

No. 91642-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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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.

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PETITIONERS' REPLY BRIEF

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## I. ARGUMENT

### A. No adequate remedy at law.

The respondents argue the petitioners “each had an adequate remedy in the form of a motion in the trial court” but “[n]one of the[m] actually raised the claimed constitutional violation prior to applying for a writ of review.” (Br. of Resp’ts at 5.) The respondents are mistaken.

This action originally involved 17 petitioners and is representative of the relentless challenges the Spokane County Public Defender’s Office brought against the unconstitutional pretrial release conditions imposed by the district court. (CP at 98-109.) This ongoing litigation has always been centered on article I, section 7 of the Washington State Constitution, and the Fourth Amendment to the United States Constitution, as interpreted by *State v. Rose*, 146 Wn. App. 439, 191 P.3d 83 (2008), and *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006). As argued below,

When the District Court has imposed such conditions, defense counsel, and it has been a rotating defense counsel, that’s how our docket works, defense counsel has been routinely objecting and advising the judges that case law, including *State v. Rose* and *U.S. v. Scott*, and the citation for *State v. Rose* is 146 Wn.App. 439 and *U.S. v. Scott*, which is a 2006 finding in a Court of Appeals case, and those cases prohibit the conditions from being imposed.

(Super. Ct. VRP at 10, Mar. 20, 2015.)

Each petitioner expressly objected to the pretrial release conditions

at issue on review. (*Blomstrom* Dist. Ct. VRP at 2, Feb. 2, 2015; *Button* Dist. Ct. VRP at 4, Mar. 2, 2015; *Cooper* Dist. Ct. VRP at 2-3, Feb. 9, 2015.) This court should consider the petitioners' error claims because the grounds for their objections were apparent from the context of the ongoing litigation described above.<sup>1</sup>

If that were not enough, Cooper specifically objected "on *State v. Rose* grounds." (*Cooper* Dist. Ct. VRP at 3.) In the context of the ongoing litigation described above, this citation was specific enough to invoke both article I, section 7 and the Fourth Amendment because *Rose* relied on both constitutional provisions in holding "because a UA is a warrantless search and there is not any evidence that a weekly UA would increase the likelihood of appearance, the imposition of a UA as a standard condition of pretrial release is inappropriate." 146 Wn. App. at 442. Blomstrom and Button may assert the same error claims as Cooper by virtue of their association with him in this action.<sup>2</sup>

Even so, the respondents' argument confuses the petitioners' error claims with the additional legal authorities supporting those error claims.

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<sup>1</sup> See *State v. Jones*, 71 Wn. App. 798, 813, 863 P.2d 85 (1993) ("[I]f the ground for objection is apparent from the context, the objection is sufficient to preserve the issue." (citing *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987))).

<sup>2</sup> See RAP 2.5(a) ("A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.").

While this court will not consider error claims raised for the first time on review, it will consider additional legal authorities supporting those error claims if they relate to the same general theory argued in the trial court.<sup>3</sup>

Further, the respondents' argument misperceives the efficacy of a motion for reconsideration. As argued below, "I guess *theoretically* a motion to reconsider *could* work." (Super. Ct. VRP at 25 (emphasis added).) But unlike the civil rules, the criminal rules for courts of limited jurisdiction do not expressly provide a motion for reconsideration. Compare CRLJ 59(a), (b), (e), (j), with CrRLJ 1.1-9.3. The district court may amend pretrial release conditions only "on change of circumstances, new information or showing of good cause." CrRLJ 3.2(j)(1).

Where, in the course of the ongoing litigation described above, the district court consistently rejects the petitioners' routine objections to specific pretrial release conditions, a motion for reconsideration will not likely break the impasse. Because the disagreement concerns constitutional interpretation, there is no change of circumstances, new information, or good cause that will persuade the district court to suddenly change its legal opinion and adopt the petitioners' argument. A motion for

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<sup>3</sup> 1 Wash. State Bar Ass'n, *Washington Appellate Practice Deskbook* § 11.2(3), at 11-7 (4th ed. 2016) (citing *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990); *Walla Walla Cnty. Fire Prot. Dist. No. 5 v. Wash. Auto Carriage, Inc.*, 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987)).

reconsideration would be a futile gesture before an unreceptive audience.

