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NO. 87104-3

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SUPREME COURT OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent,

v.

LARRY D. TYLER,

Petitioner.

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BRIEF OF AMICUS CURIAE WASHINGTON STATE PATROL

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**TABLE OF CONTENTS**

I. IDENTITY AND INTEREST OF AMICUS CURIAE .....1

II. ISSUE ADDRESSED BY AMICUS .....2

III. STATEMENT OF THE CASE .....2

IV. ARGUMENT .....3

A. This Court Should Not Adopt A Rule That Requires  
Consent Of A Driver, Who Is Not The Vehicle’s Owner,  
As A Prerequisite To An Inventory Search. ....3

B. The Court of Appeals Correctly Found That A Non-  
Owner’s Consent Is Not Required Before A Law  
Enforcement Officer Conducts A Limited Inventory  
Search Of A Lawfully Impounded Vehicle. ....5

1. Limited Inventories Conducted Pursuant To A  
Lawful Impound, And Without Pretextual  
Motivations, Secure An Individual’s Privacy  
Interests.....7

a. A law enforcement officer must have reasonable  
cause to authorize a vehicle’s impound. ....7

b. An inventory search must be limited to those  
areas that present the greatest risk of theft or  
vandalism of private property. ....8

c. An inventory is invalid when a Court finds a  
pretextual motivation. ....9

2. The Proposed Rule Is Impractical For A Myriad Of  
Lawful Impounds.....10

3. Inventories of Lawfully Impounded Vehicles Protect  
Public Safety.....12

V. CONCLUSION .....14

## TABLE OF AUTHORITIES

### Cases

<i>In re Impoundment of Chevrolet</i> 148 Wn.2d 145, 60 P.3d 53 (2002).....	8
<i>State v. Bales</i> 15 Wn. App. 834, 552 P.2d 688 (1976).....	8, 11
<i>State v. Houser</i> 95 Wn.2d 143, 622 P.2d 1218 (1980).....	passim
<i>State v. Ladson</i> 138 Wn.2d 343, 979 P.2d 833 (1999).....	6
<i>State v. Montague</i> 73 Wn.2d 381, 438 P.2d 571 (1968).....	7, 10
<i>State v. Tyler</i> 166 Wn. App. 202, 269 P.3d 379 (2012).....	2, 4, 8, 12
<i>State v. Valdez</i> 167 Wn.2d 761, 224 P.3d 751 (2009).....	5, 6, 9
<i>State v. White</i> 135 Wn.2d 761, 958 P.2d 982 (1998).....	3, 4, 6, 9
<i>State v. Williams</i> 102 Wn.2d 733, 689 P.2d 1065 (1984).....	3, 4
<i>York v. Wahkiakum Sch. Dist. No. 200</i> 163 Wn.2d 297, 178 P.3d 995 (2008).....	5
<i>Colorado v. Bertine</i> 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).....	12
<i>South Dakota v. Opperman</i> 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).....	6, 12

*U.S. v. Edwards*  
577 F.2d 883 (5th Cir. 1978) ..... 12

**Constitutional Provisions**

Const. art. I, § 7.....1, 5

**Statutes**

---

RCW 46.55.350-.370 ..... 1

RCW 46.55.085 ..... 11

## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Patrol (WSP) is a law enforcement agency charged with enforcing the traffic laws and keeping Washington's roadways safe. Each year, WSP officers conduct scores of limited inventories of lawfully impounded vehicles. With the advent of Hailey's Law, RCW 46.55.350-.370, law enforcement officers are now mandated, subject to limited exceptions, to impound vehicles for twelve hours when the driver is arrested for driving under the influence or being in physical control of a vehicle while under the influence. Consequently, the number of vehicles subject to impound, and the risks associated with an un-inventoried impounded vehicle, have increased.

A. limited inventory of a lawfully impounded vehicle is a recognized exception to the warrant requirement. Additionally, this Court has narrowed this exception to comport with privacy principles in the Washington Constitution's article I, section 7. In Washington, a valid inventory depends on a law enforcement officer having reasonable cause to impound a vehicle, limiting the search to those places where private property is significantly vulnerable to theft and vandalism, and conducting the search without a pretextual motivation. These requirements safeguard an individual's privacy interest while protecting private property and public safety.

The WSP has a substantial interest in this case because a rule requiring the consent of a driver, who is not the owner, before conducting an inventory is unnecessary to further safeguard individual privacy interests, fails to protect private property, and presents public safety concerns. The WSP respectfully requests this Court not to adopt a rule that affirmatively requires a law enforcement officer to obtain the consent of a driver, who is not the vehicle's owner, before conducting an inventory search of a lawfully impounded vehicle.

