No. 91642-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

HON. GREGORY TRIPP,
Respondent.

ON APPEAL FROM A DECISION OF THE SPOKANE COUNTY SUPERIOR COURT
Honorable Salvatore Cozza

# BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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## I. IDENTITY AND INTEREST OF *AMICUS*

The identity and interest of the ACLU of Washington is set forth in the Motion for Leave to Participate as *Amicus Curiae* filed concurrently with this brief.

## II. INTRODUCTION

Petitioners in these cases were charged with Driving Under the Influence (DUI) and, as conditions of pretrial release, were ordered to submit to random urinalysis (UA) testing for drugs and alcohol several times a month. Petitioners were also ordered to pay fees associated with the UA tests; each UA costs $20. Petitioners' Op. Br. at 1, 5, 7-10, 12, 26. Petitioners objected to the UA testing and other conditions. *Id.*

For the reasons explained in Petitioners' opening and reply briefs, in the *Amicus* Brief ACLU filed in *State v. Olsen*, Case No. 93315-4 pending in this Court (argued 2/16/17), and in the *Amicus* Brief below, the trial court's orders requiring Petitioners to submit to the bodily intrusion of random, warrantless, suspicionless UA testing as a condition of pretrial release violated WASH. CONST. Art. 1, sec. 7.

Well established state constitutional analysis demonstrates that UA testing is an especially intrusive invasion of privacy and cannot be ordered without the safeguard of at least reasonable suspicion, whether as a sentencing condition or as a pretrial release condition. *Olsen Amicus* Brief, *supra*. Random, suspicionless searches will always provide a greater opportunity to uncover wrongdoing, but this does not make them constitutional. Defendants released pending trial are entitled to the

presumption of innocence and do not have a diminished privacy interest. Because the random, warrantless, and suspicionless UA testing at issue here would greatly compromise the state constitution's strong privacy protection, this Court should invalidate the trial court's mandatory testing orders.

The testing condition also raises concerns under the applicable court rule on pretrial release conditions, because a "violent" offense is not involved.

Finally, this Court should address the provisions of the orders requiring indigent defendants to pay the costs of the tests. The payment conditions exacerbate disparate and unfair treatment of rich and poor defendants, and raise concerns similar to the "debtor's prison" problems that this Court has confronted in other cases

## III. ARGUMENT

### A. Random Urinalyses Are Warrantless, Suspicionless Searches That Violate the State Constitution

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. "Article I, section 7 encompasses the privacy expectations protected by the Fourth Amendment and in some cases may provide greater protection than the Fourth Amendment because its protections are not confined to the subjective privacy expectations of citizens." *State v. Mecham*, 186 Wn.2d 128, 141, 380 P.3d 414 (2016) (lead opinion of Wiggins, J., joined by three Justices) (citing *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d

151 (1984)). Instead, article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy" than the Fourth Amendment. *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999) (footnote and quotations omitted).

> Article I, section 7 requires a two-part analysis:
>
> > First, [the Court determines] whether the state action constitutes a disturbance of one' private affairs . . . Second, if a privacy interest has been disturbed, the second step in [the Court's] analysis asks whether authority of law justifies the intrusion.

*York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008). Using this analysis and recognizing that Washington's constitution "offer[s] heightened protection for bodily functions compared to the federal courts," *id.* at 307, Washington courts have consistently protected individuals from the random, suspicionless collection of urine.

**1. Urinalysis Involves a Constitutionally Protected Private Affair**

It is well-settled in Washington that "[i]ndividuals have a constitutionally protected interest in the privacy of their internal bodily functions and fluids," and that the State "infringes on this interest when it takes someone's blood, DNA, urine, or breath." *Mecham*, 186 Wn.2d at 145 (citing *York*, 163 Wn.2d at 308; *State v. Garcia–Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010); *Robinson v. City of Seattle*, 102 Wn. App. 795, 819–22, 10 P.3d 452 (2000)). "These activities infringe on a person's privacy interests on multiple levels: the physical intrusion associated with drawing blood and urine . . . intrudes on an individual's privacy; and the

chemical analysis associated with these tests provide a wealth of private medical information that, as the United States Supreme Court has held, infringes on the reasonable expectations of privacy. 186 Wn.2d at 145 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)).

This case concerns the collection of urine, which is unquestionably "a significant invasion of privacy." *York*, 163 Wn.2d at 334-35 (J.M. Johnson, J., concurring); *see also Robinson*, 102 Wn. App. at 818 ("[i]t is difficult to imagine an affair more private than the passing of urine."). Thus, the question before this Court is whether authority of law exists for the random collection and testing of urine of accused individuals who are released but pending trial.

