

No. 91642-0

SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

HONORABLE GREGORY TRIPP, et al.,
Respondents.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENTS

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I. ISSUES PRESENTED

1. Whether the superior court correctly determined that the Petitioners had an adequate remedy at law and therefore lacked the ability to challenge the conditions of release in a writ of review?
2. Whether the conditions of release respected the Petitioners' constitutional rights?

II. STATEMENT OF THE CASE

CORTNEY BLOMSTROM

On February 2, 2015,¹ Cortney Blomstrom made her first appearance and was arraigned on the charge of driving while under the influence of intoxicating liquor. *See* Report of Proceedings for *State v. Blomstrom* (“Blomstrom RP”). At the arraignment, the State presented evidence that Ms. Blomstrom had difficulty maintaining her vehicle in its lane for quite some time. *Id.* at 1. She subsequently provided two breath samples that showed alcohol concentrations of .191 and .184. *Id.* The State also referenced National Highway Traffic Safety Administration (hereinafter “NHTSA”) studies which indicate that individuals driving with

¹ The VRP of Ms. Blomstrom’s first appearance and arraignment, supplied by an employee of the public defender’s office, indicates on page one that the proceedings occurred on February 9, 2015. This appears to be in error, as the orders from her arraignment are dated February 2, 2015. CP 37.

an alcohol concentration above a .15 are more likely to reoffend and more likely to be involved in a fatal collision. *Id.* at 2.

Based on these facts, the State asked the court to impose random pretrial alcohol testing four times monthly. *Id.* In response, the public defender argued that because Ms. Blomstrom had no prior offenses, an unmonitored prohibition on use, possession, or consumption of alcohol would be sufficient to protect public safety. *Id.* Based on the facts presented, the court found a likelihood that Ms. Blomstrom would reoffend and that continued consumption of alcohol posed a risk to public safety. *Id.* at 3. The court released Ms. Blomstrom on her own recognizance, but required that she not use, possess, or consume alcohol or other non-prescribed drugs. *Id.* The court also imposed random EtG (Ethyl Glucuronide)² and THC (Tetrahydrocannabinol) testing twice monthly. *Id.*

BROOKE BUTTON

On March 2, 2015, Brooke Button made her first court appearance following a weekend arrest for driving under the influence. *See* Report of Proceedings for *State v. Button* (“Button RP”). Ms. Button was accused of

² EtG is an ethanol metabolite formed after alcohol is consumed. EtG testing is a urinalysis test used to detect the presence of the metabolite in a person’s body and simply indicates some non-specific, recent consumption of alcohol. EtG is testable three to four days after a person consumes alcohol, and therefore, long after the alcohol and its intoxicating effects have dissipated.

driving under the influence of marijuana. *Id.* at 1-2. A judge had previously found probable cause and imposed conditions of release, which included a no use, possession, or consumption requirement and an ignition interlock requirement. *Id.* at 1. Ms. Button had previously been convicted of driving under the influence in Idaho in 2009. *Id.* at 2. She had also been charged, but not convicted, thrice for operating a vehicle without a required ignition interlock device. *Id.* at 2-3.

The State asked that random drug and alcohol testing be imposed as a pretrial release condition. *Id.* at 2. The State argued that her previous DUI conviction indicated a likelihood of re-offense and that the three ignition interlock charges indicated that she was unlikely to comply with court orders. *Id.* at 3, 5. The public defender argued that the ignition interlock charges should not be considered because they were dismissed and asked that the ignition interlock requirement be removed because the current offense was not alcohol related. *Id.* at 3-4. The public defender also indicated that the most current DUI was “strictly a marijuana [impairment] allegation.” *Id.* at 4. The court removed the ignition interlock requirement, but found, based on the prior DUI offense from Idaho and the prior ignition interlock charges, that random testing under RCW 10.21.030 was necessary to monitor Ms. Button’s compliance with the no use, possession, consumption requirement. *Id.* at 5-6.