Finally, the respondents wrongly suggest a writ of review is prohibited unless and until the applicant moves for reconsideration in the trial court. RCW 7.16.040 requires that the applicant for a writ of review have “no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law” available to challenge the inferior tribunal’s illegal action. The structure of the quoted phrase suggests a legislative focus on legal remedies available outside the inferior tribunal.

This interpretation is intuitive because again, repeated efforts in the inferior tribunal would be a futile gesture before an unreceptive audience. Moreover, a motion for reconsideration would necessarily require the applicant to endure some privacy invasion before the inferior tribunal could hear and decide the issues. (*See Super. Ct. VRP at 24-25.*) Considering all, this court should hold the petitioners are entitled to a writ of review because they have no adequate remedy at law.

Alternatively, if this court perceives any defect in the petitioners’ application for a writ of review, it may still reach the merits by treating the action as an application for a writ of habeas corpus.<sup>4</sup>

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<sup>4</sup> “This court has traditionally regarded substance rather than form, and has treated any application as proper irrespective of the writ asked.” *Tuschoff v. Westover*, 60 Wn.2d 722, 722, 375 P.2d 254 (1962). A writ of habeas corpus is available to challenge pretrial release conditions if they unlawfully restrain the applicant’s liberty. *See* RCW 7.36.010; *Butler v. Kato*, 137 Wn. App. 515, 154 P.3d 259 (2007). A writ of habeas corpus is

**B. Procedural posture and preliminary issues.**

The respondents argue the petitioners' action "must be seen as a challenge to the constitutionality of these statutes"—RCW 10.21.030 and .055. (Br. of Resp'ts at 9.) That is not necessarily correct. The petitioners challenge the constitutionality of the district court's orders, regardless of what statutes or court rules the respondents argue support them. After all, it is *always* the State who bears the heavy burden of proving, by clear and convincing evidence, that a narrowly drawn exception to the warrant requirement applies. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). It is the State who must show these warrantless, random, and suspicionless disturbances of private affairs, are justified by 'authority of law' under article I, section 7. And it is the State who must show such searches are 'reasonable' under the Fourth Amendment.

The petitioners never directly challenged the constitutionality of any statute or court rule, only the district court's orders. However, RCW 10.21.030 and .055 are plainly implicated to the extent the respondents

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available even if the applicant has not exhausted legal remedies. *See* RCW 7.36.010-.250 (omitting the requirement that the applicant have no adequate remedy at law); *see also Toliver v. Olsen*, 109 Wn.2d 607, 610, 746 P.2d 809 (1987); *Weiss v. Thompson*, 120 Wn. App. 402, 407, 85 P.3d 944 (2004).

rely on them as ‘authority of law’ or as a ‘reasonable’ justification for the district court’s order. If this court treats the petitioners’ action as a direct challenge to the constitutionality of these statutes, it should analyze them as applied rather than on their face.<sup>5</sup>

The respondents argue chapter 10.21 RCW applies to all criminal cases because the word “felony” appears only in a bill report and “is nowhere in the text of the statute.” (Br. of Resp’ts at 8 & n.7.) But the word “felony” appears in the actual session law, not just a bill report. RCW 10.21.010 note (enacted as Laws of 2010, ch. 254, § 1). The legislature’s own expression of its intent shows it did not contemplate applying chapter 10.21 RCW to misdemeanors or gross misdemeanors: “The legislature intends by this act to require an individualized determination by a judicial officer of conditions of release for persons in custody for *felony*.” *Id.* (emphasis added).

The respondents argue “*none* of the [petitioners] were subject to an ignition interlock requirement.” (Br. of Resp’ts at 9.) But on the weekend before her preliminary appearance, the district court ordered Button to

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<sup>5</sup> This court presumes a statute is constitutional but will declare it unconstitutional if the challenger establishes its unconstitutionality beyond a reasonable doubt. *Sch. Dists. v. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). In this context, “beyond a reasonable doubt” does not refer to an evidentiary standard but “merely means that based on [this court’s] respect for the legislature, [this court] will not strike a duly enacted statute unless [it is] ‘fully convinced, after a searching legal analysis, that the statute violates the constitution.’” *Id.* at 606.

install an ignition interlock in every motor vehicle she operates. (*Button* Dist. Ct. VRP at 1-2; Mot. for Discretionary Review App. at 7-8.) “A breath test is a search under the Fourth Amendment and under article I, section 7.” *State v. Baird*, 187 Wn.2d 210, 218, 386 P.3d 239 (2016) (Madsen, C.J., lead opinion) (citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010)). A warrantless breath test, therefore, is subject to the same constitutional analysis as a warrantless urine test.