### 2. The State Does Not Have "Authority of Law" for the Warrantless and Suspicionless Searches Here

It is undisputed that the searches at issue are warrantless and suspicionless. '"As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.'" *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014) (quoting *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "There are several narrowly drawn exceptions to that rule, and the State bears a heavy burden to prove by clear and convincing evidence that a warrantless search falls within one of those exceptions." *Id*. The State neither cites an exception nor argues that the warrantless searches here fall

within "a jealously and carefully guarded" exception to Washington's warrant requirement; instead, it reiterates the oft-rejected argument that these warrantless searches are reasonable under the Fourth Amendment because they are a reasonable response to the "special needs" of the pretrial release system that is intended to protect communities.

This argument fails: although the Fourth Amendment provides protections from "unreasonable searches," article I, section 7 is unconcerned with the reasonableness of the search. *See State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005); *compare Griffin v. Wisconsin*, 483 U.S. 868, 880, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (finding that, pursuant to the special needs doctrine, "[t]he search of Griffin's residence was 'reasonable' within the meaning of the Fourth Amendment"). Warrantless searches in Washington are per se unreasonable.

**3. The Special Needs Doctrine Does Not Apply**

This Court has never held the federal special needs doctrine provides "authority of law" for suspicionless searches under article I, section 7:

> We cannot countenance random searches of public school student athletes with our article I, section 7 jurisprudence. As stated earlier, we require a warrant except for rare occasions, which we jealously and narrowly guard. We decline to adopt a doctrine similar to the federal special needs exception in the context of randomly drug testing student athletes.

*York*, 163 Wn.2d at 316 (lead opinion of Sanders, J. joined by Alexander, C.J., Owens, J., and Chambers, J.), 327-29 (school's suspicionless

program does not fall within federal special needs exception) (Madsen, J. concurring, joined by Johnson, J., Fairhurst J., and Bridge, J.), 335-45 (considering lessened privacy interest of students,[1] applying strict scrutiny, and holding that random, suspicionless drug testing "was not narrowly tailored to a compelling government interest.") (J.M. Johnson, J. concurring). This language from *York* is consistent with this Court's "long history of striking down exploratory searches not based on at least reasonable suspicion." *See id.* at 314; *State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999); *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 674, 658 P.2d 653 (1983); *see also Robinson*, 102 Wn. App. at 815 ("Our Supreme Court has thus not been easily persuaded that a search without individualized suspicion can pass constitutional muster.").

Although the special needs exception should be rejected as incompatible with the heightened privacy protections of article I, section 7, the State has also failed to show that the federal exception could apply to this scenario. The special needs exception is only potentially applicable when a search (1) "arises from a 'special need' beyond the needs of ordinary law enforcement, and (2) if so, whether the intrusion of [the search at issue], without probable cause or individualized suspicion . . . is justified by that need." *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 91-92, 847 P.2d 455 (1993) (upholding HIV testing for defendants

[1] As addressed in part A(4) of this brief, *infra*, individuals released pending trial are presumed innocent and do not have a lessened privacy interest.

convicted of sex offenses—unlike the petitioners here who had suspicionless testing imposed as a condition of pretrial release). The Court in *Juveniles* considered several factors before determining that the testing at issue in *Juveniles* was permissible under the Fourth Amendment:

> First, the testing statute is not part of the criminal code; it is designed to protect the victim, the public, and the offender from a serious public health problem. Second, unlike the typical Fourth Amendment situation, the appellants are not being tested in an effort to gain evidence for a criminal prosecution. Third, a positive HIV test does not place the appellants at risk for a new conviction or a longer sentence. Finally, traditional standards which require individualized suspicion are impractical because HIV infected sexual offenders often have no outward manifestations of infection.

*Id.* at 92.

Analysis of these factors and the State's purpose compels the opposite conclusion here. The State's identified purpose of protecting the community from the unlawful activities of pretrial releases, though compelling, describes "a quintessential general law enforcement purpose [that is] the exact opposite of a special need." *United States v. Scott*, 450 F.3d 863 870 (9th Cir. 2006).

The *Juveniles* factors bears this out: If a DUI Petitioner violates the imposed conditions of release, he or she stands in jeopardy of having his or her release revoked and being returned to jail pending trial. Indeed, the Legislature specifically authorized police officers with probable cause to believe that a defendant has violated the terms of participation in an alcohol/drug monitoring program to "immediately take the participant into

custody" and to imprison the participant until he or she can be brought before a judge. RCW 36.28A.390(1). Further, the Legislature has directed that a defendant who does not pay the required fees or associated costs for sobriety testing "shall, at a minimum," be warned for a first such violation and serve "a minimum" amount of jail time for the violation of failing to make such payment. RCW 36.28A.390(2)(a)-(e). The random testing authorized here is part of the criminal code and a positive test serves as evidence for additional incarceration.

