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No. 91642-0

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' OPENING BRIEF

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I. INTRODUCTION

The Spokane County District Court ordered the petitioners—all defendants in cases of driving under the influence of alcohol or drugs (DUI)—to submit to random urinalyses or install ignition interlock devices on every motor vehicle they operate, as conditions of their release pending trial. The urinalyses are administered by Absolute Drug Testing LLC and test for Ethyl Glucuronide (EtG) and Tetrahydrocannabinol (THC) in urine. The ignition interlock devices are installed by Smart Start Inc. and test for ethanol in breath.

The Spokane County Superior Court denied the petitioners' application for a statutory writ of review. This court should reverse the superior court, holding (1) the petitioners are entitled to a statutory writ of review because the district court acted illegally and they have no adequate remedy at law, and (2) the district court violated article I, section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution by ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release.

**II. ASSIGNMENTS OF ERROR AND
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

(1) The superior court erred by denying the petitioners' application for a statutory writ of review. (Mot. for Discretionary Review App., Oct. 1, 2015 (Mem. Op. & Order at 4, Mar. 31, 2015).)

Issue: whether the superior court erred by denying the petitioners' application for a statutory writ of review.

(2) The superior court erred in concluding "the petitioners' challenge is barred from consideration by writ." (*Id.*)

Issue: whether the superior court erred in concluding "the petitioners' challenge is barred from consideration by writ."

(3) The superior court erred in concluding the petitioners' challenge "can only be undertaken by a RALJ appeal if they are convicted or plead guilty to the charges." (*Id.*)

Issue: whether the superior court erred in concluding the petitioners' challenge "can only be undertaken by a RALJ appeal if they are convicted or plead guilty to the charges."

(4) The superior court erred by failing to reach the merits of the petitioners' challenge. (*Id.* at 1-4.)

Issue: whether the superior court erred by failing to reach the merits of the petitioners' challenge.

(5) The superior court erred in failing to hold that the district court violated article I, section 7 of the Washington State Constitution by ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release. (*Id.*)

Issue: whether the superior court erred in failing to hold that the district court violated article I, section 7 of the Washington State Constitution by ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release.

(6) The superior court erred in failing to hold that the district court violated the Fourth Amendment to the United States Constitution by ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release. (*Id.*)

Issue: whether the superior court erred in failing to hold that the district court violated the Fourth Amendment to the United States Constitution by ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release.

III. STATEMENT OF THE CASE

A. *Blomstrom*

Courtney L. Blomstrom was arrested for DUI on February 1, 2015. (CP at 39.) She had never been convicted of a crime or even arrested for an alcohol- or drug-related offense. (*Id.*) Likewise, there was no evidence she had ever failed to appear in court when required. (CP at 35.)

Blomstrom appeared before the district court for a preliminary appearance on February 2, 2015. (*Blomstrom* Dist. Ct. VRP, Feb. 2, 2015.) Blomstrom stipulated to probable cause and pleaded not guilty. (*Id.* at 1.) The district court sought recommendations regarding what pretrial release conditions to impose on Blomstrom. (*Id.*) The State requested that the district court order Blomstrom to submit to “four times monthly random testing.” (*Id.* at 2.)

To support its request for testing, the State alleged Blomstrom exhibited a bad driving pattern and had a breath alcohol concentration of .191 and .184 grams’ ethanol per 210 liters’ exhaled air. (*Id.* at 1.) While the State conceded Blomstrom had no prior alcohol-related offenses, it argued “once someone is driving at above a .15 they’re fair [sic] more likely to be involved in a fatal car crash as well as more likely to reoffend.” (*Id.* at 2.)

Defense counsel objected to testing, arguing that in light of Blomstrom's lack of criminal history, prohibiting her from possessing or consuming alcohol or non-prescribed drugs would be enough to "prevent her from being a, a threat to public safety." (*Id.* at 2.)

The district court released Blomstrom on personal recognizance, subject to the condition that she submit to random urinalyses, screening for EtG and THC, at a frequency of two times per month. (CP at 37.) The district court ordered Blomstrom to report to Absolute Drug Testing within 24 hours to enroll in its urinalysis program. (*Id.*) The district court also ordered Blomstrom to commit no crimes, not possess or consume alcohol or non-prescribed drugs, not drive a motor vehicle after possessing or consuming alcohol or non-prescribed drugs, not operate a motor vehicle without a valid driver license and insurance, and timely appear for all scheduled hearings. (*Id.*)

In imposing random urinalyses as a condition of Blomstrom's pretrial release, the district court reasoned, "[b]ecause of the facts of this case, because of the argument of counsel I do find that there is a likelihood that you would reoffend and, and possibly believe consuming alcohol would be a risk to public safety as well." (*Blomstrom* Dist. Ct. VRP at 3.) Upon the district court's inquiry, Blomstrom declared her intent to apply for a public defender. (*Id.*)

B. Button

Brooke M. Button was arrested for DUI on February 27, 2015. (*Button* Def. Case History at 1, Mar. 4, 2015.) She had a prior conviction in Idaho for DUI, which occurred in 2009. (*Button* Dist. Ct. VRP at 2, 4, Mar. 2, 2015.) She also had prior convictions in Washington state for reckless driving, third degree driving while license suspended or revoked, possession of marijuana, and second degree possession of stolen property, all of which occurred in 2001. (*Button* Def. Case History at 4-5.) But there was no evidence she had ever failed to appear in court when required. (*Button* Certificate in Supp. of Writ of Review at 2, Mar. 6, 2015.)

Over the weekend of Button's arrest, the district court found probable cause and released her on personal recognizance, subject to the condition that she report to Smart Start within five days and install its ignition interlock device on all motor vehicles she operates. (*Button* Dist. Ct. VRP at 1-2.) The district court also ordered Button to commit no crimes; not possess or consume alcohol or non-prescribed drugs; not drive a motor vehicle after possessing or consuming alcohol or non-prescribed drugs; not operate a motor vehicle without a valid driver license, insurance, and ignition interlock device if required; and timely appear for all scheduled hearings. (*Id.* at 1-2.)

Button reappeared before the district court for a preliminary appearance on March 2, 2015. (*Id.*) The district court sought recommendations regarding what additional pretrial release conditions to impose on Button. (*Id.* at 1.) The State requested that the district court also order Button to submit to “four time’s [sic] monthly random drug and alcohol testing.” (*Id.* at 2.)

