual bail amount imposed based on the nature of the indictment alone and without regard to the individual facts related to the defendant is an arbitrary act and injects into our own system of government principles of totalitarianism.)

<sup>20</sup> “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

constitutional claim under Art. I, §7.<sup>21</sup>

Under Art. I, §7, two issues are concerned: was there an invasion of privacy and if so was there authority of law to justify the invasion.<sup>22</sup> In this regard, there is no consideration whether a search was “reasonable.”

“[Art. I, §7] prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. ... This creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....”<sup>23</sup>

Under Art. I, §7, a finding that a search violates a recognized privacy interest ends the analysis, and this Court requires the State to establish the “authority of law” to justify the invasion with either a warrant or an exception to the warrant requirement. The “authority of law” required by Art. I, §7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions.<sup>24</sup>

Our courts recognize that a urine test, where a person is required to discharge urine into a receptacle for chemical analysis, constitutes an

---

<sup>21</sup> *McNabb v. Dept of Corrections*, 163 Wn.2d 393, 400, 180 P.3d 1257 (2008). (Recognition that Art. I, §7 provides broader privacy protections now “commonplace.”)

<sup>22</sup> *York*, at 306. (J. Sanders, lead opinion).

<sup>23</sup> *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), overruled in part by *State v. Stroud*, 106 Wn.2d 144, 150-151, 720 P.2d 436 (1986).

<sup>24</sup> *State v. Valdez*, 167 Wn.2d 761, 771-772, 224 P.3d 751 (2009).

invasion of privacy under Art. I, §7. As Division One of the Court of Appeals explained in *Robinson*,

It is difficult to imagine an affair more private than the passing of urine. ... There is thus 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 governmental trespass.<sup>25</sup>

Likewise, a majority of this Court has held that breath-alcohol testing is a search, and an invasion of privacy recognized under Art. I, §7.<sup>26</sup> The essential function of an ignition interlock device is to test breath for the presence of alcohol.

“Ignition interlock device” means breath alcohol analyzing ignition equipment or other biological or technical device certified in conformance with RCW 43.43.395 and rules adopted by the state patrol and designed to prevent a motor vehicle from being operated by a person who has consumed an alcoholic beverage.<sup>27</sup>

Therefore, this Court fully acknowledges a constitutional privacy protection associated with the alcohol and drug testing at issue in the three cases before this Court.

---

<sup>25</sup> *Robinson v. City of Seattle*, 102 Wn. App. 795, 818-819, 10 P.3d 452 (2000); see also *York*, at 307 (J. Sanders, lead opinion); and at 327 (J. Madsen, concurring opinion).

<sup>26</sup> See *State v. Baird*, 187 Wn.2d 210, 386 P.3d 239 (2016) (At 218; J. Madsen, lead opinion); and at 234 (J. McCloud, dissenting opinion.)

<sup>27</sup> RCW 46.04.215.

At its core, this case presents the simple question whether CrRLJ 3.2 permits a trial court to impose pre-trial conditions that violate Art. I, §7. While the text of the rule, in particular CrRLJ 3.2(d)(10), suggests that it can, this Court must uphold the “unconstitutional conditions” doctrine and hold that pre-trial defendants may not be compelled to submit to urine and breath alcohol testing in exchange for release pending trial.

Under CrRLJ 3.2, release on personal recognizance is presumed. Conditions may be imposed where the court finds the defendant may not appear for court or there is a likely danger the defendant will commit a violent crime, intimidate a witness, or unlawfully interfere with the administration of justice.<sup>28</sup> If the court determines the defendant is not likely to appear it may impose certain conditions to secure attendance.<sup>29</sup> The court may also impose “any condition ... deemed reasonably necessary to assure appearance as required.”<sup>30</sup> If the court determines there is a likely danger the defendant will commit a violent crime, intimidate a witness, or unlawfully interfere with the administration of justice court may impose certain conditions.<sup>31</sup> The court may also impose

---

<sup>28</sup> CrRLJ 3.2(a).