CHRISTOPHER COOPER

Mr. Cooper was stopped on suspicion of driving while under the influence following an officer observing him commit a series of lane violations, repeatedly weaving side to side, over and across lane lines. Report of Proceedings for *State v. Cooper* (“Cooper RP”) at 2. Cooper was very intoxicated, having just come from a bar, and he had an open bottle of whiskey on the floor. *Id.* He subsequently provided a breath sample with an alcohol concentration of .175. *Id.* The court arraigned Mr. Cooper on February 9, 2015.

At Cooper’s arraignment, the State requested a no use, possession, or consumption condition of release, and random EtG testing four times monthly. *Id.* at 1-2. The State based that request on NHTSA studies indicating that individuals driving with alcohol concentrations above a .15 are far more likely to reoffend, and more likely to be involved in fatal collisions. *Id.* at 2. The State also pointed to two older minor in possession charges and an extensive history of traffic infractions. *Id.* at 3-4. Based on this combination of facts, the court imposed random EtG and THC testing four times monthly. *Id.* at 5-6.

Each defendant thereafter petitioned for a writ of review to the Spokane County Superior Court, without including any of the transcripts

from the district court proceedings.³ The Honorable Salvatore Cozza denied the writs by orders dated March 31, 2015, concluding the defendants had an adequate remedy at law. CP 95-106. The defendants then sought discretionary review in this Court.

III. ARGUMENT

A court can only grant a writ of review where (1) an inferior court has exceeded its jurisdiction or acted illegally, and (2) there is no appeal or adequate remedy at law. RCW 7.16.040. The defendants failed to establish either of these conditions in their applications to the superior court for writs of review. First, the defendants each had an adequate remedy in the form of a motion in the trial court. None of the defendants actually raised the claimed constitutional violation prior to applying for a writ of review. Second, the imposition of pretrial testing on these specific defendants who were charged with driving under the influence did not infringe upon their constitutional privacy rights. Consequently, the superior court correctly denied the applications for writs of review.

³ On February 8, 2017, this Court allowed the belated submission of the verbatim reports of the district court proceedings after considering the State's motion to strike the submissions because they were not considered by the superior court.

A. STATUTORY WRIT AS A REMEDY

Statutory writs are something of a relic, and are only available in extraordinary circumstances where there is no plain, speedy, and adequate remedy at law. RCW 7.16.040; *County of Spokane v. Local No. 1553, AFSCME, AFL-CIO*, 76 Wn. App. 765, 768, 888 P.2d 735 (1995). “A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship.” *State ex rel. O’Brien v. Police Court of Seattle*, 14 Wn.2d 340, 347, 128 P.2d 332 (1942). Rather, there must be something in the nature of the proceeding that renders it necessary for the higher court to exercise this extraordinary jurisdiction. *Id.* at 348.

The defendants argue convincingly that an appeal under the Rules for Appeals from Courts of Limited Jurisdiction (RALJ) is not an adequate remedy to address unlawful conditions of release pretrial. And the State agrees. By the time a defendant is tried and convicted, pleads guilty, or is found not guilty or the charge is otherwise dismissed, there would no longer be any value to enforcing any rights concerning pretrial conditions; those conditions would be moot. However, there was a simple and perfectly adequate remedy at law available: the defendants could have raised the issue in district court.

None of the defendants raised article 1, section 7, in the trial court. Only Mr. Cooper tangentially raised his Fourth Amendment right by

reference to *State v. Rose*, 146 Wn. App. 439, 191 P.3d 83 (2008).⁴ Cooper RP at 3. However, no constitutional provisions were plainly raised or argued. In short, the defendants sought to raise a constitutional error in their writs that was never raised, argued, briefed, or addressed in the trial court. All of the defendants had an opportunity to raise this issue in the trial court by simply filing a motion. *See* Button RP at 6; Cooper RP at 6; CrRLJ 3.2(j)(1).