To support its request for random urinalyses, the State emphasized the existence and recency of Button’s prior DUI conviction and the nature of the current allegations against her. (*Id.* at 2-3.) The State then alleged Button had three prior charges of driving without an ignition interlock device, all of which were dismissed, in 2011. (*Id.*)

Defense counsel objected to random urinalyses, arguing the current allegations against Button were strictly marijuana-related and she had “paperwork showing she can use medical cannabis.” (*Id.* at 4.) Defense counsel then objected to an ignition interlock device because there was no evidence that either Button’s prior DUI conviction or the current allegations against her involved alcohol. (*Id.*) The State conceded it did not have such evidence but nonetheless suggested the district court could exercise its discretion and require Button to install an ignition interlock device on all motor vehicles she operates. (*Id.*) The State argued Button’s three dismissed charges for driving without an ignition interlock device

suggested she would not obey a prohibition on possessing or consuming alcohol or non-prescribed drugs. (*Id.*)

The district court maintained the pretrial release conditions it imposed over the weekend of Button's arrest but changed the requirement of an ignition interlock device to a requirement of random urinalyses. (Mot. for Discretionary Review App. (*Button* Order on Probable Cause, Setting Release Conditions, Ct. Date &/Or Commitment at 1, Mar. 2, 2015.) Thus, the district court ordered Button to submit to random urinalyses, screening for EtG and THC, at a frequency of four times per month. (*Id.*) The district court ordered Button to report to Absolute Drug Testing within 24 hours to enroll in its urinalysis program. (*Id.*)

In imposing random urinalyses as a condition of Button's pretrial release, the district court adopted the State's factual recitation and reasoned, "[t]his is based upon Rule 3.2 as well as RCW 10.21.030 which allows for that testing and the, frankly the, the likelihood of her reoffending." (*Button* Dist. Ct. VRP at 5-6.) The court said Button's three dismissed charges for driving without an ignition interlock device indicate she needs to be tested. (*Id.* at 6.)

C. Cooper

Christopher V. Cooper was arrested for DUI on February 7, 2015. (CP at 26.) He had a prior conviction in Washington state for third degree

malicious mischief, which occurred in 1998. (*Id.* at 28.) But he had never been arrested for DUI before and had never been convicted of an alcohol- or drug-related offense. (*Id.* at 26-28.) Moreover, there was no evidence he had ever failed to appear in court when required. (*Id.* at 23.)

Cooper appeared before the district court for a preliminary appearance on February 9, 2015. (*Cooper* Dist. Ct. VRP, Feb. 9, 2015.) Cooper stipulated to probable cause and pleaded not guilty. (*Id.* at 1.) The district court sought recommendations regarding what pretrial release conditions to impose on Cooper. (*Id.*) The State requested that the district court order Cooper to submit to “four times monthly random testing.” (*Id.*)

To support its request for testing, the State alleged Cooper exhibited a bad driving pattern, had an open and partially emptied liquor bottle on the floorboard of his motor vehicle, admitted he had just left a bar, appeared very intoxicated, and had a breath alcohol concentration of .175 and .174 grams’ ethanol per 210 liters’ exhaled air. (*Id.* at 1-2.) The State argued testing was appropriate considering “the facts of this case, the driving, the BAC, the NHTSA studies indicating that above a .15 an individual is far more likely to both reoffend and be involved in a fatal accident.” (*Id.* at 2.)

Defense counsel objected to testing, arguing that prohibiting Cooper from possessing or consuming alcohol or non-prescribed drugs

would be sufficient to alleviate such concerns. (*Id.* at 2-3.) Defense counsel noted that because Cooper had never been arrested for DUI before, “there’s no indication he wouldn’t follow the Court’s orders . . . or that he would be a danger to society or reoffend.” (*Id.* at 3.) Defense counsel specifically cited *State v. Rose*, 146 Wn. App. 439, 191 P.3d 83 (2008). (*Id.*) The State alleged Cooper had two prior charges of minor in possession of alcohol, both of which were resolved by bond forfeiture, in 1998 and 1999. (*Id.*; CP at 27.) Additionally, the State alleged Cooper had a lengthy history of traffic infractions, including speeding and driving without a license or insurance. (*Cooper* Dist. Ct. VRP at 3.)

Defense counsel argued Cooper’s two prior charges of minor in possession of alcohol occurred too long ago to have any relevance and in any case do not indicate he poses any special danger to society. (*Id.* at 4.) The district court nonetheless considered it as evidence, rebuffing defense counsel’s attempt to “minimize it and the behavior” and “break down each individual thing,” favoring an approach considering “the totality of the circumstances which surround the conditions of release.” (*Id.*) The district court suggested it could hold Cooper in custody on bond as an alternative to random urinalyses. (*Id.* at 5.) Ultimately, the district court ruled,

So, under . . . CrRLJ 3.2(d) talking about showing substantial danger of committing a new offense. The court has to consider factors, among the factors considered is the

nature of the charge and, of course, we need to put something in place that reduces the danger to others and the community.

So, in looking at his record granted they're older but there are some small, small bit of history the amount of weight given but the standard, the studies which [the State] has indicated, the high blow which is more than two times the legal limit are concerns to the Court and to me and we have to put something in place that will reduce the danger to the community under, under 3.2(d)(10). So, that's what I'm going to do in this case.

(Id.)

The district court released Cooper on personal recognizance, subject to the condition that he submit to random urinalyses, screening for EtG and THC, at a frequency of four times per month. (CP at 25.) The district court ordered Cooper to report to Absolute Drug Testing within 24 hours to enroll in its urinalysis program. *(Id.)* The district court also ordered Cooper to commit no crimes, not possess or consume alcohol or non-prescribed drugs, not drive a motor vehicle after possessing or consuming alcohol or non-prescribed drugs, not operate a motor vehicle without a valid driver license and insurance, and timely appear for all scheduled hearings. *(Id.)*

D. Application for Writ of Review

The petitioners applied for a writ of review in the superior court, which denied their application in a memorandum opinion issued March 19, 2015. (Mot. for Discretionary Review App. (Mem. Op. & Order at 4).)

During oral argument, counsel for the petitioners reported that each urinalysis costs them \$20. (Super. Ct. VRP at 8, Mar. 20, 2015.) This court granted the petitioners' motion for discretionary review.

IV. ARGUMENT

A. The petitioners are entitled to a statutory writ of review because the district court acted illegally and they have no adequate remedy at law.

This court reviews de novo the superior court's decision on whether to issue a writ of review. *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010).

