

NO. 78542-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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MATTHEW RUIZ,

Petitioner,

v.

HON. EDWARD McKENNA, HON. FAYE CHESS, SEATTLE  
MUNICIPAL COURT,

Respondents

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BRIEF OF *AMICI CURIAE* WASHINGTON DEFENDER  
ASSOCIATION AND WASHINGTON ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS IN SUPPORT OF MR. RUIZ

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## **I. INTEREST OF *AMICI***

The identity and interest of the Washington Defender Association and the Washington Association of Criminal Defense Lawyers are set forth in the Motion for Leave to Participate as *Amici Curiae* filed concurrently with this brief.

## **II. FACTS**

The City of Seattle charged Mr. Ruiz with driving under the influence (DUI). Mr. Ruiz pleaded not guilty at his arraignment. Pet'rs' Opening Br. (Ruiz Br.) at 4. Mr. Ruiz had two prior convictions for first degree negligent driving. *Id.* Seattle Municipal Court (SMC) set two invasive conditions of Mr. Ruiz's pretrial release. The most invasive was that he submit to electric home monitoring with breath testing (EHMB). The other condition was that he have an ignition interlock device (IID) installed in his vehicle. *Id.* Mr. Ruiz sought a writ challenging these conditions, and King County Superior Court denied the writ, holding in part that Mr. Ruiz had a reduced expectation of privacy due to his prior negligent driving convictions. CP 108-113. Mr. Ruiz then petitioned this Court for review. Ruiz Br. at 9.

Mr. Ruiz enrolled in EHMB through Sentinel, a company that contracts with SMC. CP 19. Sentinel provides three kinds of electric home

monitoring (EHM)—radio frequency monitoring (RF monitoring), UniTrack GPS monitoring, and OM400 GPS tracking. Sentinel website.<sup>1</sup>

Sentinel requires a person on RF monitoring to use the RF Patrol System. Sentinel website.<sup>2</sup> A person who submits to monitoring through the RF Patrol System must wear a RF Patrol ankle radio transceiver at all times. The transceiver is in constant communication with a home monitoring unit (HMU). The combination of the transceiver and the HMU track and record all of the wearer’s activity within his or her home. *Id.*

A person who submits to GPS tracking through Sentinel must wear an ankle GPS transceiver, which constantly communicates with at least four satellites. The transceiver captures the wearer’s location and transmits that information to Sentinel, and Sentinel software stores and reports the wearer’s location. Sentinel website.<sup>3</sup>

Both RF monitoring and GPS monitoring detect and relay a person’s location precisely and accurately. RF monitoring detects a person’s entry or exit from a specific room. Pineles, Lisa et al, *Accuracy of a Radiofrequency Identification Badge System to Monitor Hand Hygiene*

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<sup>1</sup> <https://www.sentineladvantage.com/electronic-monitoring/> (last visited June 30, 2019)

<sup>2</sup> <https://www.sentineladvantage.com/rf-patrol/> (last visited June 30, 2019)

<sup>3</sup> <https://www.sentineladvantage.com/gps-monitoring/> (last visited June 30, 2019)



*Behavior During Routine Clinical Activities.*<sup>4</sup> GPS monitoring is typically accurate within a 16 foot radius. GPS.gov.<sup>5</sup>

Sentinel requires a person who submits to breath testing to blow into a portable breath testing (PBT) machine. Sentinel website.<sup>6</sup> In addition to taking a breath sample, the PBT machine takes a picture of the person being monitored as he or she takes a breath test. *Id.*

Mr. Ruiz had LifeSafer install an IID in his vehicle. CP 21. That IID gathered information about Mr. Ruiz's location and appearance, and LifeSafer shared that information with SMC. LifeSafer website<sup>7</sup> ("The data received from all breath samples are sent to the authority (court/DMV/probation, etc.) that ordered the device to be installed."). An IID is a small machine that a person blows into to give a breath sample that the machine can test for alcohol. LifeSafer website.<sup>8</sup> Like the PBT, the IID takes a picture of the person. It also stores all the information it gathers on a built-in memory chip. LifeSafer website.<sup>9</sup>

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<sup>4</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4892498/> (last visited June 30, 2019)

<sup>5</sup> <https://www.gps.gov/systems/gps/performance/accuracy/> (last visited June 30, 2019).