<sup>29</sup> CrRLJ 3.2(b)(1-6). Alcohol and drug testing is not listed.

<sup>30</sup> CrRLJ 3.2(b)(7).

<sup>31</sup> CrRLJ 3.2(d)(1-9). Alcohol and drug testing is not listed.

“any condition ... to assure noninterference with the administration of justice and reduce danger to others or the community.”<sup>32</sup> These provisions must have parameters restricting the conditions a court may impose or the courts risk inflating these provisions to the point they swallow the rule.

To mitigate against this risk this Court should adopt the reasoning in *Butler*<sup>33</sup> and apply the “unconstitutional conditions” doctrine to CrRLJ 3.2. This doctrine holds that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.<sup>34</sup>

[T]he power of the state in that [ability to deny a privilege or benefit altogether] is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>35</sup>

*Butler* addressed this doctrine in the context of pre-trial conditions in a DUI case. The defendant was required to complete an alcohol evaluation and comply with treatment recommendations. This condition

---

<sup>32</sup> CrRLJ 3.2(d)(10). In at least one case the trial court justified imposing urine testing under CrRLJ 3.2(d)(10). See Cooper RP 5.

<sup>33</sup> *Butler v. Kato*, 137 Wn. App. 515, 154 P.3d 259 (2007).

<sup>34</sup> *Butler*, at 530.

<sup>35</sup> *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593-94, 46 S. Ct. 605, 70 L. Ed. 1101 (1926).

impliedly required the defendant to give detailed evidentiary disclosures to the treatment provider, under threat of incarceration for non-compliance, which infringed upon his right against self-incrimination.<sup>36</sup>

The *Butler* court relied heavily on the Ninth Circuit's decision in *United States v. Scott*.<sup>37</sup> In *Scott* the defendant was required to consent to random drug tests and searches of his home as a condition of release.<sup>38</sup>

Finding these conditions unconstitutional, the court stated;

The right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions . . . . Once a state decides to release a criminal defendant pending trial, the state may impose only such conditions as are constitutional.<sup>39</sup>

However, the court went further and discussed the impact an unconstitutional condition has on a person subject to the condition.

Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections. Where a constitutional right "functions to preserve spheres of autonomy . . . [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands."<sup>40</sup>

---

<sup>36</sup> *Butler*, at 525-526.

<sup>37</sup> *United States v. Scott*, 450 F.3d 863 (9<sup>th</sup> Circ. 2006).

<sup>38</sup> *Scott*, at 865.

<sup>39</sup> *Scott*, at 867.

<sup>40</sup> *Scott*, at 866.

The “government abuse” is manifested in two areas. First, the pre-trial conditions, particularly in the area of DUI crimes, have become indistinguishable to post-conviction sentencing conditions. In *Butler*, the alcohol evaluation and treatment condition was in fact a mandatory sentencing condition.<sup>41</sup> Maintaining a distinction between post-sentencing probationers and those released before trial is critical because unlike probationers, a person charged with a crime is presumed innocent.<sup>42</sup>

Second, these “probation-like” conditions are imposed using the assumption that a person accused of DUI is likely to commit a new crime and/or endanger the public without an individualized determination.

That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.<sup>43</sup>

This form of “government abuse” is strikingly evident in the present appeal. First, the pre-trial condition for urine and/or breath alcohol testing is identical to the conditions imposed on a person convicted of

---

<sup>41</sup> *Butler*, at 525.

<sup>42</sup> *Scott*, at 873.

<sup>43</sup> *Butler*, at 531.

DUI.<sup>44</sup> Using these as pre-trial conditions merely blurs the line between probationer and pre-trial defendant. Second, it is clearly evident that the state relied heavily on generalized studies seeking to link high breath alcohol levels to recidivism.<sup>45</sup> But it is illogical to conclude that generalized studies support an individualized finding for a particular defendant. This Court on at least two occasions has refused to accept this type of argument.<sup>46</sup> This Court should make no exception here and require trial courts to make individualized findings under CrRLJ 3.2 that truly reflect the unique facts related to the particular defendant.