There are two categories for writs of review, namely, a constitutional common law writ and a statutory writ. *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 767, 261 P.3d 145 (2011). Here, the petitioners seek a statutory writ of review. The standard for issuing a statutory writ of review appears in RCW 7.16.040, which provides,

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

The petitioners are "entitled to a statutory writ of review under RCW 7.16.040 if [they] establish[] '(1) that an inferior tribunal (2)

exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate remedy at law.” *Kozol v. Dep’t of Corr.*, 185 Wn.2d 405, 408, 373 P.3d 244 (2016) (quoting *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992)). Here, the district court is an inferior tribunal exercising judicial functions. And, the district court acted illegally because, as discussed in Part IV.C below, it “has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act.” *Holifield*, 170 Wn.2d at 244. The dispositive issue is whether the petitioners have an adequate remedy at law.

The Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) provide that “[a] party may appeal from a final decision of a court of limited jurisdiction.” RALJ 2.2(a)(1). “Only an aggrieved party may appeal.” RALJ 2.1(a). However, “[t]hese rules do not supersede and do not govern the procedure for seeking review of a decision of a court of limited jurisdiction by statutory writ.” RALJ 1.1(c).

The reason the RALJ retain the statutory writ of review, among others, lies in article IV, section 6 of the Washington State Constitution, which establishes the superior court’s jurisdiction. *City of Seattle v. Williams*, 101 Wn.2d 445, 454, 680 P.2d 1051 (1984). The relevant portion of article IV, section 6 provides, “[superior] courts and their

judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties.”

See id.

Despite the RALJ, “the *only method* of review of interlocutory decisions in courts of limited jurisdiction is still the statutory writ.” *Id.* at 455 (emphasis added). Because the RALJ provides an adequate remedy at law in most instances, the superior court should issue a statutory writ of review sparingly as a method of reviewing an interlocutory decision. *Id.* In deciding whether to issue a statutory writ of review, the superior court should consider the following guideline: “the remedy by appeal is inadequate whenever it appears inequitable to require the litigants to proceed through a lengthy, expensive trial which, if the present state of the case were allowed to continue, would mean an unquestioned reversal and termination of the entire litigation when appealed after the trial.” *Id.* (quoting *State v. Harris*, 2 Wn. App. 272, 280-81, 469 P.2d 937 (1970)).

In *Mabe v. White*, a defendant charged with a crime in the Spokane County District Court sought an interlocutory writ of review from the superior court, contending a violation of his right to a speedy trial. 105 Wn. App. 827, 828-29, 15 P.3d 681 (2001). The Washington State Court of Appeals, Division III, concluded a direct appeal was an inadequate

remedy at law because, “[s]imply put, requiring an appeal after a trial on the merits would subject petitioners to the very trial they seek to avoid.” *Id.* at 830-31. Thus, it seems a direct appeal is an inadequate remedy at law if proceeding to a final decision would, in itself, subject a criminal defendant to an illegal status quo of an ongoing nature.

A direct appeal is also an inadequate remedy at law if “the delay incident to the appeal will work a deprivation of some substantial right which will prevent the enjoyment of the fruits of the appeal.” *State ex rel. Nw. Elec. Co. v. Superior Court*, 27 Wn.2d 694, 707, 179 P.2d 510 (1947) (internal quotation marks omitted); *State ex rel. N. Pac. Ry. Co. v. Superior Court*, 46 Wash. 303, 305, 89 P. 879 (1907)); e.g., *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 282-83, 285-86, 66 P. 385 (1901) (concluding a writ of review was available because appealing an injunction was an inadequate remedy at law where, by the time of appeal, the challenged construction project would have already been completed and the damage would be done); *In re Estate of Sullivan*, 36 Wash. 217, 224-25, 78 P. 945 (1904) (concluding a writ of review was available because appealing ex parte orders authorizing financial distributions was an inadequate remedy at law where, by the time of appeal, the estate would have already lost the funds it was seeking to preserve); *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 294-96, 136 P. 147 (1913)

(concluding a writ of review was available because appealing orders denying the right to administer partnership property and supervise performance of a contract was an inadequate remedy at law where, by the time of appeal, the purpose and subject matter of the partnership would have already ceased and the right to administration and supervision would be lost). Thus, “the court, in aid of its appellate and advisory jurisdiction, will issue writs when it is necessary to preserve the fruits of an appeal.” *Smith*, 26 Wash. at 284.

Here, the superior court relied on *Commanda v. Cary*, 143 Wn.2d 651, 23 P.3d 1086 (2001), to conclude the petitioners had an adequate remedy at law because they could directly appeal from their convictions, if any. The superior court’s reliance on *Commanda* is misplaced.

In *Commanda*, defendants charged with DUI in the Spokane Municipal Court sought an interlocutory writ of review from the superior court, contending the mandatory minimum sentencing scheme violated equal protection principles. *Id.* at 653-54. This court “held the writ of review was not proper because ‘defendants have *conceded* there is an adequate remedy at law after the final judgment’ and ‘they have an adequate remedy at law through a RALJ appeal.’” *Holtfield*, 170 Wn.2d at 244 n.13 (emphasis added) (quoting *Commanda*, 143 Wn.2d at 657). In so holding, this court reasoned that if the defendants were convicted

following trial or guilty pleas, the superior court could review their contentions on direct appeal. *See Commanda*, 143 Wn.2d at 657.

Commanda is a classic case where a direct appeal provided an adequate remedy at law. The defendants challenged their anticipated sentences. Of course, if the defendants avoided conviction, they would not face sentencing at all and would have no need to seek recourse. If the defendants were convicted and sentenced, and were aggrieved by those final judgments, they would have the right to appeal their sentences. Whether the defendants were convicted following trial or guilty pleas, their right to appeal their sentences would be unaffected. And, most importantly, if the defendants' contentions were meritorious, the superior court could then provide them effective relief from their sentences.

Commanda is unlike the petitioners' cases. Here, the petitioners challenge their pretrial release conditions, which are not final judgments but which regularly invade their privacy until the district court enters final judgments. Regardless of whether the petitioners are convicted and sentenced, they still suffer significant constitutional violations while their cases are pending.

Even if the petitioners are convicted and sentenced, it is not immediately apparent that they would be aggrieved by those final judgments in the traditional sense. Just because they challenge their

pretrial release conditions does not necessarily mean the petitioners would dispute the ultimate outcomes of their cases. Besides, it appears the illegality of their pretrial release conditions would need to have identifiable impacts on conviction and sentencing for the petitioners to appeal them. *See State v. Hardtke*, 183 Wn.2d 475, 352 P.3d 771 (2015) (addressing a transdermal alcohol detection bracelet as a pretrial release condition where the defendant pleaded guilty, the sentencing court ordered him to pay the cost of that device as part of his sentence, and he appealed his sentence).