<sup>6</sup> <https://www.sentineladvantage.com/breath-alcohol-real-time/> (last visited June 30, 2019)

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<sup>9</sup> <https://www.lifesafer.com/interlock-devices/> (last visited July 5, 2019)

### III. INTRODUCTION

EHM invaded Mr. Ruiz's home and disturbed his private affairs without authority of law. EHM constantly reveals a person's location and activity both inside and outside of the home. It is an invasive search that requires authority of law under article 1, section 7 of the Washington Constitution. No authority of law allowed SMC to impose EHM as a condition of pretrial release. No constitutional statute or constitutional court rule provided authority. The court order setting conditions of release did not meet the requirements of a warrant. No exception to the warrant requirement applies to conditions of pretrial release.

The IID and breath testing disturbed Mr. Ruiz's private affairs, and SMC imposed these condition of pretrial release on Mr. Ruiz without authority of law. The statutes that purport to authorize an IID and breath testing as conditions of pretrial release are unconstitutional. SMC imposed IID and breath testing on Mr. Ruiz without authority of law.

### IV. ARGUMENT

**A. EHM as a Condition of Pretrial Release Was a Warrantless, Suspicionless Search That Invaded Mr. Ruiz's Home and Disturbed His Private Affairs in Violation of the Washington Constitution.**

**1. The Washington Constitution Forbids Government Invasion of the Home and Government Disturbance of Private Affairs Without Authority of Law.**

The Washington constitution forbids the government from invading a person's home or disturbing his private affairs: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wa. Const., art. 1, sec. 7. The protections of article I, section 7 are both broader and qualitatively different than those under the Fourth Amendment of the United States Constitution because article I, section 7 explicitly protects personal privacy, while the Fourth Amendment prohibits only unreasonable government conduct. *State v. Gunwall*, 106 Wn.2d 54, 65 (1986). Because Washington courts have already held that article 1, section 7 is more protective than the Fourth Amendment, a *Gunwall* analysis is not necessary to show article I, section 7 provides more protection in a given context. *State v. Mayfield*, 192 Wn.2d 871, 879 (2019). Instead, Washington courts look to "the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." *Id.* at 879-80 (quoting *State v. Chenoweth*, 160 Wash.2d 454, 463 (2007)). Article 1, section 7 is extremely protective of the home and of location data.

**2. EHM Invaded Mr. Ruiz's Home, So It Required Authority of Law.**

The home is entitled to the highest degree of constitutional protection. *State v. Young*, 123 Wn.2d 173, 185 (1994). The government invades a home when it detects activity within that home, even if police do not physically enter. *Young*, 123 Wn.2d at 185-86 (“When sense-enhancing devices allow police to ‘see through the walls’ of a home, the home has been invaded for purposes of Const. art. 1, § 7.”).

The government’s use of EHM to monitor Mr. Ruiz while in his home invaded Mr. Ruiz’s home. EHM allowed the government to see through Mr. Ruiz’s walls and determine his location within his home. By monitoring Mr. Ruiz’s location and activity while in his home, the government invaded Mr. Ruiz’s home.

### **3. EHM Disturbed Mr. Ruiz’s Private Affairs, So It Required Authority of Law.**

In addition to invading Mr. Ruiz’s home, EHM disturbed Mr. Ruiz’s private affairs by allowing the government to monitor his activity at home and continuously track him outside of his home. Private affairs are “those privacy interests which citizens of Washington have held, and should be entitled to hold, safe from governmental trespass.” *State v. McKinney*, 148 Wash.2d 20, 27 (2002) (quoting *State v. Myrick*, 102 Wash.2d 506, 511 (1984)) (internal alterations omitted). Washington citizens are entitled to expect that much information about their lives will

be safe from governmental trespass. *See, e.g., State v. Boland*, 115 Wn.2d 571 (1990) (garbage is a private affair); *State v. Jorden*, 160 Wn.2d 121 (2007) (motel registration is a private affair); *City of Seattle v. Mesiani*, 110 Wn.2d 454 (1988) (motorist checkpoints disturb private affairs).