At no point have the defendants presented any compelling reason why such a motion would be an inadequate remedy.⁵ The only argument ever raised was that it *might* take up to a month to schedule such a motion, which could cost a defendant up to \$40 for pretrial testing during that time. RP at 24-25. This argument fails because defendants have not demonstrated why they could not request an expedited hearing if that were the case. *See*, CrRLJ 3.2(j)(authorizing amendment or revocation of pretrial release order *at any time*). And, even assuming this to be true, such a minor cost and delay hardly renders this an inadequate remedy. If it did, misdemeanor defendants would have a general right to an interlocutory writ in the superior court to

⁴ No argument was presented concerning any constitutional grounds. Counsel merely stated, “we object on *State v. Rose* grounds.” Cooper RP at 3.

⁵ Defendants conceded at oral argument that “theoretically a motion to reconsider could work.” RP 25.

raise any issue for the first time. The ability to raise an issue in the trial court is certainly an adequate remedy, and only after exhausting that remedy should a writ even be considered. Consequently, the defendants were not entitled to the entry of a statutory writ.⁶

B. CONSTITUTIONALITY OF PRETRIAL TESTING

In part because this issue was never briefed or argued in any lower court, the nature of the defendants' challenge is not entirely clear. Even though the issues here are controlled by statute, the defendants make only a passing reference to such. RCW 10.21 governs bail hearings and the imposition of pretrial release conditions on all cases.⁷ RCW 10.21.050 requires a judicial officer to impose "conditions of release that will reasonably assure the safety of any other person and the community." RCW 10.21.030 authorizes the court to prohibit a defendant from possessing or consuming any non-prescribed intoxicating liquors or drugs, and to require testing to determine compliance with such a provision.

⁶ This court can affirm the lower court on any basis supported by the record. *See, e.g., Backlund v. Univ. of Washington*, 137 Wn.2d 651, 975 P.2d 950 (1999).

⁷ The defendants suggest that this chapter is constrained to felony matters because the word "felony" appears at one point in a bill report on an amendment to the chapter. Br. of Pet'r at 24. However, that restriction is nowhere in the text of the statute. Rather, it purports to apply generally to all crimes.

For each of the three defendants, the district court imposed pretrial testing at arraignment, adhering to that statutory regime. Consequently, the defendants' challenge must be seen as a challenge to the constitutionality of these statutes. Portions of the defendants' brief seem to further challenge the constitutionality of requiring the installation of an ignition interlock device under RCW 10.21.055. However, *none* of the defendants were subject to an ignition interlock requirement. Because they have not been adversely affected by this statute, they lack standing to challenge its constitutionality, and so it should not be addressed here. *Blondheim v. State*, 84 Wn.2d 874, 876, 529 P.2d 1096 (1975).

A party can challenge the constitutionality of a statute either as it is applied to that individual's circumstances or facially in all of its applications. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-669, 91 P.3d 875 (2004). In order to prevail on a facial challenge, the party must establish that no set of circumstances exists in which the statute can be constitutionally applied. *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 242, 282 n. 14, 4 P.3d 808 (2000). Again, the defendants have not indicated which approach they are taking. As analyzed below, these statutes were constitutionally applied to the defendants and, by extension, are constitutional on their face.

1. Fourth Amendment Analysis

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches. Ordinarily, a warrantless search is per se unreasonable. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). There are a few exceptions to the warrant requirement where the societal costs of obtaining a warrant outweighs the reasons for obtaining review from a neutral magistrate. *Id.*, citing *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979).

Beyond the normal need for law enforcement, a search can be exempt from these requirements where special needs make them impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Whether such a search is reasonable depends on weighing the degree to which it intrudes on an individual's privacy against the degree to which it is needed for the promotion of legitimate governmental interests. *Wyoming v. Houghton*, 526 U.S. 33, 39, 119 S.Ct. 417, 143 L.Ed.2d 408 (1999). Here, the reason behind the testing requirement was to monitor compliance with pretrial release conditions intended to protect community safety. RCW 10.21.030, .050; Blomstrom RP at 3; Button RP at 5-6; Cooper RP at 5-6.