Also unclear is whether the petitioners would have to proceed to trial in order to challenge their pretrial release conditions on appeal. This is important because a criminal defendant generally waives his or her right to appeal by entering a voluntary guilty plea. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). The limitation applies even if a defendant does not explicitly agree to waive the right to appeal. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). However, a voluntary guilty plea “does not usually preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made.” *Id.* There is no guarantee that this exception allows a defendant,

who has voluntarily pleaded guilty, to challenge his or her pretrial release conditions on appeal.

Even if the petitioners appealed, the superior court probably would decline to review their contentions as purely academic. Because it is already very busy and its RALJ opinions lack precedential value in collateral matters, the superior court is unlikely to consider moot issues regarding the propriety of pretrial release conditions. And, even if the superior court were to exercise its discretion to decide the petitioners' contentions, a favorable ruling on appeal would not remedy the regular privacy invasions they endure leading up to their final resolutions.

Therefore, the superior court erred by concluding a direct appeal is an adequate remedy at law. The petitioners have no alternative. Considering all, this court should hold the petitioners are entitled to a statutory writ of review because the district court acted illegally and they have no adequate remedy at law.

B. Background on the court rule and statutes the district court relied on to order warrantless, suspicionless urine or breath testing as conditions of the petitioners' pretrial release.

The district court relied on CrRLJ 3.2, and RCW 10.21.030 and .055, to order warrantless, suspicionless urine or breath testing as conditions of the petitioners' pretrial release. Each is discussed below.

1. *CrRLJ* 3.2

A court of limited jurisdiction must release a criminal defendant on personal recognizance pending trial unless it finds that doing so “will not reasonably assure the accused’s appearance, when required” or there “[t]here is shown a likely danger that the accused” will either “commit a violent crime” or “seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.” *CrRLJ* 3.2(a). If the court makes one of these findings, it may impose appropriate conditions on pretrial release. *See CrRLJ* 3.2(b)-(e). But the court may not impose such conditions unless the available information rebuts the presumption of pretrial release. *See CrRLJ* 3.2(a), (c), (e).

a. Future appearance

“If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the *least restrictive . . .* conditions that will reasonably assure that the accused will be present for later hearings” *CrRLJ* 3.2(b) (emphasis added). Possible conditions include placing the defendant in the custody of a designated person or organization agreeing to supervise him or her; restricting the defendant’s travel, association, or residence; requiring the defendant to post bond; requiring the defendant to return to custody during specified hours; or placing the defendant on electronic monitoring. *CrRLJ*

3.2(b)(1)-(6). Also, the court may “[i]mpose any condition other than detention deemed reasonably necessary to assure appearance as required.” CrRLJ 3.2(b)(7).

The court may consider the defendant’s failure-to-appear history in assessing his or her likelihood of appearing. CrRLJ 3.2(c)(1). The court may also consider “[t]he nature of the charge, if relevant to the risk of nonappearance.” CrRLJ 3.2(c)(8). But “[s]uch a risk of nonappearance is not logically apparent in a charge of DUI.” *Butler v. Kato*, 137 Wn. App. 515, 523, 154 P.3d 259 (2007). Regardless, neither urine nor breath testing reasonably assures the defendant will appear when required because the State has not demonstrated a nexus. *See Rose*, 146 Wn. App. at 456-58.

b. Substantial danger

“Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose . . . [certain] nonexclusive conditions.” CrRLJ 3.2(d). Possible conditions, in addition to those mentioned in Part IV.B.1.a above, include prohibiting the defendant from committing crimes and prohibiting the defendant from possessing or consuming alcohol or non-prescribed drugs. CrRLJ 3.2(d)(3), (5). Also, the court may “[i]mpose any condition other than detention to assure

noninterference with the administration of justice and reduce danger to others or the community.” CrRLJ 3.2(d)(10). “But CrRLJ 3.2(d)(10) is not without limits. The court may not impose onerous or unconstitutional provisions where *lesser conditions* are available to ensure the public is protected” *Butler*, 137 Wn. App. at 524 (emphasis added).

The court may consider the defendant’s criminal history in assessing his or her dangerousness. CrRLJ 3.2(d)(1). The court may also consider “[t]he nature of the charge.” CrRLJ 3.2(d)(3). DUI is not a violent crime because it does not involve physical force as an element. *Compare* CrRLJ 3.2(a) (failing to define “violent crime” while stating possible definitions “may include misdemeanors and gross misdemeanors and are not limited to crimes defined as violent offenses in [the Sentencing Reform Act of 1981,]RCW 9.94A.030”), *with Black’s Law Dictionary* 429 (9th ed. 2009) (defining “violent crime” as “[a] crime that has as an element the use, attempted use, threatened use, or substantial risk of use of physical force”), *and* RCW 46.61.502(1) (providing the elements of DUI).

It is true that, “[g]iven probable cause, the court c[an] impose conditions to address its legitimate concerns for public safety.” *Butler*, 137 Wn. App. at 523. “But [again] CrRLJ 3.2(d)(10) is not without limits. The court may not impose onerous or unconstitutional provisions where *lesser conditions* are available to ensure the public is protected.” *Id.* at 524

(emphasis added). Such lesser conditions include the requirements that the defendant commit no crimes and not possess or consume alcohol or non-prescribed drugs. *Id.* at 523-24; CrRLJ 3.2(d)(3), (5).

2. RCW 10.21.030 and .055

In 2010, the legislature enacted an act affecting pretrial release conditions in felony cases. Laws of 2010, ch. 254. The legislature made these changes in response to an amendment to article I, section 20 of the Washington State Constitution, which establishes the right to a judicial determination of either release or reasonable bail. RCW 10.21.010; *Westerman v. Cary*, 125 Wn.2d 277, 291-92, 892 P.2d 1067 (1994). The legislature created the following new statute, codified at RCW 10.21.030:

(1) The judicial officer may at any time amend the order to impose additional or different conditions of release. The conditions imposed under this chapter supplement but do not supplant provisions of law allowing the imposition of conditions to assure the appearance of the defendant at trial or to prevent interference with the administration of justice.

(2) Appropriate conditions of release under this chapter include, but are not limited to, the following:

....