## **II. ISSUE ADDRESSED BY AMICUS**

Should this Court add a new requirement for inventory searches of lawfully impounded vehicles that an officer must obtain consent of the driver, who is not the vehicle's owner, before conducting the search, where such a requirement would be impractical, and existing requirements for inventory searches adequately protect individual privacy?

## **III. STATEMENT OF THE CASE**

The WSP adopts the statement of facts as set forth in the Court of Appeals opinion, *State v. Tyler*, 166 Wn. App. 202, 269 P.3d 379 (2012).

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#### IV. ARGUMENT

**A. This Court Should Not Adopt A Rule That Requires Consent Of A Driver, Who Is Not The Vehicle's Owner, As A Prerequisite To An Inventory Search.**

This Court has never squarely addressed the issue of whether a law enforcement officer must obtain consent from a driver, who is not the owner, before conducting an inventory search. This Court has also not considered whether a law enforcement officer must attempt to contact and obtain consent from an owner of an abandoned vehicle before conducting an inventory search. Rather, this Court has invalidated inventories based on either an illegal impound or because the inventory exceeded the scope of the areas vulnerable to theft or vandalism. *E.g.*, *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980) (impound invalid because the officer lacked probable cause to believe the vehicle was stolen, and reasonable alternatives to impoundment existed); *State v. Williams*, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984) (impound invalid because the vehicle was not “evidence of a crime,” “alternatives to impoundment existed,” and no statute authorized impoundment); *State v. White*, 135 Wn.2d 761, 764, 958 P.2d 982 (1998) (inventory search of locked trunk invalid without “manifest necessity”).

The petitioner, Mr. Larry D. Tyler, seeks to vastly expand the prerequisites to a valid inventory, asking this Court to hold that a law

enforcement officer must “obtain the express permission of the vehicle’s owner or spouse or the driver, if the owners are not available” before conducting an inventory of a lawfully impounded vehicle. Supp. Br. Pet’r at 9.

This Court has noted that an owner, if present when the vehicle is impounded, has the option to waive the inventory. See e.g., *White* 135 Wn.2d at 771, n. 11. The WSP’s current policy is consistent with this premise and allows a vehicle owner, who is present during the impound, to waive an inventory. In *Williams*, after determining that the officer lacked reasonable cause to impound the vehicle, the opinion remarked “[t]he purpose of an inventory search is to protect the police from lawsuits arising from the mishandling of [private property and] . . . a defendant may reject this protection . . . .” 102 Wn.2d at 743 (citation omitted). The *White* opinion similarly noted in dicta that “an individual is free to reject the protection that an inventory search provides and take the chance that no loss will occur.” 135 Wn.2d at 771, n. 11. However, the statements are dicta, and the Court did not necessarily consider the logistical and public safety issues addressed in this amicus brief.

In this case, the owner was not present, nor reasonably available, *Tyler* 166 Wn. App. at 206, so this Court need not address whether its prior dicta should be binding. Instead, this Court need only address the

Court of Appeals holding that a driver, who is not the vehicle's owner, need not consent to an otherwise valid inventory of an impounded vehicle. For the reasons expressed below, the WSP respectfully requests that the Court affirm the Court of Appeals and hold that an otherwise valid inventory is not invalidated because a non-owner driver did not consent to the inventory search.

**B. The Court of Appeals Correctly Found That A Non-Owner's Consent Is Not Required Before A Law Enforcement Officer Conducts A Limited Inventory Search Of A Lawfully Impounded Vehicle.**

Given that the current limitations on inventories protect an individual's privacy interests, this Court should decline to adopt an unworkable rule that requires law enforcement officers to obtain a non-owner's consent before conducting an inventory of a lawfully impounded vehicle. Under article I, section 7, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision "prohibits any disturbance of an individual's private affairs without authority of law." *State v. Valdez*, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009) (citation omitted) (internal quotations omitted). "The authority of law required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions." *Id.* at 772 (quoting *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178

P.3d 995 (2008)) (internal quotations omitted). A limited inventory search pursuant to a lawful impound is one of the “few jealously guarded exceptions.” See *White*, 135 Wn.2d at 769-70; *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

“The three principal reasons for conducting an inventory search are: (1) to protect the vehicle owner’s property; (2) to protect the police against false claims of theft by the owner, and (3) to protect the police from potential danger.” *White*, 135 Wn.2d at 769-70 (citation omitted); see also *South Dakota v. Opperman*, 428 U.S. 364, 370, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (citations omitted).

These justifications “are not simply products of judicial fancy, but of principled necessity.” *Valdez*, 167 Wn.2d at 773 (citation omitted). An inventory search is necessary to protect private property located in unlocked areas of the vehicle, prevent meritless lawsuits against law enforcement agencies, and ensure public safety. Moreover, the proposed rule is impracticable when a law enforcement officer impounds an abandoned vehicle and the owner is not readily available to consent to or waive the protections of an inventory.