This Court should not authorize a departure from the traditional standard of at least individualized suspicion to permit a large and unprecedented expansion of random, warrantless, suspicionless searches. A reasonable suspicion requirement is practical because persons under the influence of drugs or alcohol outwardly manifest signs of intoxication. As discussed in the *Amicus* Brief in *Olsen*, there are numerous effective means for the supervising entity to obtain individualized suspicion that a defendant has consumed drugs or alcohol, which would then permit the State to compel a urinalysis. There may be visible signs of impairment (which last for hours), or observations of erratic behavior; suspicion for a UA can also be established through tips, witness interviews, or observed drug paraphernalia or alcohol. For these reasons, the State cannot establish that the federal special needs exception applies.

Relatedly, it is important to reiterate that the government's interest in protecting the community from drunk driving, however strong, does not outweigh an individual's privacy interests. *Cf. Missouri v. McNeely*, ___

U.S. ___, 133 S. Ct. 1552, 1565, 185 L. Ed. 2d 696 (2013) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. . . . But ***the general importance of the government's interest in this area does not justify departing from the warrant requirement***") (citation omitted, emphasis added).[2]

This Court has repeatedly rejected a "DUI exception" to the state constitution's privacy protections, and should not create one now. *See City of Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988). As Justice Utter stated in *Mesiani*:

> The City asserts that the state's interest in [protecting against DUIs] defeats any privacy interest under article 1, section 7. While we acknowledge the state's strong interest in assuring all drivers comply with applicable laws, the City's position is without support in either our cases or the language or logic of our constitution.

*Id.* Applying the "special needs" doctrine to justify the suspicionless UA testing here would amount to a "DUI exception" to the constitution, and should be rejected.

#### 4. Petitioner's Status Does Not Change this Court's Article 1, Section 7 Analysis

Nothing about the Petitioners' status as individuals accused of DUI who are released but pending trial should alter this Court's analysis that UAs are a search requiring at least reasonable suspicion. Defendants released pending trial are entitled to the presumption of innocence and do

[2] The State only quotes the first half of this quote to support its argument that its interest "should be considered as outweighing the defendants' privacy in this instance." *See* Br. of Resp. at 14.

not have a diminished privacy interest. *See United States v. Scott*, 450 F.3d 863, 872 (9th Cir. 2006) ("[p]eople released pending trial [ ] have suffered no judicial abridgment of their constitutional rights"); *see also State v. Jorgenson*, 179 Wn.2d 145, 172, 312 P.3d 960 (2013) (citing *Scott* and recognizing that untried defendants are still entitled to the presumption of innocence) (Wiggins, J. dissenting). Accordingly, Petitioners have the same privacy interest in their bodily functions as any other Washington citizen.

Petitioners here also have either the same or greater right to a suspicion requirement for UA tests than the convicted defendants in *State v. Olsen*, No. 93315-4, based on the presumption of innocence. The logic and arguments supporting at least a reasonable suspicion requirement apply with even greater force here, because defendants awaiting trial retain their full constitutional rights.

Petitioners also have either the same or a greater privacy interest in their urine than students, whom this Court has held to have "a lower expectation of privacy" but nonetheless retain "a genuine and fundamental privacy interest in controlling [their] own bodily functions." *York*, 163 Wn.2d at 308; *see also Kuehn v. Renton School Dist. No. 403*, 103 Wn.2d 594, 599-600, 694 P.2d 1078 (1985) (general search of student luggage for contraband was not supported by reasonable, individual suspicion and therefore unconstitutional).

Persons pending trial have ***no*** reduced expectation of privacy. "No matter the drawbacks or merits of [ ] random drug testing, [this Court]

cannot let the policy stand if it offends our constitution." *York*, 163 Wn.2d at 302-03. The State's policy of forcing random, warrantless, and suspicionless searches on citizens with the full panoply of constitutional rights cannot stand.

### B. The Trial Court Orders Imposing Suspicionless UA Testing as a Condition of Pretrial Release Raises Significant Concerns Under the Applicable Court Rule Regarding Pretrial Release Conditions

Washington's court rules and case law limit the conditions of release that can be imposed in courts of limited jurisdiction. These Rules mandate that the prosecution make "a showing that there exists a substantial danger that the accused will commit a violent crime . . ." in order to justify the imposition of conditions of release in courts of limited jurisdiction. CrRLJ 3.2(d).