(i) 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;

(j) The defendant may be prohibited from operating a motor vehicle that is not equipped with an ignition interlock device

RCW 10.21.030 (originally enacted as Laws of 2010, ch. 254, § 5). In 2014 and 2015, the legislature made minor changes to this statute that are not relevant here. Laws of 2014, ch. 24, § 2; Laws of 2015, ch. 287, § 5. Thus, the petitioners' argument references current RCW 10.21.030.

The legislature did not intend RCW 10.21.030 to apply to misdemeanor or gross misdemeanor cases. On the contrary, the legislature declared it "intends by this act to require an individualized determination by a judicial officer of conditions of release for persons in custody for *felony*." Laws of 2010, ch. 254, § 1 (emphasis added).

Even so, it appears the legislature did not contemplate the constitutionality of all the pretrial release conditions it prescribed. The legislature opined that "[t]his requirement is consistent with constitutional requirements and court rules regarding the right of a detained person to a prompt determination of probable cause and judicial review of the conditions of release." *Id.* The legislative history shows the legislature considered *Westerman*, 125 Wn.2d at 291-92, as it interprets the right to a judicial determination of either release or reasonable bail. *E.g.*, H.R. Rep. on H.B. 2625, 61st Leg., Reg. Sess., at 2 (Wash. Mar. 8, 2010). But the legislative history is devoid of evidence that the legislature ever considered, or was even aware of, the limitations on certain pretrial release conditions, as determined by cases discussed in Part IV.C below.

Then, in 2013, the legislature enacted an act affecting pretrial release conditions in DUI cases. Laws of 2013, 2d Spec. Sess., ch. 35. The legislature created the following new statute, codified at RCW 10.21.055:

(1) When any person charged with or arrested for a violation of RCW 46.61.502, 46.61.504, 46.61.520, or 46.61.522, 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 before arraignment or trial on bail or personal recognizance, the court authorizing the release shall require, as a condition of release, that person to (a) have a functioning ignition interlock device installed on all motor vehicles operated by the person, with proof of installation filed with the court by the person or the certified interlock provider within five business days of the date of release from custody or as soon thereafter as determined by the court based on availability within the jurisdiction; or (b) comply with 24/7 sobriety program monitoring, as defined in RCW 36.28A.330; or both.

Former RCW 10.21.055 (2013) (enacted as Laws of 2013, 2d Spec. Sess., ch. 35, § 1). In 2015 and 2016, the legislature made numerous changes to this statute that never factored into the petitioners' cases. Laws of 2015, 2d Spec. Sess., ch. 3, § 2; Laws of 2016, ch. 203, § 16. Thus, the petitioners' argument references former RCW 10.21.055.

An ignition interlock device is "breath alcohol analyzing ignition equipment or other biological or technical device certified . . . and designed to prevent a motor vehicle from being operated by a person who

has consumed an alcoholic beverage.”¹ RCW 46.04.215. 24/7 sobriety program monitoring is “a twenty-four hour and seven day a week sobriety program in which a participant submits to the testing of the participant’s blood, breath, urine, or other bodily substances in order to determine the presence of alcohol, marijuana, or any controlled substance in the participant’s body.” Former 36.28A.330(5) (2013) (enacted as Laws of 2013, 2d Spec. Sess., ch. 35, § 26). DUI defendants must pay for ignition interlock devices and 24/7 sobriety program monitoring themselves. RCW 10.21.055(1)(a)(iii)-(iv), 46.61.5055(5)(b)-(c).

C. The district court violated article I, section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution by ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release.

Article I, section 7 of the Washington State Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The Fourth Amendment to the United States Constitution provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

¹ In enacting a comprehensive regulatory scheme for ignition interlock devices, the legislature “intended to reduce the incidence of illegal drunk driving, thus protecting motorists in our state.” *Nielsen v. Dep’t of Licensing*, 177 Wn. App. 45, 51, 309 P.3d 1221 (2013). A bill report described ignition interlock devices as “[t]echnology [that] will prevent people from driving drunk, . . . intended to ‘hold [drunk drivers] accountable.’” *Id.* at 50-51 (alterations in original) (quoting H.R. Rep. on Second Substitute H.B. 3254, 60th Leg., Reg. Sess., at 5 (Wash. Feb. 19, 2008)).

seizures, shall not be violated” Because the petitioners challenge their pretrial release conditions under both article I, section 7 and the Fourth Amendment, this court should consider the state constitution first. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

It is well settled that article I, section 7 “provides greater protection to individual privacy rights” than the Fourth Amendment. *Rose*, 146 Wn. App. at 455 (citing *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004)). But according to the petitioners’ research, no court has considered whether article I, section 7 provides greater protection than the Fourth Amendment in the context of pretrial release conditions. Therefore, the petitioners ask this court to perform the analysis set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

1. *Gunwall* analysis

In *Gunwall*, this court concluded,

The following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

Id. at 58. Because *Gunwall* interpreted the same state and federal constitutional provisions involved here, this court should adopt its analysis

of the first, second, third, and fifth factors. *See Robinson v. City of Seattle*, 102 Wn. App. 795, 809, 10 P.3d 452 (2000). Doing so is appropriate here because this court's analysis of those factors "generally remains the same." *See id.* This court should independently examine the fourth and sixth factors because they "tend to be unique to the context in which the issue arises." *Id.* at 810.

a. Preexisting state law

"[P]reexisting state law reflects a consistent protection of privacy of the body and bodily functions." *Robinson*, 102 Wn. App. at 810. Additionally, "the area within an occupied toilet stall is characterized as 'private' for purposes of article I, section 7." *Id.* at 810-11. Indeed, "[a]n enclosed toilet stall is an area in which a person has both a subjectively and an objectively reasonable expectation of privacy such that an officer's act of looking into an enclosed toilet stall constitutes a search under article I, section 7." *Id.* at 811. cursory research yielded nothing specific to pretrial release conditions in the late nineteenth century, though it appears arrestees' private affairs could be disturbed at the time of arrest in a similar manner to what occurs today.²

² Scholars have concluded,

In the late nineteenth century, courts allowed warrantless searches of the person of an arrestee when incident to lawful arrest. However, the exception was limited to personal property found in the possession of a

b. Matters of particular state or local concern

Imposing pretrial release conditions is traditionally a function of state and local trial courts. *See Westerman*, 125 Wn.2d at 290-91; *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). There is no particular need for national uniformity on whether a trial court in Washington state may order a DUI defendant to submit to warrantless, suspicionless urine or breath testing as a condition of pretrial release.

c. All factors favor analyzing article I, section 7 independently.