It must be noted initially that the “special needs” exception to the warrant requirement cannot be applied where the interest falls within the normal need for law enforcement. *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). The defendants point to *Scott* and *Rose* for the proposition that community safety is a general law enforcement purpose and cannot constitute a special need. *See U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2005); *Rose, supra*. However, this is an over-broad reading of those two holdings. *See Scott*, 450 F.3d at 872 n. 10 (“We do not hold that the government can never justify drug-testing as a condition of pretrial release”). They are both, though, illustrative of the scope of this exception.

Both *Scott* and *Rose* involved individuals charged with drug crimes, who were then released pretrial with the condition that they submit to drug testing. In both cases, this condition was ostensibly imposed out of generalized concern for public safety and to ensure future appearance in court. However, no evidence was presented in either case that the defendants were likely to engage in any criminal activity or that their drug use would pose a risk to the community. Then, while the defendants awaited trial, law enforcement used the testing requirement to obtain evidence of new crimes. Both courts found this use of pretrial testing to be a generalized

search for evidence of crimes, and consequently, a normal law enforcement function.

The testing at issue here is substantially different in nature and intent from a law enforcement search. With two of the three defendants, the court was presented with evidence that the individual drove a vehicle with a very high BAC level, i.e., breath tests over .15. The court was also presented with evidence that people who drive with BAC levels that high are likely to do so again and are more likely to be involved in a fatal collision. With respect to the third defendant, the court was presented with evidence of a prior DUI offense and other dismissed charges of driving without an ignition interlock device. Based on this evidence the court concluded that the continued consumption of alcohol or marijuana by the defendants constituted a specific risk to the community. The court required that the defendants not consume alcohol, and imposed testing *solely* to monitor compliance with that provision.

Unlike the defendants in *Scott* and *Rose*, the testing here is entirely unrelated to law enforcement. Defendants were required to submit to EtG testing, which only detects recent alcohol consumption. Such alcohol consumption is not criminal. Regardless what the testing finds, it would not support new charges and it would not be relevant to the pending criminal

charges.⁸ Rather, the court individually determined that alcohol consumption by each of the defendants created a specific risk to the community. The testing here is for a specific purpose only tangentially related to prosecution. That purpose was to monitor compliance with the court's condition that was intended to alleviate a specific risk to community safety.

Seen in that light, the testing ordered here was to further a specific, individualized governmental interest in public safety. With similarly focused interests, the U.S. Supreme Court has upheld warrantless drug and alcohol testing regimes on railroad employees (*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)), individuals seeking employment with the Customs Service (*Nat. Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)), and student athletes (*Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)). The relevant inquiry involves balancing the scale of the intrusion against the governmental interest at stake. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325,

⁸ The court also ordered THC testing for each of the defendants. Like EtG, THC remains in the system for an extended time and its presence in urine does not indicate current impairment but rather recent consumption. Because such consumption is not unlawful in Washington, the legal analysis is identical.

105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (in balancing student privacy rights against school interests in maintaining order, the validity of a search depends on its general reasonableness under the circumstances). Looking to the situation here, the State (and the court, under RCW 10.21.050) has a distinct and individual interest in protecting the community from the risk imposed by each of the defendants' continued use of impairing substances, and the intrusion into their privacy is narrowly focused to affect that interest. That interest should be considered as outweighing the defendants' privacy in this instance. As the United States Supreme Court stated:

No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. "Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage." 4 W. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.8(d), p. 71 (2d ed. 1987). For decades, this Court has "repeatedly lamented the tragedy." *South Dakota v. Neville*, 459 U.S. 553, 558, 103 S.Ct. 916, 920, 74 L.Ed.2d 748 (1983); *see Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways ... now reaches the astounding figures only heard of on the battlefield").

Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (internal footnotes omitted); *see also, Missouri v. McNeely*, 133 S.Ct. 1552, 1565, 185 L.Ed.2d 696 (2013) ("While some progress has been made, drunk driving continues to exact a terrible toll on our society. *See* NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700,

Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes)’’).

As brought to the district court’s attention during the first appearance/arraignment hearings, NHTSA studies reflect a correlation between high breath alcohol content and likelihood of recidivism. In the United States in 2012, for example, more than 10,000⁹ people died in alcohol impaired driving crashes. That amounted to one person killed every 51 minutes. NHTSA, Traffic Safety Facts, 2012 Data 1 (No. 811870, Dec. 2013).¹⁰ Of the 10,322 people who died in alcohol impaired driving collisions in 2012, sixty-five percent involved a driver with a BAC of .08 or higher. *Id.* Eighty-five percent of the drivers who had consumed alcohol and then were involved in fatality collisions had BAC levels at or above .08; fifty-nine percent had BAC levels at or above .15. *Id.* at 5. The most frequently recorded BAC level among drinking drivers involved in fatal crashes was .16. *Id.* at 5.¹¹

⁹ This number did not significantly decrease in NHTSA’s 2015 study. NHTSA, Traffic Safety Facts, 2015 Data 1, (No. 812350, Dec. 2016).

¹⁰ Available at <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811870> (last accessed 3/8/2017).

¹¹ 2009 statistics indicate that the most frequently recorded BAC level among drinking drivers involved in fatal collisions was .17. NHTSA, Traffic Safety Facts, 2009 Data, (No. 811385, Dec. 2010), available at <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811385> (last accessed 3/8/16).

Additionally, drivers with a BAC of .08 or higher involved in fatal crashes were seven times more likely to have a prior conviction for DUI within the preceding three years than were drivers involved in fatal collisions who had not consumed any alcohol prior to the collision.¹² *Id.* at 4. Moreover, twenty-four percent of alcohol impaired drivers involved in fatal crashes in 2013 had a previous license suspension or revocation (within the last three years, for both alcohol and non-alcohol related offenses.) NHTSA, Traffic Safety Facts, 2013 Data 5, (812101, Dec. 2014).¹³ Studies have indicated that “any alcohol-impaired driving violation, not just convictions, is a marker for future recidivism.” William J. Rauch, et. al, *Risk of Alcohol-impaired driving recidivism among first offenders and multiple offenders*, Am. J. Public Health, May 2010, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2853607/#bib10>.

More recent data which postdates the defendants’ first appearances indicates the most frequently recorded BAC of drivers involved with fatality collisions in 2015 was .14. In 2015, 67 percent of alcohol-involved fatality

¹² In 2014, drivers with a BAC of .08 or greater who were involved in a fatal crash was 4.5 times more likely to have a prior conviction for driving under the influence. NHTSA Traffic Safety Facts, 2015 Data at 4.

¹³ Available at <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812101> (last accessed 3/7/17).

collisions involved at least one driver with a BAC of .15 or higher. NHTSA, Traffic Safety Facts, 2015 Data at 4.

This data supports the district court's conclusions that the three defendants should be subject to pretrial release conditions requiring EtG testing. The court found Ms. Blomstrom, who had a BAC of .191 at the time of her arrest, to be "likely to reoffend" and believed that her further consumption of alcohol "would be a risk to public safety." Blomstrom RP 1, 3. Likewise, Mr. Cooper had a BAC of .175, an open container of whiskey in his car, admitted to just having driven from a bar, and had prior MIP offenses and multiple speeding tickets. Cooper RP 1, 3. The court determined under his facts:

So, under rule CrL, 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 she 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.

Cooper RP 5.