The Rule's requirement of a showing of "substantial danger" of commission of a "violent" crime is not satisfied here. Washington courts have struck down suspicionless UA tests when there was "no evidence in the record support[ing] that a substantial danger existed, that [Rose] would commit a violent crime, …." *State v. Rose*, 146 Wn. App. 434, 445, 453, 191 P.3d 83 (2008) (weekly urinalysis drug and alcohol testing as a condition of pretrial release).

In the present case, the prosecution never even attempted to make a showing that Petitioners posed a "substantial danger" to the community if released from custody. Thus, like the weekly UA requirements imposed in the *Rose* case, the pretrial release conditions ordered in Petitioners' cases

are unlawful: Under CrRLJ 3.2(d), the District Court had no authority to impose them.

DUI is not "a violent crime" under applicable statutes; it is classified as a serious traffic offense but not a "violent" offense. RCW 9.94A.030(44); RCW 9.94A.030(54); RCW 9.94A.030(45). The Court's ruling in *Butler v. Kato*, 137 Wn. App. 515, 154 P.3d 259 (2007), also supports this point: the *Butler* Court had the opportunity to declare DUI a "violent crime" for purposes of CrRLJ 3.2(a)(2)(a) but declined to do so. Furthermore, in analogous situations where the U.S. Supreme Court has been called upon to decide whether DUI is properly considered a violent offense under federal statutes, it has held that it is not.[3] Because the offense charged here does not fit the classification of a "violent" offense referenced in CrRLJ 3.2(d), requiring Petitioners to submit to suspicionless UA tests as a condition of pretrial release should be invalidated.

### *C.* Requiring Indigent Accused Persons to Pay All Expenses Associated with the Random UA Tests of the 24/7 Sobriety Program Monitoring and Imprisoning Them if They Fail to Pay Such Fees Runs Afoul of Principles Announced By This Court in *State v. Blazina* and *State v. Hardtke*

[3] In *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004) the Court held that the crime of DUI is not "a crime of violence" since it involves merely the negligent operation of a vehicle but not the intentional use of force to harm someone. *See also Begay v. United States*, 553 U.S. 137, 145-46, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008) ("[D]runk driving is a crime of negligence or recklessness, rather than violence or aggression.") (citation omitted).

This Court in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), and again in *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016), recognized the "particularly punitive consequences" of requiring indigent defendants to pay costs imposed in criminal cases. A defendant who has financial resources is able to pay the costs without fear of being incarcerated due to non-payment, while an indigent defendant either must sacrifice paying for things essential to survival or risk being incarcerated for non-payment. *Blazina*, *supra*; *Wakefield*, *supra*. The defendants in *Blazina* and *Wakefield* had already been convicted, but the costs imposed on indigent defendants are even more troubling here due to the pretrial status of the Petitioners. In effect, if they cannot pay the costs, pretrial indigent DUI defendants become incarcerated and subject to "debtor's prison," even if they comply with the condition of not using drugs and alcohol, while financially well-off defendants retain the advantages of release while awaiting trial.

Examination of the statutes authorizing the district court orders as to testing costs demonstrates the threat of incarceration for indigent pretrial DUI defendants is very real. The district court's orders requiring Petitioners to bear the cost of pretrial testing are based on RCW 36.28A.350, authorizing courts to condition pretrial release upon the accused's fulfillment of an obligation to pay the "associated costs and expenses" of 24/7 sobriety monitoring (blood, breath or urine testing to

see if the defendant is drinking).[4] *See also* RCW 10.21.055(1)(a)(iii) (describing costs of the 24/7 program as part of conditions of release as "at the expense of the person, as provided in RCW 46.61.5055(5)(b) and (c)"); RCW 10.21.055(1)(a)(iv) ("at the expense of the person, as provided in RCW 46.61.5055(5)(b) and (c)"). The legislative scheme effectively requires accused defendants to pay all expenses associated with the operation of sobriety monitoring, since RCW 36.28A.380 expressly *forbids* the courts from relieving DUI defendants of the obligation to pay these costs. *See* RCW 36.28A.380 ("The court shall not waive or reduce fees or associated costs charged for participation in the 24/7 sobriety program.") (emphasis added).