The government's use of technology to determine a person's activity within his home disturbs that person's private affairs when it uses intrusive means and observes personal property or activity. *Young*, 123 Wn.2d at 182-83. For example, police use of an infrared thermal detection device to surveil a home disturbs the resident's private affairs. *Young*, 123 Wn.2d 173. Infrared thermal detection is intrusive because it allows police to "see through the walls" of a home and observe parts of the resident's personal life. *Id.* at 183-84. By showing the distribution of heat in a home, infrared thermal detection indicates what rooms the resident is using, the location of heat producing appliances, the number of people in the home on a given night, and the resident's financial inability to heat parts of the home. *Id.*

SMC's requirement that Mr. Ruiz submit to EHM disturbed his private affairs. EHM is more invasive than the infrared thermal detection that disturbed Mr. Young's private affairs. GPS monitoring and RF monitoring transmit a person's location and movements within the home constantly, while thermal detection shows the location of a person within

his or her home only when the person is by a window or other thin barrier. *Young*, 123 Wn.2d at 177. A search that reveals the location and activity of a person within his or her home disturbs that person's private affairs.

In addition to having a privacy interest in activity within the home, a Washington citizen has a privacy interest in data that shows his or her location outside of the home under both the Fourth Amendment and article 1, section 7. The United States Supreme Court has held that the government must get a warrant before obtaining cell-site location information (CSLI) from a cell phone service provider because detailed records of a person's movements reveal that person's associations, preferences and beliefs. *Carpenter v. U.S.*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 2206, 2217 (2018) (CSLI reveals not only a person's movements, "but through them his familial, political, professional, religious and sexual associations") (quoting *Riley v. California*, 573 U.S. 373, 415, 13 S.Ct. 2473 (2014)) (internal alterations omitted). The Washington Supreme Court has held that police disturb a person's private affairs by attaching a GPS device to that person's vehicle. *State v. Jackson*, 150 Wn.2d 251, 262 (2003). Such a device allows the government to surveille a person continually for 24-hours a day. *Id.* Tracking a person's car without interruption yields intimate details about that person's life, such as trips to places of worship, political meetings, doctors' offices, or strip clubs that

reveal preferences, beliefs, illnesses, weaknesses and associations. *Id.* at 262. A person's presence at a series of locations outside the home is a private affair.

The EHM SMC required for Mr. Ruiz as a condition of pretrial release was more invasive than the GPS device attached to Mr. Jackson's vehicle and at least as revealing as the CSLI the government obtained in *Carpenter*. The EHM device was attached to Mr. Ruiz's ankle and inescapable at all times. It tracked all of Mr. Ruiz's movements, including trips to appointments and meetings. By constantly pinpointing Mr. Ruiz's location, EHM revealed his associations, beliefs and preferences—a disturbance of his private affairs.

While Mr. Ruiz knew of the government's surveillance through EHM as it was happening and the defendants in *Young* and *Jackson* did not, that difference does not distinguish *Young* or *Jackson*. Rather, the fact that Mr. Ruiz did not consent to the surveillance is important. A defendant's voluntary disclosure of information will render a search constitutional while knowledge of surveillance as it happens will not. *See, e.g., State v. Athan*, 160 Wn.2d 354, 367 (2007) (no disturbance of private affairs when police tricked defendant into licking envelope to get DNA because defendant acted voluntarily even though he did not know he was returning sealed envelope to police); *Seattle v. McCready*, 123 Wn.2d 260

(1994) (inspection of rented apartments with knowledge but not consent of tenants required valid warrant). The voluntary disclosure of information is dispositive. Lack of knowledge of police surveillance is not.