CrRLJ 3.2(d)(10) clearly contemplates permitting courts to impose conditions upon a defendant that reduce danger to the community. The trial court in this appeal made such findings and required the defendants to

---

<sup>44</sup> See RCW 46.61.5055(5): (5) **Monitoring.** (a) **Ignition interlock device.** The court shall require any person convicted of a violation of RCW [46.61.502](#) or [46.61.504](#) or an equivalent local ordinance to comply with the rules and requirements of the department regarding the installation and use of a functioning ignition interlock device installed on all motor vehicles operated by the person. (b) **Monitoring devices.** If the court orders that a person refrain from consuming any alcohol, the court may order the person to submit to alcohol monitoring through an alcohol detection breathalyzer device, transdermal sensor device, or other technology designed to detect alcohol in a person's system. The person shall pay for the cost of the monitoring, unless the court specifies that the cost of monitoring will be paid with funds that are available from an alternative source identified by the court. The county or municipality where the penalty is being imposed shall determine the cost.

<sup>45</sup> Brief of Respondent, pgs. 12; 15-17.

<sup>46</sup> *York*, at 326. (J. Madsen, concurring opinion). (School's statistical evidence of drug use by students does not adequately establish a special need for suspicionless testing.); *Seattle v. Mesiani*, 110 Wn.2d 454, 458 n. 1, 755 P.3d 775 (1988). (Finding statistical probability that sobriety checkpoints will intercept drug impaired motorists inadequate to justify suspicionless investigative stops).

abstain from alcohol and drug use. This rule should not be used as an open invitation to intrude upon the privacy rights of persons accused of DUI. The right to privacy under Art. I, §7 supersedes any authority to impose pre-trial conditions of urine and breath testing under CrRLJ 3.2.

**3. The State’s argument for a “special needs” exception to permit suspicionless testing fails to meet the standards for such an exception as described in *York v. Wahkiakum Sch. Dist. No. 200*.**

The WFCJ concurs with Petitioners that this Court has yet to formally adopt a “special needs” exception for warrantless invasions of privacy under Art. I, §7.<sup>47</sup> Suspicionless searches run counter to the requirement that any invasion of privacy must be based on "authority of law."<sup>48</sup> Nonetheless, the concurring opinions in *York* suggest a “special needs” exception may in fact exist based on a melding of previously accepted common law principles.<sup>49</sup> Therefore, should this Court formally adopt “special needs” its scope under Art. I, §7 must be more narrowly drawn than under the Fourth Amendment.<sup>50</sup>

A special needs exception is recognized under the federal constitution. First, the need for a suspicionless search must be “special;”

---

<sup>47</sup> Reply Brief pg. 14-17.

<sup>48</sup> Art. I, §7.

<sup>49</sup> *York*, at 317-318. (J. Madsen, concurring opinion).

<sup>50</sup> *York*, at 322. (J. Madsen, concurring opinion).

servicing a non-law enforcement purpose. Second, the traditional requirement of a warrant and probable cause must be inadequate to fulfill the purpose of the search.<sup>51</sup>

Justice Madsen's concurring opinion in *York* is rightly critical of the dangers inherent with traditional balancing tests that exist under Fourth Amendment and the "special needs" exception in particular.<sup>52</sup> Pitting individual privacy interests against an asserted governmental need to protect society is incompatible with Art. I, §7, and threatens to create an exception which can swallow the rule.<sup>53</sup>

Instead, Justice Madsen argues this Court has historically restricted the scope of warrant exceptions under Art. I, §7 in comparison to the Fourth Amendment.<sup>54</sup> Therefore any "special needs" exception must be restricted and narrowly tailored to situations where the "traditional requirement of individualized suspicion (for a warrantless search) is impracticable."<sup>55</sup> This impracticability requirement is an "indispensable component of any "special needs" exception under Art. I, §7;<sup>56</sup>

---

<sup>51</sup> *York*, at 319. (J. Madsen, concurring.); citing *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

<sup>52</sup> *York*, at 321. (J. Madsen, concurring opinion).