Additionally, the court ordered Ms. Button to engage in pretrial EtG/THC testing based on the recency of her prior DUI conviction as well as the recitation of the facts of her particular case as given by the prosecutor, which included prior dismissed ignition interlock violations, demonstrating a potential lack of compliance with previous court orders. Button RP 1-5. In light of each defendant's particular facts, the court was justified in imposing pretrial release conditions which monitored the defendants' abstinence.

As a side note, this calculus would become even more focused in the context of ignition interlock devices. Capturing exhaled air instead of urine is less intrusive into an individual's privacy. A search of a person's breath:

is reasonable under the Fourth Amendment because (1) society is not willing to recognize an expectation of privacy in a reasonably suspicious driver's breath and (2) a breath test is a minor imposition that is limited solely to collecting information to calculate the alcohol content of the breather's blood. The limited use of a breath test after arrest does not contravene the safeguards that protect the privacy rights of drivers under the Washington Constitution.

State v. Baird, 187 Wn.2d 210, 386 P.3d 239 (2016) (Gonzalez, J., concurring).

An ignition interlock device search is also *only* conducted when the individual attempts to drive. Consequently, the pretrial installation of an ignition interlock device is even more narrowly focused on the

governmental interest at stake. The ignition interlock device is, however, easier to circumvent, as an individual can simply drive a different vehicle not equipped with such a device.

2. Article I, Section 7, Analysis

Privacy protections under the State constitution potentially differ in scope and quality from Fourth Amendment protections under the federal constitution. Washington Constitution article 1, section 7, protects an individual from the disturbance of his private affairs without authority of law. Whether this provides greater protection from the Fourth Amendment depends on considering six nonexclusive criteria: (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. *State v. Gunwall*, 106 Wn.2d 54, 58-59, 720 P.2d 808 (1986). Factors 1, 2, 3, and 5 are uniform in any analysis of article 1, section 7, and generally support analyzing our State constitution independently from the Fourth Amendment. *State v. Boland*, 115 Wn.2d 571, 575, 800 P.2d 1112 (1990).

Looking first to the fourth factor, the defendants have not identified *any* state law protections that historically differ in scope or value from federal protections in the area of pretrial release condition monitoring. Both constitutions predate the invention of the automobile, and the common

usage of automobiles to transport people and commodities across state and international lines. While both constitutions have traditionally held urinalysis to be constitutionally protected, thus, requiring a warrant to obtain, courts have also found warrantless urinalysis testing allowable where specific governmental interests justify an intrusion for the sake of public safety. *See Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000); *accord Von Raab, supra*.

Similarly in the arena of pretrial release conditions, there is no notable difference between the federal and state courts that would justify a narrower reading of our State constitution. Issues of bail and release generally fall within the authority of the judicial branch. While this Court continues to recognize the validity of legislative regulation in the area of pretrial release, it ultimately retains final authority on this matter by virtue of its rulemaking power. *See State v. Blilie*, 132 Wn.2d 484, 492-93, 939 P.2d 691 (1997). Historically, CrR 3.2 permits the trial court to place conditions on the pretrial release of an accused. The original purpose of the rule, according to the drafters' comments, was to alleviate the hardships associated with pretrial detention and bail because such detention handicaps defendants in preparing their defenses, often prevents them from maintaining jobs and supporting their families, stigmatizes them, and often makes them suffer incarceration solely because they cannot afford bail.

State v. Perrett, 86 Wn. App. 312, 318, 936 P.2d 426 (1997) citing Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure Rule 3.2, gen. cmt. at 22 (1971).

These state concerns over the hardship of pretrial detention did not differ from those expressed in the federal system. The 1966 Bail Reform Act was largely initiated in response to the mounting criticism that the bail system was simply a “de facto pretrial detention through the imposition of insurmountable secured bond requirements,” and made “own recognizance,” or “OR,” release the primary pretrial option for all noncapital cases. See Michael Harwin, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 Ariz. L. Rev. 1091, 1093 (1993).