**B. SMC Lacked the Authority of Law Necessary for It to Impose EHM as a Condition of Pretrial Release.**

**1. Mr. Ruiz’s Status as an Accused Person Did Not Lessen the Authority of Law Requirement for SMC to Impose EHM as a Condition of Pretrial Release.**

A person accused of a crime is presumed innocent. *See, e.g., State v. Chacon*, 192 Wn.2d 545, 549 (2018) (“the presumption of innocence in favor of the accused is axiomatic and elementary”) (quoting *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976)) (internal alterations omitted). A court may not assume that an accused person is more likely than anyone else to commit a crime. *U.S. v. Scott*, 450 F.3d 863, 874 (9<sup>th</sup> Cir. 2006) (“That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody”).

People released pending trial have greater privacy interests than those on probation or held in custody pending trial. *Blomstrom v. Tripp*, 189 Wn.2d 379, 408-09 (2017). No Washington court has held that an accused person who is out of custody suffers a loss of privacy rights, and the Washington Supreme Court has recently held article 1, section 7



protects people on pretrial release from suspicionless urinalysis testing. *Id.* at 410 (people released pretrial have “suffered no diminution in their privacy sufficient to justify highly invasive urinalysis testing under article I, section 7”).

Mr. Ruiz, who was accused, not convicted, had suffered no diminution in his privacy rights sufficient to justify invasive EHM monitoring. Mr. Ruiz was presumed innocent and did not suffer reduced privacy rights that would have allowed the government to track all of his activity both in and out of his home.

**2. Because Mr. Ruiz’s Status as an Accused Person Did Not Lessen the Authority of Law Requirement for SMC to Impose EHM as a Condition of Pretrial Release, No Authority of Law Supported That Condition.**

The government may not disturb private affairs without authority of law. Wa. Const. art. 1, sec.7. Authority of law must come from at least one of four sources: a constitutional statute, a constitutional court rule, a warrant or equivalent to a warrant, or an exception to the warrant requirement. *Blomstrom*, 189 Wn.2d at 404-05. No authority of law supported SMC’s invasion of Mr. Ruiz’s home or disturbance of his private affairs.

- a. No Constitutional Court Rule Provided Authority of Law for EHM as a Condition of Mr. Ruiz’s Pretrial Release.

CrRLJ 3.2 did not provide authority of law for EHM as a condition of Mr. Ruiz's pretrial release. CrRLJ 3.2 governs pretrial conditions of release in courts of limited jurisdiction. A court may impose pretrial conditions of release only if the court finds that personal recognizance will not reasonably assure the accused appearance in court or there is a likely danger that the accused will commit a violent crime or unlawfully interfere with the administration of justice. CrRLJ 3.2(a). Mr. Ruiz did not meet either of the requirements: DUI is not a violent crime and Mr. Ruiz was not at risk for failure to appear. Because DUI is not a violent crime, a chance that the accused may commit DUI will not support the imposition of a condition of release under CrRLJ 3.2. *Blomstrom*, 189 Wn.2d at 405-06.

A court rule can be unconstitutional. *State v. Berry*, 31 Wn.App. 408, 411 (1982). An unconstitutional court rule or a court rule applied unconstitutionally cannot provide authority of law. *State v. Rose*, 146 Wn.App. 439, 455- 58 (2008) (CrR 3.2<sup>10</sup> did not authorize urinalysis as a condition of pretrial release for defendant who posed a risk of committing a violent crime because urinalysis was an unconstitutional search); *Butler v. Kato*, 137 Wn.App. 515 (2007) (CrRLJ 3.2 did not authorize alcohol

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<sup>10</sup> CrRLJ 3.2 and CrR 3.2 are worded identically.

evaluation and attendance at self-help meetings as conditions of pretrial release because they violated the accused's constitutional rights); *See also* CrRLJ 1.1 (court rule may not "affect or derogate from the constitutional rights of any defendant.") The court rule lists conditions the trial court may impose if there is a substantial danger the accused will commit a violent crime. CrRLJ 3.2(d). Those conditions include requiring the accused to be placed on electric home monitoring (EHM). CrRLJ 3.2(d)(9). To the extent that CrRLJ 3.2 allows for EHM as a condition of pretrial release, it is unconstitutional. An unconstitutional court rule cannot provide authority of law.

b. No Constitutional Statute Authorized EHM as a Condition of Mr. Ruiz's Pretrial Release.