**C. *Gunwall* analysis.**

The respondents concede four of the six *Gunwall*<sup>6</sup> criteria “generally support analyzing our State constitution independently from the Fourth Amendment.” (Br. of Resp’ts at 19.) But according to the respondents, “an analysis of the fourth and sixth *Gunwall* factors favors a finding of national concern, rather than one solely of local concern; there has been no historical difference between our State’s jurisprudence in this arena and that in the federal system.” (*Id.* at 23.)

The petitioners disagree because (1) it has already been determined that “preexisting state law reflects a consistent protection of privacy of the body and bodily functions,” *Robinson v. City of Seattle*, 102 Wn. App. 795, 810, 10 P.3d 452 (2000); and (2) it is undisputed that imposing

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<sup>6</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

pretrial release conditions is traditionally a function of state and local trial courts under state and local laws, *see Westerman v. Cary*, 125 Wn.2d 277, 290-91, 892 P.2d 1067 (1994); *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974).

Further, the petitioners disagree with the respondents' hypertechnical application of the *Gunwall* criteria. As commentators note, "It gradually became well settled that Article I, Section 7 . . . provides greater protection to individual rights than the Fourth Amendment . . . . As a result, for this section, the court no longer requires the extensive analysis called for in *Gunwall*." Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 32 (2d ed. 2013); *see, e.g., State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013) ("Article I, section 7 is more protective of individual privacy than the Fourth Amendment, and we turn to it first when both provisions are at issue.").

In recent years, this court clarified that "*Gunwall* was not meant to be a 'talisman' or a key to the magic kingdom of the state constitution . . . [and instead] was to serve as an interpretive tool to assure better briefing by lawyers and the more thoughtful development of state constitutional jurisprudence." Utter & Spitzer, *supra*, at 17. Therefore, use of the *Gunwall* criteria changed because "what had been comparative factors for deciding *whether* to interpret a state provision independently, transformed

into factors to guide briefing and to aid the court in determining *how much weight* to accord U.S. Supreme Court decisions. *Id.* at 14.

This court “has been particularly active in developing a distinct jurisprudence related to search and seizure.” *Id.* at 32. Such independence is consistent with state history. “Washington’s 1889 constitution confirmed and entrenched an individualistic mentality and a suspicion of established interests.” *Id.* at 6. Nineteenth century Washington homesteaders embraced “a natural-rights liberalism defined in terms of individual self-seeking for economic advantage.” *Id.* at 7 (internal quotation marks omitted). Thus, the state constitution “began with a forthright Lockean declaration: ‘All political power is inherent in the people, and governments . . . are established to protect and maintain individual rights.’” *Id.* at 8 (quoting Wash. Const. art. I, § I).

The respondents argue this court should interpret article I, section 7 the same as the Fourth Amendment in part because “[b]oth constitutions predate the invention of the automobile.” (Br. of Resp’ts at 19.) But the automobile was invented between 1885 and 1886, three to four years before the state constitutional convention began.<sup>7</sup> Regardless, article I,

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<sup>7</sup> *Everyday Mysteries: Who Invented the Automobile?*, Library of Congress, <https://www.loc.gov/rr/scitech/mysteries/auto.html> (last visited Apr. 9, 2017); *Washington State Constitution*, Wash. Sec’y of State, <https://www.sos.wa.gov/legacy/constitution.aspx> (last visited Apr. 9, 2017).

section 7 was designed to adapt and provide broad protection despite such technological advances.

The framers of article I, section 7 selected the term ‘private affairs,’ as opposed to ‘persons, . . . papers, and effects,’ in response to “rapid advances in technology and the public’s increasing concerns about privacy.” Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 433 (2008). “Due to rapid advances in technology and an expanding governmental presence in peoples’ lives, the Rights Committee likely realized that far more than residents’ ‘persons . . . papers and effects’ needed protection and therefore selected the broader phrase ‘private affairs’ for article I, section 7.” *Id.* at 444 (omission in original).