<sup>53</sup> *York*, at 321. (J. Madsen, concurring opinion).

<sup>54</sup> *York*, at 322. (J. Madsen, concurring opinion).

<sup>55</sup> *York*, at 323. (J. Madsen, concurring opinion).

<sup>56</sup> *York*, at 321. (J. Madsen, concurring opinion).

“Regardless of the strength of the government's need for a search, or the closeness of the fit of the means chosen to achieve the state's legitimate goals, a search cannot be justified under the special needs exception absent a showing that adherence to the requirement of a warrant and probable cause would be impracticable under the circumstances.”<sup>57</sup>

“Impracticality” centers on whether use of warrant procedures are “unworkable” considering the circumstances. This inquiry asks several questions such whether the search is so unrelated to criminal activity that it renders the concept of probable cause inapt; whether the ability exists to develop individualized suspicion; and an evaluation of the severity of consequences that may exist by failing to detect illicit conduct.<sup>58</sup> If this Court formally adopts a special needs exception under Art. I, §7 its application must be premised on these factors. Accordingly, it is clear the exception may not be used to permit suspicionless alcohol and drug testing to monitor pre-trial release conditions under CrRLJ 3.2.

It is difficult to conceptualize pre-trial release conditions under CrRLJ 3.2 as being divorced from the State’s law enforcement function. Compliance with release conditions is monitored by the courts.<sup>59</sup>

---

<sup>57</sup> *York*, at 321. (J. Madsen, concurring opinion) (Emphasis added); citing *Barlow v. Ground*, 943 F.2d 1132 (9<sup>th</sup> Cir. 1991).

<sup>58</sup> *York*, at 325. (J. Madsen, concurring.)

<sup>59</sup> CrRLJ 3.2(j), (k).

Regardless if a urine or breath test takes place (probation office, private business, personal vehicle) the results are collected and analyzed by the trial court which can potentially lead to increased bail and likely incarceration if the results are positive.<sup>60</sup> This consequence is categorically distinct from the non-criminal consequences that could apply to railroad operators,<sup>61</sup> customs service agents,<sup>62</sup> or student athletes.<sup>63</sup>

Even assuming a non-law enforcement need, there is no showing made that adherence to the traditional requirements of individualized suspicion and a warrant is unworkable.

First, the use of the probable cause standard to believe a person has used alcohol or drugs is well established in our legal system. Law enforcement officers and probation officers are regularly trained to evaluate persons for alcohol or drug usage and can use this training to establish probable cause.<sup>64</sup> Judging by the substantial number of DUI arrests that occur each year this training is effective.<sup>65</sup>

---

<sup>60</sup> CrRLJ 3.2(j), (k).

<sup>61</sup> *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); State's Brief, pg. 13.

<sup>62</sup> *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); State's Brief, pg. 13.

<sup>63</sup> *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); State's Brief, pg. 13.

<sup>64</sup> For a discussion on law enforcement roadside testing and other testing to determine alcohol and drug usage, as well as common observations relevant to a determination a

Second, the State has not established how a testing process based on individualized suspicion would be inadequate to detect alcohol or drug use in comparison to a suspicionless testing process. Specifically, no argument is provided whether a random urine test is any more or less effective at “catching” a person with alcohol or drugs in their system than simply scheduling a random probation appointment. The purpose of the urine test is not to detect actual impairment but to find ethanol metabolites (EtG) in urine (or metabolites for marijuana) indicating use in past three or four days.<sup>66</sup> The effectiveness of the test is based solely on the fortuity that it takes place close enough in time to when alcohol or drugs were used. A person can escape detection if too much time passes. Considering this limitation it is no less effective to schedule a surprise probation appointment to assess whether a person is under the influence or consumed the night before. Absent around-the-clock observation no monitoring process will be foolproof.

---

person has consumed alcohol or drugs, see; *State v. Quale*, 182 Wn.2d 191, 340 P.3d 213 (2014); *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000); and *Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993).