No constitutional statute authorizes EHM for a person accused of a misdemeanor. The government may refer to RCW 10.21.030, but that statute cannot apply and be constitutional. RCW 10.21.030(2)(e), which allows "home detention," differentiates between people accused of misdemeanors and those accused of a felonies. RCW 10.21.030(2)(d) cannot be a mere reiteration of the authorization of home detention in RCW 10.21.030(2)(e). *See Spokane County v. Dep't of Fish and Wildlife*, 192 Wn.2d 453, 458 (2018) (courts construe statutes so that no portion is

“rendered meaningless or superfluous”). RCW 10.21.030 does not apply to Mr. Ruiz.

If the court finds RCW 10.21.030 does apply, that statute is unconstitutional because it allows a search the Washington Constitution forbids. *See State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400 (1972) (statute that allowed for assessment of value of real estate in a way other than article 1, section 2 required was unconstitutional); *State v. Rasmussen*, 14 Wn.2d 397, 400–01 (1942) (statute must fail if “it is in clear and irreconcilable conflict with some express provision of the constitution”). To avoid the question of whether RCW 10.21.030 unconstitutionally authorized an invasion of Mr. Ruiz’s home and disturbance of his private affairs, this Court should interpret that statute as providing no authority for EHM as a condition of pretrial release for a person accused of a misdemeanor. *See Utter v. Bldg. Indus. Ass’n of Washington*, 182 Wn.2d 398, 434 (2015) (courts construe statutes and rules in a manner that avoids constitutional doubt).

- c. No Warrant or Equivalent to a Warrant Supported EHM as a Condition of Mr. Ruiz’s Pretrial Release.

The court order setting the conditions of Mr. Ruiz’s pretrial release was not equivalent to a warrant, so it did not provide authority of law for the requirement that Mr. Ruiz submit to EHM. A valid court order may

sometimes<sup>11</sup> serve as a warrant if it meets all the requirements of a warrant. *State v. Garcia-Salgado*, 170 Wn.2d 176, 186 (2010). A warrant must be issued by a neutral and detached magistrate, must describe the place to be searched and the items to be seized, and must be based on probable cause based on an oath or affirmation. *Id.* at 184-85.

The court order imposing EHM on Mr. Ruiz did not describe the items to be seized, and it was not based on probable cause. The Fourth Amendment requires warrants to "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The court order that imposed conditions of pretrial release on Mr. Ruiz did not describe any items to be seized. A court order that is equivalent to a search warrant must be based on probable cause to search. *Garcia-Salgado*, 170 Wn.2d at 187-88. There is no indication that SMC had probable cause for a search, which requires a reasonable inference that a person is involved in crime and that the government can find evidence of that crime at the place to be searched.<sup>12</sup> *State v. Maddox*, 152 Wn.2d 499,

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<sup>11</sup> The Court of Appeals recently held that the government may collect CSLI only with a warrant, not a court order that meets the requirements of a warrant. *State v. Phillip*, \_\_\_\_ Wn.App. 2d \_\_\_\_, 2019 WL 2723990 (July 1, 2019).

<sup>12</sup>In contrast, probable cause to detain or set conditions of pretrial release requires only a reasonable inference that a person committed a crime. *Gerstein v. Pugh*, 95 S.Ct. 854, 866, 420 U.S. 103, 120 (1975).

505 (2004). The court order setting conditions of pretrial release for Mr. Ruiz did not provide authority of law for those invasions.

- d. No Exception to the Warrant Requirement Supported EHM as a Condition of Mr. Ruiz's Pretrial Release.
  - i. No Special Needs Exception or Balancing Test Provided Authority of Law for EHM as a Condition of Mr. Ruiz's Pretrial Release.

The Washington Supreme Court has repeatedly declined to adopt a special needs exception under article I, section 7. *Blomstrom*, 189 Wn.2d at 406-10; *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 314 (2008). It has occasionally allowed suspicionless searches when the court “rel[ies] entirely on federal law, in the context of criminal investigations, or when dealing with persons already convicted or otherwise having received the benefit of a full adversarial proceeding.” *Blomstrom*, 189 Wn.2d at 407; *See also York*, 163 Wn.2d at 315 (lead opinion).