At the time of the state constitutional convention, “[t]he American public was struggling to adapt to a rapidly changing society and consequently sought greater protection for their privacy interests.” *Id.* at 444-45. “The rapid advances in technology taking place in the late nineteenth century, such as the camera, telegraph, and telephone created new methods for invading the private affairs of individuals that were not explicitly protected by existing common law and statutory doctrines or by the Fourth Amendment.” *Id.* at 445.

In this historical context, the Rights Committee “recognized that,

in order to fully protect residents' privacy, they needed to use a general term that would not only cover the tangible items listed in the Fourth Amendment, but also one that would account for interests that were threatened by new technologies. The term 'private affairs' was the natural choice." *Id.* at 446. The Rights Committee "recognized that the term 'private affairs' would encompass privacy interests threatened by future technological developments" and "would always provide broad textual support for the protection of an individual's private affairs." *Id.* at 447.

As to pretrial release conditions, the respondents are correct that, for the most part, state and federal standards evolved simultaneously.<sup>8</sup> This does not mean article I, section 7 will tolerate warrantless, random, and suspicionless urine or breath tests as conditions of pretrial release. Again, "preexisting state law reflects a consistent protection of privacy of the body and bodily functions." *Robinson*, 102 Wn. App. at 810.

The respondents are also correct that traffic crimes have a greater potential for interstate impact because they occur in motor vehicles on public highways. Still, imposing pretrial release conditions remains a function of state and local trial courts under state and local laws. *See*

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<sup>8</sup> *See generally* Timothy R. Schnacke et al., Pretrial Justice Inst., *The History of Bail and Pretrial Release* (2010), available at <http://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf> (chronicling the development of bail and pretrial release from Anglo-Saxon roots to modern American law).

*Westerman*, 125 Wn.2d at 290-91; *Smith*, 84 Wn.2d at 501.

It is a longstanding American principle that “[the] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4, 72 S. Ct. 1, 96 L. Ed. 3 (1951) (citation omitted) (citing *Hudson v. Parker*, 156 U.S. 277, 285, 15 S. Ct. 450, 39 L. Ed. 424 (1895)). Since its inception, Washington state has upheld this fundamental precept and provided even greater protection for pretrial rights.

Unlike the Eight Amendment to the United States Constitution, article I, section 20 of the Washington State Constitution expressly provides a right to bail and not just a right against excessive bail. *Westerman*, 125 Wn.2d at 287 & n.4. Traditionally, the right to bail included the right to a judicial determination of either release or reasonable bail. *Id.* at 291-92. Washington state has upheld the common law history of bail, which included not only a right to bail, but also “a habeas corpus procedure to convert this right into reality.” *Id.* at 290.

Overall, given Washington state’s rich history of providing enhanced individual rights, this court should analyze article I, section 7

independently from the Fourth Amendment.

**D. Article I, section 7: disturbance of private affairs.**

Under article I, section 7, “[i]ndividuals have a constitutionally protected interest in the privacy of their internal bodily functions and fluids.” *State v. Mecham*, 186 Wn.2d 128, 145, 380 P.3d 414 (2016) (Wiggins, J., lead opinion) (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 308, 178 P.3d 995 (2008) (Sanders, J., lead opinion)). Thus, “the State infringes on this interest when it takes someone’s . . . urine, or breath.” *Id.* (citing *Garcia-Salgado*, 170 Wn.2d at 184; *York*, 163 Wn.2d at 308 (Sanders, J., lead opinion); *Robinson*, 102 Wn. App. at 819-22). “These activities infringe on a person’s privacy interests on multiple levels: the physical intrusion associated with drawing . . . urine or of extracting ‘deep lung’ breath intrudes on an individual’s privacy; and the chemical analysis associated with these tests provide a wealth of private medical information . . . .”<sup>9</sup> *Id.*

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<sup>9</sup> “It is difficult to imagine an affair more private than the passing of urine. . . . ‘Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.’” *Robinson*, 102 Wn. App. at 818 (internal quotations marks omitted) (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)). Most urinalyses require the subject to expose his or her genitals and excrete his or her bodily fluids, on demand, into a container, under the watchful eye of a state agent. Observation is required to assure the sample is genuine and unadulterated, and to establish a chain of custody. *See* Cathryn Jo Rosen & John S. Goldkamp, *The Constitutionality of Drug Testing at the Bail Stage*, 80 J. Crim. L. & Criminology 114, 130 & n.70, 131, 151, 161-63, 169 (1989). Even

The respondents do not dispute these principles, although they argue “[c]apturing exhaled air instead of urine is less intrusive into an individual’s privacy”—a point well taken, but not dispositive of the issue. (Br. of Resp’ts at 18.) Thus, this court’s analysis hinges on whether warrantless, suspicionless urine or breath tests are justified by ‘authority of law’ under article I, section 7.