<sup>65</sup> 26,363 DUI charges filed in Washington State in 2015. Caseloads of the Courts of Washington.

<http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=&fileID=rpt07>

<sup>66</sup> State’s Brief, pgs. 2; 13

Third, other than to offer statistics, the State has offered no evidence that an alcohol and drug abstinence condition cannot be complied with and therefore public safety cannot be maintained without suspicionless testing.<sup>67</sup> Yet this Court in *York*<sup>68</sup> and *Mesiani*<sup>69</sup> rejected suspicionless searches and seizures based on similar statistical evidence. And (not) surprisingly, the State has failed to present any evidence that defendants under a general pre-trial release condition to abstain from alcohol or drugs are incapable of honoring that condition. As Justice Madsen observes in *York*;

“If drug use does not result in observable manifestations that adversely impact the school's ability to provide a safe, orderly environment, the school's interest in detecting drug use does not justify nonconsensual drug testing. On the other hand, if drug use is an actual problem, school officials likely will have the individualized suspicion necessary to require a drug test, particularly given the relaxed standard of suspicion applicable in the school context. [Citation omitted]. Thus, it is difficult to see how a suspicionless drug testing program is necessary.”<sup>70</sup>

This logic applies here. If abstinence cannot be maintained then individualized suspicion will exist and the State and court can comply

---

<sup>67</sup> State's Brief, pg. 12-17.

<sup>68</sup> *York*, at 326. (J. Madsen, concurring opinion). (The school's statistical evidence of drug use by students does not adequately establish a special need for suspicionless testing.)

<sup>69</sup> *Seattle v. Mesiani*, 110 Wn.2d 454, 458 n.1, 755 P.2d 775 (1988). (Statistical probability that sobriety checkpoints will intercept drug-impaired motorists inadequate to justify suspicionless investigative stops.)

<sup>70</sup> *York*, at 326. (J. Madsen, concurring opinion).

with the warrant and probable cause requirements of Art. I, §7 to compel testing.

**V. CONCLUSION**

For the reasons herein stated the WFCJ asks this Court to hold that the Legislature lack authority to enact statutes in conflict with CrRLJ 3.2, urine and breath-alcohol testing as a pre-trial condition of release constitutes an invasion of privacy under Art. I, §7, and the trial court's imposition of suspicionless urine and breath-alcohol testing to monitor a condition of alcohol and drug abstinence cannot be supported by a special needs exception under Art. I, §7. This Court should rule in favor of Petitioners Blomstrom, Button, and Cooper.

Respectfully submitted the 21<sup>st</sup> day of April, 2017.



\_\_\_\_\_  
Ryan B. Robertson, WSBA #28245  
George Bianchi, WSBA #12292  
Jason Lantz, WSBA #42873  
Jonathan Rands, WSBA #32793  
Howard Stein, WSBA #14114

IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

CORTNEY BLOMSTROM, et al, ) No. 91642-0  
Petitioners, )  
 )  
v. ) DECLARATION OF  
 ) SERVICE  
 )  
THE HONORABLE GREGORY )  
TRIPP, Spokane County District )  
Court Judge, )  
Respondent. )

\*\*\*\*\*

I certify that on April 21, 2017, I served a copy of the foregoing amicus brief submitted by the Washington Foundation for Criminal Justice, via email, to the following individuals:

1. Counsel for Petitioners: Mr. Michael I. Vander Giessen  
[mvandergiessen@spokanecounty.org](mailto:mvandergiessen@spokanecounty.org).
2. Counsel for Respondent: Mr. Brian C. O'Brien  
[bobrien@spokanecounty.org](mailto:bobrien@spokanecounty.org)  
Mr. Samuel J. Comi  
[sjcomi@spokanecounty.org](mailto:sjcomi@spokanecounty.org)  
Ms. Gretchen E. Verhoef  
[gverhoef@spokanecounty.org](mailto:gverhoef@spokanecounty.org)

I swear under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.



Ryan B. Robertson  
WSBA #28245

April 21, 2017

Signed in Seattle, WA on this date