Considering all, this court “may appropriately resort to separate and independent state grounds of decision” in the petitioners’ cases. *Gunwall*, 106 Wn.2d at 67 (citing *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)).

2. Urine and breath tests are disturbances of private affairs under article I, section 7.

Under the Fourth Amendment, a search occurs when a government actor intrudes upon a person’s “reasonable expectation of privacy”—“an

person when he was arrested and that (1) was apparently used in the commission of the crime; (2) was obtained by the crime; (3) could be used to commit violence or effect an escape; or (4) could used [sic] as evidence against the accused. The arresting officer could not confiscate money unless there was reason to believe it was connected with the supposed crime as its fruits or as the instruments with which the crime was committed.

Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 453-54 (2008) (footnotes omitted).

actual (subjective) expectation of privacy . . . that society is prepared to recognize as reasonable.” *Katz v. United States*, 389 U.S. 347, 360-61, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). Under article I, section 7, a disturbance of private affairs occurs when a government actor intrudes upon “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). “[A]rticle I, section 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999).

Both urine and breath tests are searches under the Fourth Amendment. *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560, 575 (2016); *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.9, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). Therefore, both urine and breath tests necessarily constitute disturbances of private affairs under article I, section 7. *See State v. Olsen*, 194 Wn. App. 264, 270, 374 P.3d 1209, *review granted*, No. 93315-4 (Wash. Nov. 2, 2016); *Rose*, 146 Wn. App. at 455; *Robinson*, 102 Wn. App. at 818-19.

Under the Fourth Amendment, the issue is whether warrantless,

suspicionless urine or breath testing is “unreasonable.” But under article I, section 7, the issue is whether warrantless, suspicionless urine or breath testing occurs “without authority of law.” This court should conclude that both the state and federal constitutions prohibit ordering a DUI defendant to submit to warrantless, suspicionless urine or breath testing as a condition of pretrial release.

3. Warrantless, suspicionless urine or breath testing occurs without the authority of law required by article I, section 7 when ordered as a condition of pretrial release.

Collecting and testing biological samples generally requires a valid warrant, supported by probable cause, to have authority of law under article I, section 7. *See Rose*, 146 Wn. App. at 455-56; *Robinson*, 102 Wn. App. at 812-13. “Warrantless disturbances of private affairs are subject to a high degree of scrutiny.” *State v. Chacon Arreola*, 176 Wn.2d 284, 292, 290 P.3d 983 (2012). This court presumes a warrantless search is per se unconstitutional unless the State shows an established exception to the warrant requirement applies. *Id.* (quoting *State v. Day*, 161 Wn.2d 889, 893-94, 168 P.3d 1265 (2007)). Such exceptions are “jealously and carefully drawn.” *State v. McKinnon*, 88 Wn.2d 75, 79, 558 P.2d 781 (1977) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)); *State v. Smith*, 88 Wn.2d 127, 144, 559 P.2d 970 (1977) (quoting *Jones v. United States*, 357 U.S. 493, 499, 78 S.

Ct. 1253, 2 L. Ed. 2d 1514 (1958)); accord *State v. Duncan*, 185 Wn.2d 430, 439, 374 P.3d 83 (2016).

A statute is not categorically sufficient, in itself, to dispense with the warrant requirement; even a statute that expressly authorizes a warrantless search does not provide authority of law to justify disturbing private affairs unless it passes constitutional muster. See *State v. Ladson*, 138 Wn.2d 343, 352 n.3, 979 P.2d 833 (1999); *City of Seattle v. McCready*, 123 Wn.2d 260, 280 n.11, 868 P.2d 134 (1994); *Robinson*, 102 Wn. App. at 812-13.

Except in the rarest of circumstances, the 'authority of law' required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate. This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes 'authority of law' justifying an intrusion into the 'private affairs' of its citizens. This defies the very nature of our constitutional scheme

Ladson, 138 Wn.2d at 352 n.3 (quoting *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 345-46, 945 P.2d 196 (1997) (Madsen, J., concurring)).

Thus, to pass constitutional muster, ordering warrantless, suspicionless urine or breath testing as a condition of pretrial release must meet a common law exception to the warrant requirement. See *Robinson*, 102 Wn. App. at 813. Exceptions to the warrant requirement must be firmly rooted in common law principles recognized in 1889, when article

I, section 7 was adopted. *State v. Walker*, 157 Wn.2d 307, 325, 138 P.3d 113, 122 (2006) (Chambers, J., concurring) (citing *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)). Traditional exceptions to the warrant requirement include “consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and . . . investigative stops.” *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). The burden is always on the State to prove one of these exceptions applies. *Ladson*, 138 Wn.2d at 350.

In *Olsen*, the Washington State Court of Appeals, Division II, noted “[t]he collecting and testing of a person’s urine generally constitutes a disturbance of a person’s private affairs and is a search.” 194 Wn. App. at 270. Surveying other cases, the court of appeals explained article I, section 7 already prohibits “suspicionless, random UA testing of public school athletes”; “suspicionless, weekly UA testing of criminal defendants released from custody before trial”; and “preemployment UA testing for positions that do not directly implicate public safety.” *Id.* (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 307, 178 P.3d 995 (2008) (Sanders, J., lead opinion); *id.* at 327 (Madsen, J., concurring); *id.* at 334 (J.M. Johnson, J., concurring); *Rose*, 146 Wn. App. at 455-58; *Robinson*, 102 Wn. App. at 828). This court should add that article I, section 7 prohibits ordering a DUI defendant to submit to warrantless, suspicionless

urine or breath testing as a condition of pretrial release.

a. Consent cannot justify ordering warrantless, suspicionless urine or breath testing as a condition of pretrial release because the unconstitutional conditions doctrine prohibits a trial court from conditioning pretrial release on a criminal defendant's waiver of a constitutional right.

“The doctrine of unconstitutional conditions provides that the government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right.” *In re Pers. Restraint of Dyer*, 175 Wn.2d 186, 203, 283 P.3d 1103 (2012) (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *United States v. Scott*, 450 F.3d 863, 866-67 (9th Cir. 2006)). Thus, the doctrine prohibits a trial court from conditioning pretrial release on a criminal defendant's waiver of a constitutional right. *Scott*, 450 F.3d at 866-68; *Butler*, 137 Wn. App. at 530.

The doctrine applies even though the benefit of pretrial release is fully discretionary or may be withheld altogether. *Scott*, 450 F.3d at 866; *Butler*, 137 Wn. App. at 530. “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” *Scott*, 450 F.3d at 866 n.5; *accord Butler*, 137 Wn. App. at 530.

