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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

LARRY D. TYLER,

Petitioner.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2012 SEP 11 A 11:48  
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BRIEF OF *AMICI CURIAE* WASHINGTON ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS AND AMERICAN  
CIVIL LIBERTIES UNION OF WASHINGTON

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ORIGINAL

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## INTEREST OF *AMICI CURIAE*

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL’s objectives include “to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights.” WACDL has filed numerous amicus briefs in the Washington appellate courts.

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of article I, section 7 of the Washington State Constitution, prohibiting interference in private affairs without authority of law. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

### ISSUE ADDRESSED BY *AMICI*

Should this Court reaffirm the rule that consent is required prior to an inventory search, given (1) the primary purpose of the inventory search is to protect the individual's property; (2) requiring consent prevents the use of "inventory" searches as a pretext for evidentiary searches; and (3) other concerns can be addressed without performing an intrusive search over the individual's objections?

### STATEMENT OF THE CASE

On April 21, 2009, the United States Supreme Court rejected the broad vehicle search-incident-to-arrest exception to the warrant requirement that had been followed in Washington and elsewhere. *Arizona v. Gant*, 556 U.S. 332, 343, 29 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The Court held it was improper for police to have searched the car of a person who was arrested for driving with a suspended license and secured in a police vehicle. *Id.* at 344.

Jefferson County Sheriff's Deputy Brett Anglin was not happy with *Gant*. In an April 23rd e-mail message to his supervisors he stated, *inter alia*, "This unfortunate ruling hinders our ability to continue the efforts that have been enforce (sic) for some time. The obvious way to circumvent this is impounding the vehicle and performing an inventory

search.” *State v. Tyler*, 166 Wn. App. 202, 214 n.10, 269 P.3d 379, *review granted* 278 P.3d 1112 (2012).

Later that year, Deputy Anglin stopped petitioner Larry Tyler for speeding. He then arrested him for driving with a suspended license and placed him in a patrol car. Deputy Anglin asked Mr. Tyler to consent to a search of the car, but Mr. Tyler refused. Deputy Anglin impounded the car and performed an “inventory” search. *Tyler*, 166 Wn. App. at 206. Deputy Anglin was unaware of the Department’s policy on inventory searches, and described it as being the same as a “search incident to arrest.” Supplemental Brief of Petitioner at 5. He exceeded the scope of a valid inventory search by opening a small closed container. *See Tyler*, 166 Wn. App. at 206 n.2; Supplemental Brief of Respondent at 5 n.7 (conceding search “possibly exceeded scope of an inventory search”).

Based on drugs found during the “inventory” search, Mr. Tyler was charged with possession of a controlled substance and use of drug paraphernalia. *Tyler*, 166 Wn. App. at 206-07. The trial court denied his motion to suppress the evidence found during the nonconsensual inventory search,<sup>1</sup> and the Court of Appeals affirmed in a 2-1 decision.

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<sup>1</sup> The court also denied a motion to reopen the suppression hearing based on the discovery of Deputy Anglin’s e-mail advocating inventory searches as a means of circumventing *Gant*. *Tyler*, 166 Wn. App. at 207.

This Court has held that article I, section 7 requires police to obtain an individual's consent prior to an inventory search, but the Court of Appeals refused to follow this rule. *Id.* at 212 (citing *State v. White*, 135 Wn.2d 761, 771 n.11, 958 P.2d 982 (1998); *State v. Williams*, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984)). Instead, the court followed Fourth Amendment caselaw from other jurisdictions holding police are not required to obtain consent because inventory searches are not just for the protection of the individual's belongings, but also for "alerting officers of potential danger." *Tyler*, 166 Wn. App. at 212-213. Thus, contrary to this Court's conclusions in *Williams* and *White*, the Court of Appeals held warrantless inventory searches are *always* valid when a car is properly impounded, regardless of consent. *Id.* at 214. The court further ruled that Deputy Anglin's "inventory" search was not a pretext for an evidentiary search. *Id.* at 215.

#### ARGUMENT

This Court should reaffirm that article I, section 7 requires officers to obtain consent prior to performing an inventory search. The purpose of an inventory search is to protect the individual's property; it is not an evidentiary search. It is therefore for the individual to decide whether to waive his or her right to privacy in favor of the protection of property. Furthermore, requiring consent prevents the use of "inventory"

searches as pretext for evidentiary searches, and is simple for police officers and courts to apply.

If an officer reasonably suspects danger, a warrantless search may be allowed under a different exception to the warrant requirement, such as community caretaking or exigency, depending on the circumstances. The claim that all impounded cars must be searched to prevent danger is a red herring and is inconsistent with article I, section 7.