**E. Article I, section 7: without authority of law.**

The respondents concede the challenged urine and breath tests “do[] not fall within any of the[] commonly analyzed exceptions” to the warrant requirement recognized under article I, section 7. (*Id.* at 24.) Thus, the respondents contend the inquiry “*must* be akin to the special needs exception under Federal law.” (*Id.*)

The respondents argue that, in *York*, “a majority of that court applied the special needs exception under Washington law.” (Br. of Resp’ts at 24.) On the contrary, all nine justices agreed no special needs exception applied on those facts. 163 Wn.2d at 299-316 (Sanders, J., lead opinion); *id.* at 316-29 (Madsen, J., concurring); *id.* at 329-46 (J.M. Johnson, J., concurring). While a majority recognized the potential viability of *some* special needs exception, this court could not agree on the

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unobserved urinalyses are highly intrusive because chemical analyses reveal a wide range of confidential information to which the government has no right. *See id.* at 131, 151, 161.

proper test. *Id.* at 299-316 (Sanders, J., lead opinion); *id.* at 316-29 (Madsen, J., concurring); *id.* at 329-46 (J.M. Johnson, J., concurring).

Considering article I, section 7's unique text and history outlined above, this court should hold the type of special needs exception employed by the federal courts cannot be found in Washington state common law. *Id.* at 314 (Sanders, J., lead opinion). At the least, this court should conclude the type of special needs exception employed by the federal courts is incompatible with article I, section 7 in the narrow context of pretrial release conditions, where the presumption of innocence is at risk.

The respondents argue "this court has on a number of occasions sustained laws authorizing warrantless searches where the governmental interest outweighed the privacy interests at stake." (Br. of Resp'ts at 24 (citing *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007); *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993)).) But in those cases, the individuals searched were convicted offenders, not pretrial releasees. Certainly, "a person's privacy rights under article I, section 7 may vary based on that person's status as an arrestee, pretrial detainee, prisoner, or probationer." *Surge*, 160 Wn.2d at 74 (C. Johnson, J., lead opinion).

"[A] defendant 'out on his own recognizance before trial' has privacy interests 'far greater than a probationer's.'" *Haskell v. Harris*, 669 F.3d 1049, 1055 (9th Cir. 2012) (quoting *Scott*, 450 F.3d at 873). And,

“defendants on pretrial release do not have reduced expectations of privacy like probationers.” *United States v. Gardner*, 523 F. Supp. 2d 1025, 1034 (N.D. Cal. 2007) (citing *Scott*, 450 F.3d at 873). Thus, “[i]ndividuals do not, by virtue of being arrested, lose their fourth amendment right to privacy.” Cathryn Jo Rosen & John S. Goldkamp, *The Constitutionality of Drug Testing at the Bail Stage*, 80 J. Crim. L. & Criminology 114, 134 (1989). Unlike members of other categories, “there is no basis for concluding that the overall privacy rights enjoyed by arrestees are diminished solely by virtue of their status.” *Id.* at 162. “Even if it is assumed that arrestees’ rights are not equivalent to those of ordinary citizens, their rights are more analogous to public school students and public employees, who retain some rights . . . .” *Id.*<sup>10</sup>

The respondents argue “people who drive with BAC levels [over .15] are likely to do so again and are more likely to be involved in a fatal collision.” (Br. of Resp’ts at 12.) The respondents cite studies from the National Highway Traffic Safety Administration “reflect[ing] a correlation

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<sup>10</sup> Thus, in *State v. Olsen*, the Washington State Court of Appeals, Division II, analogized members of these three categories to one another, noting 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.” 194 Wn. App. 264, 270, 374 P.3d 1209 (citing *York*, 163 Wn.2d at 307 (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), *review granted*, 186 Wn.2d 1017 (2016).