The Washington Constitution allows suspicionless searches of convicted people on probation. Before so holding, the Washington Supreme Court employed a balancing test, examining whether a compelling government interest, achieved through narrowly tailored means, supported a search. *State v. Olsen*, 189 Wn.2d 118, 128 (2017). Throughout *Olsen*, the court emphasized that Ms. Olsen was on probation-- a punishment that can only follow a misdemeanor conviction-- and that

probation “is not a right, but an act of judicial grace or lenience. . . .” *Id.* at 128 (citing *Gillespie v. State*, 17 Wn.App. 363, 366-67 (1977)) (internal alterations omitted). The balancing test was appropriate only because Ms. Olsen had the reduced privacy interests associated with probation. *Id.* at 128.

Mr. Ruiz had not had the benefit of a full adversarial proceeding when SMC required EHM as a condition of pretrial release. Instead, he was entitled to the presumption of innocence. While probation is an act of a trial court’s lenience, the presumption of innocence is a constitutional right.

ii. No Consent Provided Authority of Law for EHM as a Condition of Mr. Ruiz’s Pretrial Release.

The doctrine of unconstitutional conditions prohibits the government from granting a benefit in exchange for the surrender of a constitutional right, even if the government may withhold the benefit altogether. *United States v. Scott*, 450 F.3d 863, 865- 68 (9th Cir. 2006) (consent to random searches as conditions of pretrial release did not legally support those searches); *Butler*, 137 Wn.App. at 530 (condition of pretrial release that Mr. Butler agree to alcohol treatment violated his constitutional rights). The doctrine stems from a recognition that allowing the government to grant conditional benefits may lead the government to

take advantage of its disproportionate power to disadvantage citizens and limit their rights. *Butler*, 137 Wn.App. at 530 (quoting *Scott*, 450 F.3d at 866).

Mr. Ruiz submitted to EHM because SMC ordered him to do so as a condition of avoiding jail pretrial. SMC granted Mr. Ruiz the benefit of staying out of jail on the condition that he surrender his right against invasion of his home and disturbance of his private affairs. The doctrine of unconstitutional conditions vitiates any consent the government may claim Mr. Ruiz gave.

**C. IID and Breath Testing as a Conditions of Pretrial Release Were Warrantless, Suspicionless Searches That Disturbed Mr. Ruiz's Private Affairs In Violation of the Washington Constitution, and SMC Lacked the Authority of Law Necessary To Impose Those Conditions.**

A person's presence in a specific location, such as a motel, is a private affair. *State v. Jorden*, 160 Wn.2d at 129 (“an individual's very presence in a motel or hotel may in itself be a sensitive piece of information”). That presence may indicate any one of several private activities or associations, such as an extramarital affair, a business meeting to engage in confidential negotiations, or flight from an abusive relationship. *State v. Jorden*, 160 Wn.2d at 129.

Breath testing and the IID disturbed Mr. Ruiz's private affairs. The IID revealed Mr. Ruiz's location and appearance at random intervals. His



presence in a place where the IID required him to take a breath test was sensitive information that revealed intimate details of his life, such as visits to doctors or counselors. As explained above, a person's activity within his or her home is a private affair. Breath testing revealed Mr. Ruiz's appearance and activity in his home.

SMC lacked the authority of law necessary to require an IID and breath testing as conditions of Mr. Ruiz's Pretrial Release. As explained above, a search that disturbs private affairs must be supported by authority of law. No warrant or equivalent, constitutional court rule, constitutional statute, or exception to the warrant requirement provided authority of law for SMC to require Mr. Ruiz to submit to breath testing or the IID, which were conditions of pretrial release that disturbed his private affairs.

## **V. CONCLUSION**

SMC imposed conditions of pretrial release on Mr. Ruiz that invaded his home and disturbed his private affairs without authority of law. This Court should find that EHMB and IID are not permissible conditions of pretrial release in Washington.

Respectfully submitted this 12th day of July, 2019

/s/ Magda Baker

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