WASHINGTON DEFENDER ASSOCIATION

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 20, 2018

Governor Jay Inslee
Office of the Governor
PO Box 40002
Olympia, WA 98504-0002

Re: Veto Request SB 5987

Dear Governor Inslee:

We are writing to urge that you veto SB 5987, which amends chapter 10.21 RCW relating to pretrial release conditions. SB 5987 is unconstitutional legislation that defies the Washington State Supreme Court's ruling in *Blomstrom v. Tripp*, 189 Wn.2d 379, 402 P.3d 831 (2017).

In *Blomstrom*, the Washington State Supreme Court held it violated Article I, Section 7 of the Washington State Constitution to order that people accused but presumed innocent of driving under the influence submit to random urinalyses as a condition of pretrial release — that is, as a requirement to get and stay out of jail pending trial. SB 5987 defies *Blomstrom* by purportedly authorizing the same practice the court condemned as unconstitutional.

To be sure, *Blomstrom* did not decide whether, if it had applied, a statute could have provided the authority of law necessary to justify warrantless pretrial urinalyses. Still, the logical and inescapable result is that *Blomstrom* renders such urinalyses unconstitutional. This conclusion flows from fundamental principles of constitutional law. A statute cannot trump the constitution. If no constitutionally-recognized exception to the warrant requirement justifies such urinalyses, then neither can SB 5987.

Blomstrom answered the central question of how much privacy invasion the constitution will tolerate in the context of pretrial release conditions. The supreme court emphatically declared that warrantless pretrial urinalyses go too far and are therefore unconstitutional. Thus, a statute that attempts to authorize such urinalyses is also unconstitutional. A statute can provide greater individual privacy protection than the constitution, but not less.

We anticipate SB 5987 will open a floodgate of new litigation regarding pretrial release conditions. A statute is not categorically sufficient, in itself, to dispense with the warrant requirement; even a statute that expressly authorizes a warrantless search does not provide authority of law to justify disturbing private affairs unless it passes constitutional muster. *See State v. Ladson*, 138 Wn.2d 343, 352 n.3, 979 P.2d 833 (1999); *City of Seattle v. McCready*,

123 Wn.2d 260, 280 n.11, 868 P.2d 134 (1994); *Robinson v. City of Seattle*, 102 Wn. App. 795, 812-13, 10 P.3d 452 (2000). As the supreme court has stated,

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

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

Thus, to pass constitutional muster, ordering warrantless urinalyses as a condition of pretrial release must meet a common law exception to the warrant requirement. *See Robinson*, 102 Wn. App. at 813. Exceptions to the warrant requirement must be firmly rooted in common law principles recognized in 1889, when article I, section 7 was adopted. *State v. Walker*, 157 Wn.2d 307, 325, 138 P.3d 113, 122 (2006) (Chambers, J., concurring) (citing *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)). Traditional exceptions to the warrant requirement include "consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and . . . investigative stops." *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). The burden is always on the State to prove one of these exceptions applies. *Ladson*, 138 Wn.2d at 350.

In *Blomstrom*, the State conceded warrantless pretrial urinalyses are "not subject to a recognized exception to the warrant requirement." 189 Wn.2d at 406. And, the supreme court rejected the State's contention that the federal special needs exception justifies warrantless pretrial urinalyses. *Id.* at 406-10. There is no other constitutionally-recognized exception to the warrant requirement upon which the legislature can justify SB 5987.

In evaluating SB 5987, we are cognizant of recent history regarding pretrial release conditions. In *State v. Rose*, 146 Wn. App. 439, 191 P.3d 83 (2008), the Washington State Court of Appeals said warrantless pretrial urinalyses violate article I, section 7. But the legislature ignored *Rose* and enacted RCW 10.21.030 and .055 anyway. In *Blomstrom*, the supreme court said warrantless pretrial urinalyses still violate article I, section 7. From this context, it should be clear that SB 5987 is unconstitutional legislation that defies *Blomstrom*.

We recognize the importance of responding to *Blomstrom* by ensuring Washington state trial courts have enough tools at their disposal to craft effective pretrial release programs protecting the public. We believe trial courts are adequately equipped to do so using less restrictive pretrial release conditions that achieve the same goal. Less restrictive pretrial release conditions include the requirements that 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, possibly including transdermal alcohol detection bracelets,

ignition interlock devices, or preliminary breath tests. The judiciary has already launched a Pretrial Reform Task Force to explore best practices in pretrial release programs. We believe the response to *Blomstrom* is best left to the judiciary.

For these reasons, we respectfully request you veto SB 5987 as an unconstitutional defiance of *Blomstrom*.

For more information, please contact Michael L. Vander Giessen at (509) 494-4586 or michaelvandergiessen@gmail.com.

Sincerely,

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