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**1. Limited Inventories Conducted Pursuant To A Lawful Impound, And Without Pretextual Motivations, Secure An Individual's Privacy Interests.**

Requiring a law enforcement officer to obtain the consent of the driver, who is not the owner, before conducting an impound inventory search is unnecessary to protect individual privacy interests. Washington law already prohibits unbridled inventory searches.

A law enforcement officer may conduct an inventory only when: (1) there is reasonable cause to impound the vehicle; (2) the scope of the inventory is limited to areas of the vehicle that present the greatest risk of theft or harm; and (3) the inventory is conducted in good faith and not for a pretextual purpose. *See State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968) (“where the search . . . is made for the justifiable purpose of finding, listing, and securing from loss, . . . then we have no hesitancy in declaring such inventory reasonable and lawful . . . .”) These requirements protect individual privacy.

**a. A law enforcement officer must have reasonable cause to authorize a vehicle's impound.**

A law enforcement officer cannot arbitrarily impound a vehicle. Rather, Washington law requires reasonable cause to impound a vehicle. *See id.* at 385; *see also Houser*, 95 Wn.2d at 148. Reasonable cause for impoundment may involve the following scenarios:

(1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway; (6) a car impoundable pursuant to ordinance or statute which provides thereof as in the case of forfeiture.

*State v. Bales*, 15 Wn. App. 834, 835-36, 552 P.2d 688 (1976) (citation omitted).

Absent a statute mandating impoundment, a law enforcement officer must consider reasonable alternatives to impound such as contacting another licensed driver to move the vehicle or leaving the vehicle on the side of the road. *See In re Impoundment of Chevrolet*, 148 Wn.2d 145, 151, n. 4, 60 P.3d 53 (2002) (citations omitted).<sup>1</sup> Accordingly, the reasonable cause requirement protects individual privacy interests by preventing unreasonable impounds.

**b. An inventory search must be limited to those areas that present the greatest risk of theft or vandalism of private property.**

Privacy interests are further protected due to the limited scope of an inventory. Assuming that a law enforcement officer has reasonable

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<sup>1</sup> In this case, Jefferson County Sheriff's Deputy Brett Anglin explored and exhausted reasonable alternatives by attempting to contact a licensed driver to move the vehicle from a dangerous stretch of the highway. *Tyler*, 166 Wn. App. at 206.

cause to impound a vehicle, the scope of an inventory search is limited. The inventory “should be limited to protecting against substantial risks to property in the vehicle and not enlarged on the basis of remote risks.” *Houser*, 95 Wn.2d at 155.

In Washington, a law enforcement officer cannot search locked trunks or closed containers during an inventory without manifest necessity. *See id.*; *White*, 135 Wn.2d at 764. Given the limited area subject to an inventory, this exception to the warrant requirement has not “been stretched beyond [its] underlying justifications.” *Valdez*, 167 Wn.2d at 774. Thus, the limited scope of inventories protects individual privacy interests while safeguarding private property.

**c. An inventory is invalid when a Court finds a pretextual motivation.**

Since courts may invalidate an inventory based on pretextual motivations, the proposed rule would not further individual privacy interests. Washington courts have long “required that the State show that the search was conducted in good faith and not as a pretext for an investigatory search.” *Houser*, 95 Wn.2d at 155 (citation omitted).

Trial courts are entrusted with the responsibility to determine whether an impound was justified or premised on pretextual motivations. “It may be admitted that, in some cases, the court will be faced with difficulty in

distinguishing between a reasonable and lawful inventory procedure and an unauthorized exploratory search.” *Montague*, 73 Wn.2d at 389 (citation omitted). Nevertheless, “[t]his is a factual determination which must be made by the court so as to separate that which is reasonable from that which is unreasonable.” *Id.*

A trial court’s finding that a law enforcement officer’s impound of a vehicle was a pretext to conduct an investigative search will invalidate an otherwise legal inventory. This rule prevents law enforcement officers from conducting investigative searches under the guise of an inventory. Since trial courts are in the best position to determine whether the impound and subsequent inventory was pretextual, the proposed rule is unnecessary to guard against pretextual searches.

**2. The Proposed Rule Is Impractical For A Myriad Of Lawful Impounds.**

Not only do existing limitations on inventories adequately safeguard privacy interests, but a rule requiring law enforcement officers to affirmatively seek consent of vehicle owners would be impractical in several situations. Impounds are not limited to situations where an owner is readily available to consent to an inventory search. A law enforcement officer may impound a vehicle without the benefit of a readily available owner in the vehicle to provide consent. Abandoned vehicles may be

subject to impound. *See Bales*, 15 Wn. App. at 835-36; *Houser*, 95 Wn.2d at 153 (“If it had later become apparent that defendant would not be able to return for the car and that it could be left safely on the street, the officer could have ordered the impoundment at that time.”); RCW 46.55.085 (procedure authorizing law enforcement officer to impound an abandoned vehicle).