After adopting similar pretrial release rules, the federal and state systems shared the same growing concerns with pretrial detention and the problems also resulting from bailed individuals committing crimes while on release. In response to this growing concern, both systems adopted similar provisions. The amended Bail Reform Act of 1984 responded to the increasingly “alarming problem of crimes committed by persons on release” and “the need to consider community safety in setting nonfinancial pretrial conditions of release.” S. Rep. No. 98-225, at 3 (1984), as reprinted in 1984 U.S.C.A.N. 3182, 3185. In § 3142(b) of the amended statute, Congress

explicitly embraced the notion that pretrial detention could be based on judicial concern that the defendant's release could jeopardize public safety.¹⁴ Likewise in time and manner, CrR 3.2 was amended twice in 1986, with both sets of amendments taking effect September 1, 1986. The essence of the amendments was to allow the court to consider the dangerousness of the defendant when setting conditions of release and bail. *See* 4A Tegland, Wash. Prac., Rules Practice CrR 3.2 Release of Accused (7th ed. 2015).

The near-lockstep developments in the state and federal treatment of pretrial release analysis would counsel against a historic view that there are significant constitutional differences in this area.

Similarly, with respect to the sixth factor, defendants assert that pretrial release conditions are an inherently local concern. However, traffic crimes are committed on the streets and highways, and so there is substantially greater interstate potential. Many individuals arrested for traffic crimes are from out of state, Washington being closely bordered by Idaho, Oregon and Canada; similarly other nearby jurisdictions are also likely to encounter Washington residents committing traffic crimes within their borders. On point, our State adopted, along with other states, an interstate driver license compact requiring mutual reporting of criminal and

¹⁴ *See* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976 (codified at 18 U.S.C. § 3142(b) (Supp. II 1984)).

noncriminal traffic violations, and comity in the application of licensing consequences. RCW 46.21.010. This compact was initially adopted in 1963. Laws of Washington 1963, ch. 120, § 1.

In sum, 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. These two factors favor a greater degree of uniform treatment across the nation,¹⁵ and therefore, this Court should analyze the issue under the Fourth Amendment.

In any event, under article 1, section 7, the relevant inquiry is whether the government unreasonably intrudes into a person's private affairs. *State v. Carter*, 127 Wn.2d 836, 848, 904 P.2d 290 (1995); *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998). A search without a warrant is ordinarily unreasonable per se. There are, however, several exceptions to the warrant requirement, such as searches incident to arrest, inventory searches, or investigative stops. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). However, because the testing

¹⁵ All of the 50 states have adopted a .08 (Federal standard) legal limit for intoxicated driving. See <http://www.madd.org/drunk-driving/state-stats/> (last accessed 3/6/2017); *Legislative History of .08 per se Laws*, available at https://one.nhtsa.gov/people/injury/research/pub/alcohol-laws/08History/1_introduction.htm (last accessed 3/6/2017).

imposed on the defendants was not for law enforcement purposes, it does not fall within any of these commonly analyzed exceptions. Rather, the inquiry here *must* be akin to the special needs exception under Federal law.

The defendants assert that no such exception exists to Washington’s constitutional protections. However, this court has on a number of occasions sustained laws authorizing warrantless searches where the governmental interest outweighed the privacy interests at stake. *See State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007) (finding warrantless DNA testing of convicted felons permissible); *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 100, 847 P.2d 455 (1993) (approving requirement that juvenile sex offenders submit to HIV testing); *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 672-674, 658 P.2d 653 (1983) (discussing airport and courthouse searches). Contrary to defendants’ assertions, a “special needs” exception to the warrant requirement is well-established in the common law and applicable in Washington.¹⁶ Consequently, in assessing the validity of these statutes, this Court should weigh the government interest against the intrusion into the defendants’ privacy, and determine whether that intrusion is reasonable.