**This Court should reaffirm the rule that article I, section 7 requires police to obtain consent prior to performing an inventory search.**

- a. The primary purpose of an inventory search is to protect the individual's valuables; thus, it is for the individual to decide whether to waive his or her right to privacy in favor of this protection.**

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. This clause provides stronger privacy protection than the Fourth Amendment to the United States Constitution. *See State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012).

Subject to limited exceptions, a warrant is the “authority of law” necessary to invade a private affair. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). Exceptions to the warrant requirement must be “jealously and carefully drawn.” *State v. Garvin*, 166 Wn.2d 242, 249,

207 P.3d 1266 (2009). They “are not devices to undermine the warrant requirement.” *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). “The State bears a heavy burden to show the search falls within one of the ‘narrowly drawn’ exceptions.” *Garvin*, 166 Wn.2d at 250 (citation omitted).

One exception to the warrant requirement is the inventory search. *Hendrickson*, 129 Wn.2d at 71. It is a search performed before impoundment for purposes of cataloging an individual’s belongings. *State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980). “Inventory searches, unlike other searches, are not conducted to discover evidence of crime.” *Id.* at 153.

Because the primary purpose of an inventory search is to protect a person’s valuables, this Court has repeatedly stated that an individual may waive this protection in favor of maintaining his or her right to privacy under article I, section 7. In other words, if the owner or possessor is present at the time of impoundment, police must obtain consent prior to performing an inventory search. *White*, 135 Wn.2d at 771 n.11; *Williams*, 102 Wn.2d at 743.

In *Williams*, this Court said, “it is doubtful that the police could have conducted a routine inventory search without asking petitioner if he wanted one done. ... Clearly, a [person] may reject this protection,

preferring to take the chance that no loss will occur.” *Williams*, 102

Wn.2d at 743. This Court reaffirmed the *Williams* rule in *White*:

Further, the record does not indicate White was ever asked whether he would consent to an inventory search, and the State makes no claim that he was. White was never given the opportunity to reject the protection available and, thus, the search is also suspect under *State v. Williams*, [102 Wn.2d 733]. **In *Williams*, the court held police may not conduct a routine inventory search following the lawful impoundment of a vehicle without asking the owner, if present, if he or she will consent to the search.**

*White*, 135 Wn.2d at 771 n.11 (emphasis added).

In light of the above, the State’s characterization of the consent rule as “dicta” is somewhat disingenuous. “Where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.” *White*, 135 Wn.2d at 767 n.3; *see also In re the Personal Restraint of Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012) (disapproving Court of Appeals’ characterization of alternate holding in a Supreme Court case as “dictum” it need not follow).

In any event, the requirement that police seek consent prior to an inventory search is the constitutionally mandated rule and this Court should reaffirm it.<sup>2</sup> Privacy rights are individually held, and it is for the

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<sup>2</sup> Oddly, the State claims this Court would have to overrule prior cases in order to rule for petitioner. Supplemental Brief of Respondent at 1. If anything, the converse is true. This Court would have to overrule the consent requirement of *Williams* and *White* in order to rule for the State. The Court should instead

individual, not the government, to determine whether it is worth waiving the right to privacy in favor of some other benefit. As the Montana Supreme Court noted when evaluating the inventory search under its state constitution, “[i]t would be anomalous to justify a search of an automobile for the owner’s benefit, when the owner is available but does not consent to the search.” *State v. Sawyer*, 174 Mont. 512, 517, 571 P.2d 1131 (Mont. 1977).

Commentators agree with this Court’s statements in *Williams* and *White* that consent should be required because an inventory search is not supposed to be an evidentiary search. *See, e.g.*, Nicholas B. Stampfli, Comment, *After Thirty Years, Is It Time To Change The Vehicle Inventory Search Doctrine?*, 30 Seattle U. L. Rev. 1031, 1059-60 (2007); Wayne R. LaFave, Search and Seizure § 7.4(a) at 638-40 (4<sup>th</sup> ed. 2004). Professor LaFave noted, “there is much to be said in favor of the proposition that the police should inventory the impounded vehicle when the owner or possessor is at hand *only if he elects that alternative*.” LaFave, *supra*, at 638-39 (emphasis added). Stampfli agrees that a “consent requirement

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reaffirm the rule from *Williams* and *White*, for the reasons set forth in this brief and Petitioner’s briefs.

should and must be clearly incorporated into the inventory search doctrine in order to protect people's privacy." Stampfli, *supra*, at 1059.<sup>3</sup>