between high breath alcohol content and likelihood of recidivism.” (*Id.* at 15.) However, “[t]he mere fact that an individual belongs to a suspect group . . . is not sufficient, in and of itself, to permit any intrusion upon that individual’s fourth amendment rights.” Rosen & Goldkamp, *supra*, at 167. “The mere assumption that the defendant would be more likely to commit crimes d[oes] not enable the government to short-circuit the warrant process.” *Gardner*, 523 F. Supp. 2d at 1034. That is so because the presumption of innocence “can only raise an inference of innocence, not of guilt.” *Butler v. Kato*, 137 Wn. App. 515, 531-32, 154 P.3d 259 (2007) (quoting *Scott*, 450 F.3d at 873-74).

Analogizing pretrial releasees’ status to that of public school students and public employees, this court should decide no special needs exception applies on these facts. If a special needs exception exists in Washington state common law, this court should consult *Scott*, *Rose*, and Justice Madsen’s concurrence in *York* for guidance on how to apply it.

The special needs exception’s first threshold requirement is that “the need must be ‘special’ in the sense that it serves a purpose other than the ordinary need for effective law enforcement.” *Id.* at 319 (Madsen, J., concurring). As *Scott* and *Rose* held, public safety and crime prevention fall within the normal need for law enforcement. 450 F.3d at 869-70; 146 Wn. App. at 456. The respondents argue “this is an over-broad reading of

these two holdings.” (Br. of Resp’ts at 11.) For support, the respondents cite the following footnote in *Scott*: “We do not hold that the government can *never* justify drug-testing as a condition of pre-trial release. Such a condition may well be justified based on a legislative finding, or an individualized finding that defendant’s ability to appear in court will be impaired absent drug-testing.” 450 F.3d at 872 n.12 (citation omitted). Yet, the respondents do not argue the testing is justified to ensure the petitioners appear in court. Indeed, no evidence suggests the petitioners have ever failed to appear in court when required. (CP at 23, 35, 88.)

Instead, the respondents argue “the reason behind the testing requirement was to *monitor compliance* with pretrial release conditions intended to protect community safety.” (Br. of Resp’ts at 10 (emphasis added).) The respondents elsewhere describe their objective more directly as “protecting the public” and “protecting the community from the risk imposed by each of the [petitioners]’ continued use of impairing substances.” (*Id.* at 14, 25.) Random, suspicionless urine or breath tests are not merely administrative tools for monitoring DUI defendants’ compliance with pretrial release conditions; they are punitive and rehabilitative tools for initiating probation-like programs before DUI defendants are pronounced guilty. The goal is to obviate future DUIs. Despite the respondents’ claims, the purpose actually served by the testing

is ultimately indistinguishable from the general interest in crime control.<sup>11</sup>

Still, the respondents argue “[u]nlike the defendants in *Scott* and *Rose*, the testing here is *entirely unrelated* to law enforcement.” (Br. of Resp’ts at 12 (emphasis added).) The respondents then backtrack from this overstatement, saying “[t]he testing here is for a specific purpose only *tangentially related* to prosecution.”<sup>12</sup> (Br. of Resp’ts at 13 (emphasis added).) The respondents’ own confusion on the testing’s proximity to crime control indicates it goes too far in eroding the rights of pretrial

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<sup>11</sup> Cf. *Ferguson v. City of Charleston*, 532 U.S. 67, 80-81, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (invalidating a state hospital’s practice of testing pregnant women for cocaine and providing the results to police because “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment”; thus rejecting the government’s argument that the testing program’s “ultimate purpose” was the “beneficent” goal of “protecting the health of both mother and child” and concluding “the purpose actually served . . . is ultimately indistinguishable from the general interest in crime control.” (omission in original) (internal quotation marks omitted)).