“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.” *Scott*, 450 F.3d at 866; *accord Butler*, 137 Wn. App. at 531. Thus, “[w]here 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.’” *Scott*, 450 F.3d at 866 (omission and alterations in original) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1492 (1989)); *accord Butler*, 137 Wn. App. at 531.

In *Scott*, the United States Court of Appeals for the Ninth Circuit held a state trial court violated the Fourth Amendment by ordering a defendant charged with drug possession to submit to random urinalyses and home searches as a condition of his pretrial release. 450 F.3d at 865-68, 874. Applying the unconstitutional conditions doctrine, the Ninth Circuit concluded the defendant’s consent to his pretrial release conditions did not justify the search unless it was otherwise reasonable under the Fourth Amendment. *Id.* at 866-68. It did not pass constitutional muster. *Id.* at 874. Like the petitioners, “[t]he *Scott* court was concerned with the erosion of pretrial rights in general.” *Butler*, 137 Wn. App. at 531. The court of appeals highlighted the “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). Thus, it declared, “[the defendant], far from being a post-conviction conditional releasee, was out on his own recognizance before trial. His privacy and liberty interests were far greater than a probationer’s.” *Id.*

In *Butler*, the Washington State Court of Appeals, Division I, held the district court violated both the state and federal constitutions by ordering a DUI defendant to undergo an alcohol evaluation and treatment, and attend three self-help meetings per week, as conditions of his pretrial release. 137 Wn. App. at 519, 532. The court of appeals concluded the full and frank disclosure required by such programs implicated the defendant’s constitutional right against self-incrimination. *Id.* at 526. Applying the unconstitutional conditions doctrine, it also concluded the district court could not condition the defendant’s pretrial release on his relinquishment of that right. *Id.* at 530-32.

The unconstitutional conditions doctrine prohibited the district court from conditioning the petitioners’ pretrial release on their waiver of constitutionally protected privacy interests. Therefore, consent cannot justify ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release.

b. The federal special needs exception does not justify ordering warrantless, suspicionless urine or breath testing as a condition of pretrial release because this court has never adopted it and it is incompatible with article I, section 7 in this context.

Under the federal special needs exception, “there are certain circumstances when a search or seizure is directed toward ‘special needs, beyond the normal need for law enforcement’ and ‘the warrant and probable-cause requirement [are] impracticable.’” *York*, 163 Wn.2d at 311 (Sanders, J., lead opinion) (alteration in original) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987)). Thus, the federal courts have relaxed these requirements, allowing searches on less than a warrant and probable cause where special needs necessitate it. *See Scott*, 450 F.3d at 868; *Rose*, 146 Wn. App. at 456.

This court has never adopted the special needs exception. *Id.* at 312; Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 Seattle U. L. Rev. 1581, 1746-47 (2013) (discussing the current status of Washington state common law). Indeed, this court “ha[s] not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement.” *York*, 163 Wn.2d at 314 (Sanders, J., lead opinion). Rather, this court “has

consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition.” *Id.* (quoting *State v. Jordan*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007)); *see also Kuehn v. Renton Sch. Dist.*, 103 Wn.2d 594, 599, 601-02, 694 P.2d 1078 (1985) (“In the absence of individualized suspicion of wrongdoing, the search is a general search. “[This court] never authorize[s] general, exploratory searches. . . . The general search is anathema to [constitutional] protections, and except for the most compelling situations, should not be countenanced.” (citing *McKinnon*, 88 Wn.2d 75, and quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)).

In *York*, this court held random, suspicionless drug testing of student athletes violated article I, section 7. *York*, 163 Wn.2d at 299, 316 (Sanders, J., lead opinion); *Id.* at 316 (Madsen, J., concurring); *Id.* at 329-30 (J.M. Johnson, J., concurring). This court declined to adopt the special needs exception in that context, although different reasoning emerged. *Id.* at 314 (Sanders, J., lead opinion) (reasoning a special needs exception cannot be found in Washington state common law); *id.* at 316-17 (Madsen, J., concurring) (reasoning a narrowly drawn special needs exception is consistent with Washington state common law but, on that record, no special need actually justified suspicionless drug testing of

student athletes because the school district failed to show a suspicion-based regime was inadequate to achieve its legitimate objectives); *id.* at 342 (J.M. Johnson, J., concurring) (reasoning a special needs exception could justify random, suspicionless drug testing of student athletes under Washington state common law if the practice meets a strict scrutiny test).

Regardless of what test this court uses in the petitioners' cases, it should hold the special needs exception is incompatible with article I, section 7 in this context because it would impose punitive pretrial release conditions that effectively reverse the presumption of innocence.³

³ The following Op-Ed. discusses this problem in more detail:

[F]light risk and crime prevention don't justify bail conditions . . . hav[ing] far more to do with punishments or moral education techniques. While such sanctions could be permitted after conviction, they are flat-out unjustified before adjudication.

. . . Unfortunately, the vast majority of these improper release orders fly under the radar. Indeed, the use of bail conditions as a means of engaging in low-level punishment and rehabilitation is more widespread than is generally understood. Drug testing, desisting from alcohol, as well as attendance at rehabilitation programs . . . have become all-too-familiar requirements of pretrial release . . .

This judicial paternalism persists in part because state and municipal judges, who handle the overwhelming number of criminal cases, face less public scrutiny . . . Even when defense lawyers are present, they don't make a stink over these improper conditions to avoid the risk of having bail for their clients denied altogether. They figure that at least the defendants will get out of jail, rather than having to cool their heels inside.

It's understandable for judges to want to attack the social problems they see in the criminal justice system. The problem – besides the obvious issue of assigning punishments to people who might not even be convicted of crimes – is that they are thinking up untested responses on a case-by-case basis. This leads to disparities and fragmentation of penal policy even within jurisdictions; increased scrutiny of suspects at a stage when they should be free to build their defense against the government; and an imposition of the values of the temperance

Again, 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).

Imposing pretrial release conditions that too closely resemble probation conditions erodes pretrial rights in general, most notably the presumption of innocence:

“[The defendant], far from being a postconviction conditional releasee, was out on his own recognizance before trial. His privacy and liberty interests were far greater than a probationer’s. Moreover, the assumption that [the defendant] was more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the

movement on the criminally accused (since even lawful and moderate consumption of alcohol is frequently prohibited). Perhaps most disconcerting is how easy it becomes for regular people to violate these unreasonable bail conditions, which leads to unnecessary arrests and even more overcrowded prisons.