Nor does it matter that Mr. Tyler did not own the car, as there appears to be no dispute that he was authorized to drive it. "Generally, the borrower of a car may consent to a search." *State v. Cantrell*, 124 Wn.2d 183, 188, 875 P.2d 1208 (1994). Thus, the converse must also be true: a borrower of a car may *refuse* consent to search. Indeed, the defendant in *Williams* did not own the car, but this Court held the inventory search was improper absent his consent. *See Williams*, 102 Wn.2d at 743; *id.* at 747 (Dimmick, J., dissenting). This makes sense. As this Court has noted, "the authority [to consent to a search] does not rest upon the law of property, with its attendant legal refinements, but rests rather on mutual use of the property." *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (defendant, who rented apartment but did not own it, had authority to consent or refuse consent to search); *Cf. Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed. 2d 856 (1964) (motel guests and renters have privacy rights in spaces they are authorized to be, notwithstanding lack of ownership).

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<sup>3</sup> Stampfli would also allow a broad scope for inventory searches, *assuming the owner or driver consented to the search*. Stampfli, *supra*, at 1057. Scope is not at issue in this case.

Indeed, if Mr. Tyler *had* consented when Deputy Anglin asked if he could search, presumably the State would have argued the consent exception applied – and the State would be correct. *Cantrell*, 124 Wn.2d at 188 (car owners’ son, who was present in car, had authority to consent to search of car even though his parents, who owned the car, were absent). But the State cannot have it both ways: if the authorized driver had the authority to consent, he also had the authority to refuse consent. *Williams*, 102 Wn.2d at 743. In this case, because an authorized driver was present, his consent was required prior to an inventory search.<sup>4</sup>

In sum, this Court should reaffirm the rule that police may not perform an inventory search when the owner or possessor is present without obtaining the individual’s consent.

**b. The secondary purposes of an inventory search have been highly criticized and can in any event be protected by other means.**

The Court of Appeals refused to follow this Court’s rule from *Williams* and *White* under article I, section 7. It instead looked to Fourth Amendment caselaw from other jurisdictions, and held consent is not

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<sup>4</sup> There may be instances in which it is impractical to obtain explicit consent, as when the owner of a stolen or abandoned car is not present. The Court can save for another day the question of whether consent may be implied under some circumstances. In the present case, there was no practical obstacle to obtaining consent, and Mr. Tyler explicitly refused consent to search the car.

required because such a requirement would undermine the secondary purposes of an inventory search: protection of police from lawsuits based on property loss, and protection of the police and public from danger. *Tyler*, 166 Wn. App. at 211-213. But this Court has already rejected these rationales, and should do so again here.

1. *Police are not in danger of losing lawsuits based on false claims of theft, and police could require a nonconsenting driver to sign a release.*

Although the purpose of the inventory search is protection of the individual's belongings, some cases have noted that another purpose is to protect police from false claims of theft. *Colorado v. Bertine*, 479 U.S. 367, 373, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); *White*, 135 Wn.2d at 769-70. This Court, however, has rejected this justification for an inventory search:

This stated purpose is articulated over and over as a valid justification for an inventory search. However, its constant repetition has created a justification without merit or the benefit of true legal analysis. When the police impound a vehicle they become involuntary bailees. In such a situation the police have the obligation to use only slight care for the impounded vehicle and its contents.

*White*, 135 Wn.2d at 770 n.9; accord *LaFave*, *supra*, at 639 n.47. The Montana Supreme Court agrees that this concern "bears little weight," because police in this situation owe only a duty of "slight care" and cannot be held liable for loss unless grossly negligent. *Sawyer*, 174 Mont. at 517.

Moreover, it is unclear that an inventory search actually reduces the possibility of false claims, “since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records.”

*South Dakota v. Opperman*, 428 U.S. 364, 378, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (Powell, J., concurring).

If police are nevertheless concerned about claims of theft, they may simply have a non-consenting driver sign a release. *See Stampfli, supra*, at 1060; *State v. Killcrease*, 379 So.2d 737, 739 (La. 1980) (reversing for illegal inventory search where officers “never asked the defendant if he consented to the search of the truck, or if he would waive his rights of a civil suit against the police department in the case of lost or stolen items”). The fear of a lawsuit is not a valid basis for discarding the consent requirement.