The risk of incarceration for failure to pay the testing costs is equally clear: The statutes specifically authorize police officers with probable cause to believe that a defendant has violated the terms of participation in an alcohol/drug monitoring program (including failure to pay costs) to "immediately take the participant into custody" and to imprison him until he can be brought before a judge. RCW 36.28A.390(1). In addition, the Legislature has directed that a defendant who "does not pay the required fees or associated costs" for sobriety testing "shall, at a minimum," be warned for a first such violation, and shall serve "a minimum" amount of jail time for the violation of failing to make such payment. RCW 36.28A.390(2)(a)-(e).

[4] RCW 36.28A.350 provides: "The court may condition any bond or pretrial release upon participation in the 24/7 sobriety program and payment of associated costs and expenses, if available."

Moreover, the statutes authorizing the payment of testing costs *forbid* accused DUI defendants from paying such costs over time. Instead, they must either pay in advance or when the monitoring tests are actually conducted:

> All applicable fees ***shall be paid by the participant contemporaneously or in advance*** of the time when the fee becomes due; however, cities and counties may subsidize or pay any applicable fees.

RCW 36.28A.370(3) (emphasis added).

Since there is no provision for exempting indigent defendants from paying these fees, and since the Legislature forbade courts from waiving these fees (RCW 36.28A.380), the inevitable happens: poor DUI defendants who cannot pay these costs are taken "into custody" pursuant to RCW 36.28A.390 and then brought before a judge. After they are jailed, they then appear before a judge who, according to RCW 36.28A.390, is statutorily required to impose an escalating amount of jail time on any defendant who has failed to pay testing fees more than once. This risk of incarceration for non-payment occurs while the defendant is in pretrial status, wholly aside from whether they are ever convicted or sentenced.

In this manner, defendants who are on pretrial status dealing with UA testing and payment for UA testing as a condition of pretrial release are treated worse than defendants who have been tried and convicted. Under *Blazina*, and RCW 10.01.160(3), even a convicted defendant has the right to have a judge make a determination of his ability to pay

discretionary costs before they are imposed. 182 Wn.2d at 837-38. But as a pretrial condition of release in a DUI case, defendants who have not been tried or convicted have costs imposed upon them in advance of trial without any determination of whether they have the ability to pay, lose their liberty if they don't pay the fees, and judges are statutorily forbidden from waiving these fees.

The cost conditions in the trial court's release orders here ignore the critical distinction that this Court drew in *State v. Hardtke*, 183 Wn.2d 475, 479, 352 P.3d 771 (2015) ("Different costs are permitted for a nonconvicted defendant than for a convicted one."). The *Hardtke* Court did not approve the imposition of greater costs on pretrial defendants than on convicted defendants. In *Hardtke* this Court ruled the statutory language of RCW 10.01.160 limited the imposition of costs for pretrial supervision to $150, and recognized that the "plain and ordinary meaning of pretrial supervision encompasses the [alcohol] monitoring[5] that took place" in that case. *Id*. at 480, 483.

However, the post-*Hardtke* statutes discussed in this brief requiring pretrial defendants to pay costs of UA testing mean that an accused DUI defendant who has not been convicted can be ordered to pay such costs without any inquiry beforehand into his ability to pay them. Further, the court is both forbidden from waiving these pretrial costs (RCW 36.28A.380) and from allowing payment of such pretrial costs over

[5] Defendant Hardtke was required to wear a transdermal alcohol detection ("TAD") bracelet. "[T]he TAD monitoring falls under the plain meaning of 'pretrial supervision.'" *Id.* at 482.

time (RCW 36.28A.370(3)). The pretrial defendant, even if he is acquitted of DUI, can never recover the days he may have spent in jail for failure to pay prior to his acquittal, and he also cannot recover any money that he did pay for the cost of drug and alcohol testing prior to being unable to make further payments. The United States Supreme Court just this month recognized the injustice of such a system; it ruled that a state "may not presume a person, adjudged guilty of no crime, nonetheless guilty ***enough*** for monetary exactions." *Nelson v. Colorado*, ___ U.S. ___, 2017 WL 1390727 *6 (April 19, 2017). This Court should likewise invalidate the trial court orders here which mandate payment of testing costs as a condition of pretrial release.

## IV. CONCLUSION

This Court should rule that the requirement of random, warrantless, suspicionless UA testing imposed as a condition of pretrial release is unconstitutional. It should also consider the ways the testing condition conflicts with the applicable court rule, and the ways the cost conditions violate concerns this Court has expressed with regard to other legal financial obligations.

Respectfully submitted this 24th day of April, 2017

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 24th day of April, 2017, I caused a true and correct copy of the foregoing document, "Brief of *Amicus Curiae* American Civil Liberties Union of Washington," to be delivered via email to the following counsel of record:

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