In the case of abandoned vehicles, it may be impossible for a law enforcement officer to track down the owner for consent to inventory the vehicle.<sup>2</sup> It is also unclear whether the law enforcement officer could verify that an individual is the owner when obtaining the purported owner’s consent over the phone.

Simply put, the result of Mr. Tyler’s proposed rule in many cases would be impounding a vehicle without an inventory. Consequently, the proposed rule would not protect private property in abandoned vehicles. Given the practical problems with obtaining consent to inventory every vehicle subject to a lawful impound, this Court should decline to adopt the proposed rule.

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<sup>2</sup> While RCW 46.55.085 requires a law enforcement officer to make reasonable efforts to contact the owner after placing a notification sticker on the abandoned vehicle, it does not require the law enforcement officer to obtain the owner’s consent before impounding the vehicle.

**3. Inventories of Lawfully Impounded Vehicles Protect Public Safety.**

Apart from preventing unjustified claims of negligent loss of property, inventories “also help[] to avert any danger to police or others that may have been posed by the property.” *Colorado v. Bertine*, 479 U.S. 367, 373, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). Courts “ha[ve] recognized that an additional valid and important purpose for the inventory search is to protect the public from vandals who might find a firearm or contraband drugs.” *Tyler*, 166 Wn. App. at 210 (citing *Houser*, 95 Wn.2d at 154 n. 2; *Opperman*, 428 U.S. at 369, 376 n. 10) (internal quotations omitted). While prior opinions have noted this justification depends on the unique facts of each case, *Houser*, 95 Wn.2d at 154 n. 2, public safety is furthered by a limited inventory of a lawfully impounded vehicle.

The U.S. Supreme Court has recognized the public safety concerns associated with an un-inventoried vehicle placed in a police or private impound yard. *See Opperman*, 428 U.S. at 376 n. 10 (An inventory search also serves to safeguard “the public from vandals who might find a firearm.”) (citation omitted). Courts have also recognized the problem with conditioning an inventory search on consent – such a rule potentially compromises public safety. *See id.*; *see also U.S. v. Edwards*, 577 F.2d

883, 894 n. 23 (5th Cir. 1978) (en banc) (per curiam) ( “the inventory is not for the exclusive protection of the owner or occupant of the vehicle.”), *cert. denied*, 439 U.S. 968, 99 S. Ct. 458, L. Ed. 2d 427 (1978).

Certainly, “countless numbers of automobiles with locked trunks are daily left on the city streets of this country without unreasonable risk of theft . . . .” *Houser*, 95 Wn.2d at 156 (citation omitted). However, an impounded vehicle towed to a police or private impound yard presents a different factual scenario. A loaded firearm under the driver’s seat may not be in open view during the initial stop. The process of towing the vehicle may cause a firearm or other dangerous object to shift into open view on the floorboard.

While this Court’s prior decisions have emphasized that the inventory search is to protect private property, public safety concerns have always been an issue for law enforcement agencies.<sup>3</sup> The proposed rule exposes law enforcement agencies, private impound yards, and the general public to an increased risk of danger. This is not just a question of mitigating civil liability. This is an issue of public safety. Accordingly, this Court should decline to require law enforcement officers to obtain

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<sup>3</sup> A driver, who is not the vehicle’s owner, waiving an inventory presents unique public safety concerns. For example, a non-owner potentially exhibits a lower standard of care for the vehicle by leaving dangerous items such as firearms, hypodermic needles with bloodborne pathogens, or controlled substances on the floorboard.

consent of a driver, who is not the owner, before conducting a limited inventory of a lawfully impounded vehicle.

## V. CONCLUSION

The WSP respectfully asks this Court not to add a new requirement for inventories of impounded vehicles. Existing requirements for inventories adequately safeguard privacy while also protecting vehicle owners from theft, protecting police and others with custody of the vehicle from claims of theft or damage, and protecting public safety. The Court should affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of August, 2012.

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Copies of the following documents:

- 1) MOTION FOR LEAVE TO FILE AMICUS BRIEF
- 2) BRIEF OF AMICUS CURIAE WASHINGTON STATE PATROL

3) DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 31st day of August, 2012.

/s/ Daisy Logo  
DAISY LOGO

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Attached for Filing for the case referenced above, please find the following documents:

- 1) Motion for Leave To File Amicus Brief
- 2) Brief of Amicus Curiae Washington State Patrol
- 3) Declaration of Service

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<<Motion for Leave to file Amicus brief.pdf>> <<Brief of Amicus.pdf>> <<Declaration of Service.pdf>>

Thank you,

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