<sup>12</sup> The respondents argue the testing is unrelated to law enforcement because “alcohol consumption is not criminal” and “[THC] consumption is not unlawful in Washington.” (Br. of Resp’ts at 12-13 & n.8.) But it is a crime for a minor to consume or possess liquor. RCW 66.44.270. It is a crime for a person to drink alcohol in a public conveyance such as a bus. RCW 66.44.250. It is a crime to possess marijuana except as authorized by chapter 69.50 RCW. RCW 69.50.4013, .4014. Marijuana possession is also a crime under federal law, and the current presidential administration has said it “expects law enforcement agents to enforce federal marijuana laws when they come into conflict with states where recreational use of the drug is permitted.” Kevin Liptak, *White House: Feds Will Step up Marijuana Law Enforcement*, CNN, <http://www.cnn.com/2017/02/23/politics/white-house-marijuana-donald-trump-pot/> (last updated Feb. 24, 2017). Of course, possessing other drugs is a crime under both state and federal law.

If a DUI defendant submits to a test that reveals the presence of alcohol or drugs, the government could potentially use that information to prosecute crimes or probation violations, or for impeachment purposes. If a DUI defendant submits to a test that reveals the presence of alcohol or drugs, or does not submit to a test altogether, the district court may revoke his or her release. CrRLJ 3.2(j)(2). Violating the district court’s order could also trigger remedial or punitive sanctions for contempt. Ch. 7.21 RCW. Further, a DUI defendant who fails in his or her testing requirement could face other consequences later, such as enhanced penalties at sentencing or denial of release pending appeal.

releases, treating them as convicts or probationers when they are still presumed innocent. Considering all, this court should conclude the testing's stated purpose is not a special need because it is indistinguishable from the general need for effective law enforcement.

The special needs exception's second threshold requirement is that "the traditional requirement of a warrant and probable cause must be inadequate to fulfill the purpose of the search." *Id.* at 319 (Madsen, J., concurring). According to Justice Madsen, "the scope of the special needs exception is more narrowly drawn under article I, section 7 than under the Fourth Amendment." *Id.* at 322. Thus, she disagreed with Justice J.M. Johnson's proposed test for evaluating whether a special need justifies a random, suspicionless search. *Id.* at 320. As she reasoned, "[a]lthough a special needs analysis is similar to . . . strict scrutiny, it differs in important ways." *Id.* at 321. Particularly, "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." *Id.* Moreover, "[a] balancing test that omits this requirement threatens to turn 'special needs' into an exception that swallows the general rule prohibiting warrantless searches." *Id.* Justice Madsen thus rejected any balancing test without carefully prescribed limits, such as individualized suspicion. *Id.*

There, the school district “failed to show a suspicion-based testing regime is not a feasible means of maintaining student order, discipline, and safety.” *Id.* at 325. As Justice Madsen reasoned, “[d]rug and alcohol use often involves observable manifestations that would supply the particularized suspicion necessary to support a search.” *Id.* She concluded a balancing test favored the students even if the school district could establish that a suspicion-based testing regime was unworkable. *Id.* at 327.

Justice Madsen agreed “[a] state-compelled urine test is ‘particularly destructive of privacy and offensive to personal dignity.’” *Id.* (quoting *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (Scalia, J., dissenting)). Further, she concluded Washington state common law was inconsistent with the “dubious premise” that “compelled urine testing is minimally intrusive” because “the invasion of students’ privacy is not significant.”” *Id.* at 327-28 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 834, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002)). Finally, she noted random, suspicionless testing was not likely to accomplish its goals because “[a] urine test remote in time from the event does not detect present drug use that might affect performance.” *Id.* at 328.

Even if a special needs exception exists in Washington state common law, the respondents have not met its strictures. The respondents

urge this court to simply “weigh the government interest against the intrusion into the [petitioners]’ privacy, and determine whether that intrusion is reasonable.” (Br. of Resp’ts at 24.) But the respondents fail to explain why individualized suspicion of alcohol or drug use would be impracticable. *See York*, 163 Wn.2d at 321 (Madsen, J., concurring). This failure is inexcusable because alcohol or drug use often involves observable manifestations that could supply the individualized suspicion required for a search. *Id.* at 325.