2. *Impounded cars are not inherently more dangerous than other cars, and where there is individualized suspicion of danger, the car can be searched under a different exception to the warrant requirement.*

The Court of Appeals endorsed the view that drivers “cannot waive an inventory after the proper impoundment of the car” because an inventory search is necessary to alert the police to potentially dangerous

items. *Tyler*, 166 Wn. App. at 212-13 (citing *Opperman*, 428 U.S. at 376 n.10). This Court has already properly rejected this reasoning:

These are valid and important purposes, but in most cases they have little relevance to the facts. Without more, **these purposes will not serve to justify an inventory search in each and every case.**

*Houser*, 95 Wn.2d at 154 n.2 (emphasis added); *Cf. Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) (Sobriety checkpoints are not based on individualized suspicion and therefore violate article 1, section 7).

Where there is reasonable, individualized suspicion of danger, a search for dangerous items might be proper – but this would not be an “inventory” search. *See Houser*, 95 Wn.2d at 154 n.2 (explaining that “danger rationale” does not justify inventory search of every impounded car but in rare cases may justify search for community caretaking); *see also Gant*, 556 U.S. at 346 (citing *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)) (explaining circumstances in which *Terry* exception allows frisk of passenger compartment for weapons). Absent such individualized suspicion, there is no good reason to search an impounded car without the driver’s consent. LaFave, *supra*, at 640. “Except in rare cases, there is little danger associated with impounding unsearched automobiles.” *Opperman*, 428 U.S. at 378 (Powell, J., concurring). As Professor LaFave noted:

In [*Opperman*], the Chief Justice’s plurality opinion asserted a third purpose: “the protection of the police from potential danger.” However, it is difficult to take this contention seriously – if police are endangered by unsearched cars in their possession, then it would seem that the public is endangered by cars parked on the streets or other public or semi-public places.

*Id.* at 633 n.18.

In sum, where there is reasonable individualized suspicion of danger, a search of an impounded vehicle may be justified. But to use the “protection from danger rationale” to justify an inventory search of every impounded vehicle “borders on the ridiculous.” Stampfli, *supra*, at 1038; LaFave, *supra*, at 639. Here, there was no reason whatever to suspect danger, and the warrantless search without consent was not justified.

“[O]nly the government’s interest in protecting the owner’s property actually justifies an inventory search of an impounded vehicle.” *Bertine*, 479 U.S. at 384 (Marshall, J., dissenting); *accord White*, 135 Wn.2d at 770 n.9; *Houser*, 95 Wn.2d at 154 n.2. Because the only valid purpose of an inventory search is to protect the individual’s property, the individual may waive this protection in favor of his or her right to privacy. This Court should reaffirm the rule that police may not perform an inventory search when the owner or authorized driver is present without obtaining the individual’s consent.

**c. Requiring consent eliminates the problem of inventory searches being used as pretext for evidentiary searches, and provides a simple bright-line rule for police and courts to apply.**

The circumstances of this case demonstrate the need for a consent requirement—a straightforward bright-line rule for police to follow.

An inventory search is not supposed to be an evidentiary search, and this Court has “required that the State show that the [inventory] search was conducted in good faith and not as a pretext for an investigatory search.” *Houser*, 95 Wn.2d at 155. But here, both the trial court and Court of Appeals summarily dismissed the possibility of the “inventory” search being pretextual once they determined the impoundment of the car was justified. *Amici* respectfully suggest that there are a number of factors suggesting Deputy Anglin may have been more motivated to search the car for evidentiary than inventory purposes,<sup>5</sup> and the trial court should have weighed these factors to determine Deputy Anglin’s primary motivation for searching the car. But this Court need neither determine motivation for itself, nor remand for the trial court to do so. Instead, enforcing the consent requirement would eliminate the need to consider an

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<sup>5</sup> These factors include Deputy Anglin’s e-mail urging the use of inventory searches to circumvent *Gant*, his expressed desire to search the car prior to impoundment, his lack of knowledge of proper inventory search procedures or limits, and his exceeding the scope of a valid inventory search by unscrewing a closed metal container.

officer's motivation and determine whether a search is actually pretextual; if an individual wishes to waive his right to privacy in favor of the protection an inventory search provides, he may do so regardless of the officer's motivations. If the individual refuses consent, a search cannot be justified based on the "inventory" exception. A consent requirement thus supports the purpose of an inventory search, prevents circumvention of constitutional rights, and provides a simple rule for officers and courts to apply. This Court should reaffirm the rule that consent is required prior to an inventory search.

#### CONCLUSION

For the foregoing reasons, amici respectfully request that this Court hold consent is required prior to inventory searches.

Respectfully submitted this 20th day of August, 2012.

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 87104-3
v.	)	
	)	
LARRY TYLER,	)	
	)	
Appellant.	)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **BRIEF OF AMICI CURIAE** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**State v. Larry Tyler**  
**No. 87104-3**

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### **BRIEF OF AMICI CURIAE**

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