¹⁶ Defendants rely on the lead opinion in *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) for the proposition that there is no special needs exception. *Id.* at 299-316 (Sanders lead opinion). However, a majority of that court applied the special needs exception under Washington law. *Id.* at 316-329 (Madsen Concurrence); 335 (J. Johnson concurrence).

Again, as stated above, the governmental interest in protecting the public should be considered to outweigh the intrusion on the defendants' privacy. Furthermore, the intrusion here is not being made arbitrarily by the government, but rather is based on individualized findings by a neutral magistrate. At arraignment, the court found that each of the defendants posed a specific risk to the public, based on the individual evidence presented. That these searches were ordered by a neutral court serves to afford the defendants similar protections to the warrant requirement. *See State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007).

Finally, it should be noted that the imposition of testing serves the further function of decreasing the cost of pretrial release. If testing is deemed too intrusive of an individual's right to privacy, the court may be forced to resort to any of several alternatives that are less intrusive searches, but more expensive and inconvenient. For example, SCRAM transdermal alcohol monitors detect alcohol released into the air through the skin. *See e.g.* NHTSA, Comparative Study and Evaluation of SCRAM Use, Recidivism Rates, and Characteristics, (No. 812143, April 2015)¹⁷; NHTSA, Transdermal Alcohol Monitoring: Case Studies, (No. 811603,

¹⁷ Available at <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812143-scramrecidivismratesreport.pdf> (last accessed 3/8/2017)

Aug. 2012)¹⁸. A SCRAM device costs upwards of \$12/day and must be constantly worn on the ankle. *See* NHTSA, *Transdermal Alcohol Monitoring: Case Studies* at 17. A court could require a person to report in person on a specified basis, often at random, to the office of pretrial services to determine the individual's present compliance with the pretrial release order. Random reporting to pretrial services, of course, could interfere with the accused's employment, or pose a transportation hardship on a person whose license has already been administratively suspended or limited by the Department of Licensing. On the other hand, random EtG testing that may be completed at a time of day convenient to the accused's schedule affords the individual more flexibility and predictability.

IV. CONCLUSION

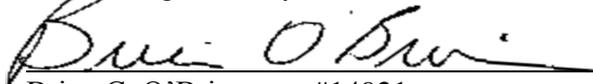
The defendants were not entitled to a writ of review where they failed to pursue an available and adequate remedy in the trial court, and instead, raised their constitutional arguments for the first time in the Superior Court. A party must exhaust their available remedies before seeking a writ of review; defendants failed to do so. Consequently, the constitutional issues are not properly before this Court.

¹⁸ Available at <https://www.nhtsa.gov/staticfiles/nti/pdf/811603.pdf> (last accessed 3/8/2017).

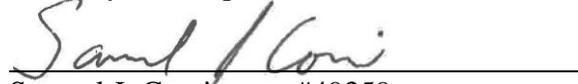
Should the Court reach review of the constitutional issues, the State has a compelling interest under both the Fourth Amendment and Washington's article 1, section 7, in protecting the community that outweighs the limited incursion into the defendants' privacy rights that occurred when the defendants were subjected to pretrial EtG/THC testing. This special needs exception allows for limited pretrial testing in these cases where the trial court considered the facts alleged in each individual case and found each individual defendant posed a danger to the community if released without monitoring their compliance with the court's orders.

Dated this 10 day of March, 2017.

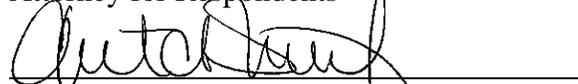
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

NO. 91642-0

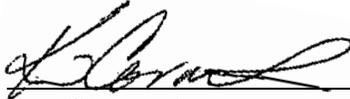
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 10, 2017, I e-mailed a copy of the Brief of Respondents in this matter, pursuant to the parties' agreement, to:

Michael L. Vander Giessen
mvandergiessen@spokaencounty.org

3/10/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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