To justify the complete lack of individualized suspicion, the respondents make the bald assertion that the testing is “narrowly focused” to achieve the stated government interest. (Br. of Resp’ts at 14.) But random, suspicionless urine or breath tests cannot be considered narrowly focused when they cast dragnets capturing far more physical samples and confidential information than is necessary to ensure public safety and prevent recidivism. Urinalyses are also inefficacious in achieving their goal because they occur remote in time from the act of consuming alcohol or drugs and the act of driving. *See York*, 163 Wn.2d at 328 (Madsen, J., concurring).<sup>13</sup> As the respondents argue, “[l]ike EtG, THC remains in the

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<sup>13</sup> *See also Anable v. Ford*, 653 F. Supp. 22, 38-44 (W.D. Ark. 1985) (concluding that, because a urinalysis could not reveal whether a student was under the influence of drugs at school, it was not reasonably related to maintaining order and security or preserving the educational environment).

system for an extended time and its presence in urine does not indicate current impairment.” (Br. of Resp’ts at 13 n.8). Thus, urinalyses cannot separate alcohol or drug use from driving. Ignition interlock devices are inefficacious in achieving their goal because, like the respondents argue, they are “easier to circumvent, as an individual can simply drive a different vehicle not equipped with such a device.” (*Id.* at 19.)

The respondents attempt to overcome these many deficiencies by emphasizing the dangers of DUIs. 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 this rule “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). The question becomes, what are some lesser alternatives to random, suspicionless urine or breath tests?

Less restrictive pretrial release conditions include the requirements that DUI defendants commit no crimes; not possess or consume alcohol or drugs; obey restrictions on association, such as not patronizing taverns, liquor stores, or cannabis stores or clubs; randomly report to a pretrial services agency or probation department so an officer of the court may determine, using his or her own five senses, whether there is good reason to suspect alcohol or drug use; not operate a motor vehicle with alcohol or

drugs in his or her bloodstream; obey travel restrictions, such as not leaving the territory of the state; or remain on electronic monitoring. *Id.* at 523-24; CrR LJ 3.2(d)(3), (4), (5), (8), (9). Electronic monitoring might include a transdermal alcohol detection bracelet. *See State v. Hardtke*, 183 Wn.2d 475, 352 P.3d 771 (2015). And, if this court deems them constitutional, ignition interlock devices or preliminary breath tests may constitute lesser alternatives to urinalyses.

In sum, the respondents have failed to explain why a suspicion-based testing regime would be insufficient to ensure DUI defendants comply with pretrial release conditions. *See York*, 163 Wn.2d at 322 (Madsen, J., concurring). Because the challenged urine or breath tests are not based on individualized suspicion of alcohol or drug use, they are general, exploratory searches, and are prohibited by article I, section 7. *See 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 . . . .” (internal quotations marks omitted)).

The glaring absence of individualized suspicion is also important because “[w]hen a search intrudes into the body, the search must meet three showings *in addition* to meeting the warrant requirement or meeting

an exception.” *Baird*, 187 Wn.2d at 221 n.3 (Madsen, C.J., lead opinion) (emphasis added) (citing *Garcia-Salgado*, 170 Wn.2d at 185-86). “First, there must be a ‘clear indication’ that the evidence will be found; second, the search method must be reasonable; and third, the search must be performed in a reasonable manner.” *Id.* (internal quotation marks omitted) (quoting *Garcia-Salgado*, 170 Wn.2d at 185; *Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)).

Here, the respondents do not explain how there could be a ‘clear indication’ that evidence will be found during random, suspicionless urine or breath tests ordered as conditions of the petitioners’ pretrial release. Therefore, the respondents can neither establish an exception to the warrant requirement nor make all required additional showings to justify this disturbance of the petitioners’ private affairs.

**F. Fourth Amendment: unreasonable search.**

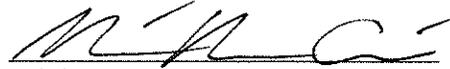
In reply to the respondents’ arguments, the petitioners hereby incorporate their briefing from Part IV.C.4 of their opening brief and, as applicable directly by analogy, from Parts I.D and I.E above.

**II. CONCLUSION**

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

DATED this 10th day of April, 2017.

Respectfully submitted,

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

Michael L. Vander Giessen  
WSBA No. 45288  
Attorney for Petitioners

Declaration of Service

I, Michael L. Vander Giessen, declare under penalty of perjury under the laws of the state of Washington that on April 10, 2017, I e-mailed a copy of the foregoing Petitioners' Reply Brief to Brian C. O'Brien, Gretchen E. Verhoef, Samuel J. Comi of the Spokane County Prosecuting Attorney's Office.

Apr. 10, 2017 Spokane, Washington  
Date and Place



Michael L. Vander Giessen  
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