Pretrial release raises complicated legal and policy issues in every case. Still, our core concern is that many judicial release orders exhibit confusion about or disregard for the distinction between pretrial release and post-conviction punishment. Judges determining pretrial release are not authorized to act as social workers or agents of public retribution. They need to stop pretending otherwise.

Dan Markel & Eric J. Miller, Opinion, *Bowling, as Bail Condition*, N.Y. Times, July 13, 2012, <http://nyti.ms/1hrTqz5>.

presumption of innocence: 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.*"

Id. at 531-32 (emphasis added) (quoting *Scott*, 450 F.3d at 873-74; *see also* RCW 10.21.900 ("Nothing in this chapter [authorizing urine and breath testing as conditions of pretrial release] may be construed as modifying or limiting the presumption of innocence.")).

Legitimate concerns about the public threat of drunk driving do not override the petitioners' constitutionally protected privacy interests. For example, in *City of Seattle v. Mestani*, this court held random sobriety checkpoints were "highly intrusive" and "violated the right to not be disturbed in one's private affairs guaranteed by article 1, section 7." 110 Wn.2d 454, 456-60, 755 P.2d 775 (1988). As this court reasoned, "there is no denying the fact that there is a very strong societal interest in dealing effectively with the problem of drunken driving." *Id.* at 459 (quoting 4 Wayne R. LaFare, *Search and Seizure* § 10.8(d), at 71 (2d ed. 1987)). But that interest was not enough to justify warrantless, suspicionless traffic stops to determine whether drivers were sober. *Id.* at 459-60. "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 . . ." *Id.* at 459 (omission in original) (internal quotation marks omitted).

Historically, this court "offer[s] heightened protection for bodily functions compared to the federal courts." *York*, 163 Wn.2d at 307 (Sanders, J., lead opinion). Given the "stark differences in the language" of article I, section 7, this court should not adopt the federal special needs exception to justify ordering warrantless, suspicionless urine or breath testing as a condition of pretrial release. *Id.* at 303.

4. Ordering warrantless, suspicionless urine or breath testing as a condition of pretrial release also violates the Fourth Amendment because the federal special needs exception does not apply where public safety and crime prevention fall within the normal need for law enforcement.

The federal special needs exception requires two threshold elements: "First, the need must be 'special' in the sense that it serves a purpose other than the ordinary need for effective law enforcement. Second, and more importantly, the traditional requirement of a warrant and probable cause must be inadequate to fulfill the purpose of the search." *York*, 163 Wn.2d at 319 (Madsen, J., concurring). "In determining whether a special need justifies a warrantless search, courts evaluate the nature of the privacy interest involved, the character of the governmental intrusion, the need and immediacy of the government's concerns, and the

efficacy of the means chosen to meet those concerns.” *Id.*

In each of the petitioners’ cases, the district court imposed the challenged pretrial release conditions for the purpose of ensuring public safety and preventing recidivism. The State has previously argued “protecting the community from criminal defendants released pending trial” is a special need, but that justification fell within the normal need for law enforcement. *Rose*, 146 Wn. App. at 456 (citing *Scott*, 450 F.3d at 869-70). “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.

In *Scott*, the United States Court of Appeals for the Ninth Circuit held the special needs exception did not justify ordering a defendant charged with drug possession to submit to random urinalyses and home searches as a condition of his pretrial release. 450 F.3d at 865, 868-72, 874. The Ninth Circuit noted that while federal courts “had upheld suspicionless drug testing programs before, . . . in those cases, ‘the special need . . . was one divorced from the State’s general interest in law enforcement.’” *Id.* at 869 (second omission in original) (quoting *Ferguson*, 532 U.S. at 79). The Ninth Circuit also reasoned while the State has a legitimate and compelling interest in public safety and crime prevention, that is true of *anyone*, not just pretrial releasees. *Id.* at 870. For this reason,

protecting the community from criminal defendants released pending trial is a general rather than special need. *Id.* Ultimately, the Ninth Circuit held the state trial court violated the Fourth Amendment by ordering the defendant to submit to random urinalyses and home searches as a condition of his pretrial release. *Id.* at 865, 874.

In *Rose*, the Washington State Court of Appeals, Division II, held the special needs exception did not justify ordering a defendant charged with drug crimes to submit to weekly urinalyses as a condition of his pretrial release. 146 Wn. App. at 442, 456-58. The trial court specifically found “a substantial danger that [the defendant] would commit a serious crime, or that his physical condition would jeopardize his safety or the safety of others.” *Id.* at 457. But the court of appeals concluded that purpose was indistinguishable from the general need for law enforcement. *See id.* at 456-58. Thus, it concluded public safety and crime prevention are not special needs.

Because public safety and crime prevention fall within the normal need for law enforcement, the federal special needs exception does not justify ordering warrantless, suspicionless urine or breath testing as a condition of pretrial release.

In sum, the district court violated article I, section 7 and the Fourth Amendment by ordering the petitioners to submit to warrantless,

suspicionless urine or breath testing as conditions of pretrial release.

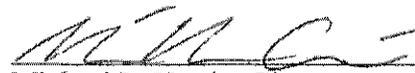
The district court “has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act.” *Holifield*, 170 Wn.2d at 244. Therefore, the petitioners are entitled to a statutory writ of review.

V. CONCLUSION

In sum, this court should reverse the superior court, holding (1) the petitioners are entitled to a statutory writ of review because the district court acted illegally and they have no adequate remedy at law, and (2) the district court violated article I, section 7 and the Fourth Amendment by ordering the petitioners to submit to warrantless, suspicionless urine or breath testing as conditions of pretrial release.

DATED this 17th day of November, 2016.

Respectfully submitted,

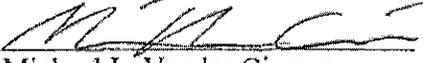


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Declaration of Service

I, Michael L. Vander Giessen, declare under penalty of perjury under the laws of the state of Washington that on November 17, 2016, I e-mailed a copy of the foregoing Petitioner's Opening Brief to Brian O'Brien and Rachel Sterett of the Spokane County Prosecuting Attorney's Office.

Nov. 17, 2016 Spokane, Washington
Date and Place


Michael L. Vander Giessen
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Sent: Friday, November 18, 2016 8:36 AM
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Subject: RE: Blomstrom v. Tripp, No. 91642-0

Please accept the attached amended Petitioners' Opening Brief for filing. This document is intended to substitute for the Petitioners' Opening Brief that I sent at the close of business. Thank you.

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From: Vander Giessen, Michael
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See attached for filing.

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