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\*This amended answer to amicus brief replaces  
the answer filed on 8-19-19

No. 96183-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

JOEL VILLELA,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable David Estudillo

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RESPONDENT JOEL VILLELA'S ANSWER TO AMICUS BRIEF OF  
WASHINGTON STATE PATROL

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## A. INTRODUCTION

“[C]ourts have long held it is a *constitutional* requirement to consider reasonable alternatives to impoundment before impounding a vehicle.” *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 155 n.8, 60 P.3d 53 (2002) (emphasis added). Thus, “even when authorized by statute, impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties[.]” *State v. Tyler*, 177 Wn.2d 690, 699, 302 P.3d 165 (2013). Although an officer “does not have to exhaust all possible alternatives,” he or she “must consider reasonable alternatives” to impoundment. *Id.* “Reasonableness of an impoundment must be assessed in light of *the facts of each case.*” *Id.* (emphasis added).

Amicus Washington State Patrol disregards these rules. It avers the legislature has the authority to eliminate a *constitutional* requirement. It argues an arrestee has a reduced right to privacy even though this Court recently rejected that very claim. And it sets up a Fourth Amendment strawman while relegating article I, section 7 to a footnote.

Amicus is wrong, and this Court should affirm. As the trial court recognized, “the statute forbids arresting officers to undergo the very individualized weighing process mandated by the Washington Constitution. ... That statute, therefore, is unconstitutional.” CP 50.

B. ARGUMENT

**1. Warrantless searches and seizures are presumed unconstitutional, and statutes that violate the right to privacy are unconstitutional.**

Warrantless searches and seizures are presumed unconstitutional, and the State bears the “heavy burden” of proving the constitutionality of a warrantless intrusion by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 249-50, 207 P.3d 1266 (2009). The State failed to meet this burden here, where it claimed the impound/inventory exception applied but acknowledged the officers did not comply with the requirements of this narrow exception – they did not consider reasonable alternatives to impoundment like releasing the car to the passengers. And though the State relied on a statute that mandates impoundment without consideration of reasonable alternatives, a statute cannot eliminate a *constitutional* requirement. *See State v. Miles*, 160 Wn.2d 236, 252, 156 P.3d 864 (2007) (holding a portion of RCW Ch. 21.20 unconstitutional because it allowed seizure of bank records based on administrative subpoena instead of requiring issuance by a neutral magistrate); *Chevrolet Truck*, 148 Wn.2d at 155 n.8 (construing an impound statute to permit consideration of reasonable alternatives in order to sustain its constitutionality).

The State Patrol claims “a statute authorizing an intrusion into private affairs is presumed constitutional,” and Mr. Villela “must prove its unconstitutionality beyond a reasonable doubt.” WSP brief at 4, 5. But as the WSP admits: “Granted, a statute does not provide ‘authority of law’ if it authorizes an unconstitutional search or seizure.” WSP brief at 5. Thus, in *Miles*, this Court held a statute was invalid because it authorized an unconstitutional search and seizure. *Miles*, 160 Wn.2d at 252. This Court did not discuss any burdens of proof in reaching this conclusion, presumably because the issue is purely legal. *See id.* Indeed, the case the WSP cites explains as much: “the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate.” *Island Cty. v. State*, 135 Wn. 2d 141, 147, 955 P.2d 377 (1998). Thus, the dueling burdens are largely academic; the question is one of law, not of fact.

The Constitution requires a warrant or a “jealously guarded,” narrowly construed exception to the warrant requirement before a government agent may invade a person’s privacy interests. *State v. Buelna Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). A statute cannot dispense with the warrant requirement or broaden an exception to the warrant requirement. *See Miles*, 160 Wn.2d at 247; *Chevrolet Truck*, 148 Wn.2d at 155 n.8. The impound/inventory exception to the warrant

requirement applies only where the officer considered reasonable alternatives to impoundment like releasing the car to a passenger. *Tyler*, 177 Wn.2d at 699; *Chevrolet Truck*, 148 Wn.2d at 155 n.8. Because that did not occur here, the search and seizure was unconstitutional, and the statute mandating this practice is invalid.

**2. The mandatory impound statute is invalid because it impermissibly expands an exception to the warrant requirement and prohibits the consideration of individual circumstances mandated by the Constitution.**

- a. The question is not whether the statute is reasonable; the question is whether the officers considered reasonable alternatives to impoundment in each individual case.

The WSP transposes the word “reasonable” and argues this court need only find the statute is reasonable. WSP brief at 9-12. This is incorrect. The issue here is not one of policy, but of constitutionality. The word “reasonable” in this context applies to the officers’ duty, in each individual case, to consider reasonable alternatives to impoundment. *Tyler*, 177 Wn.2d at 699. This duty is mandated by the Constitution. *Chevrolet Truck*, 148 Wn.2d at 155 n.8.

The State Patrol claims this constitutional rule “is not necessarily true for a statutorily mandated impound.” WSP brief at 11. This statement does not make sense; in fact, on the next page the WSP repeatedly concedes that the reasonableness of an impoundment (i.e., whether

reasonable alternatives were considered) must be assessed in light of the facts of each particular case. WSP brief at 12 (quoting cases). Thus, a statute is invalid if it eliminates officers' discretion to consider reasonable alternatives in each case. *See Chevrolet Truck*, 148 Wn.2d at 155 n.8 (construing statute as discretionary to avoid unconstitutionality); *State v. Reynoso*, 41 Wn. App. 113, 119, 702 P.2d 1222 (1985) (same).

The WSP further muddles the reasonableness requirement by setting up a Fourth Amendment strawman and literally relegating article I, section 7 to a footnote. WSP brief at 12-15 & n.2. Amicus argues, "The 'touchstone' of Fourth Amendment protections is reasonableness, and the reasonableness of seizures 'depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" WSP brief at 13 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)). Here again, amicus takes the word "reasonable" out of context, and uses it to reframe the issue as a federal constitutional question rather than a state law claim. But while Mr. Villela does not concede the intrusion here would pass Fourth Amendment muster, he relies on Washington's more-protective state constitutional provision – a provision the WSP simply chooses to ignore.

As already explained, article I, section 7 “focuses on disturbance of private affairs, which casts a wider net than the Fourth Amendment’s protection against unreasonable search and seizure.” *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Our state constitutional provision has less tolerance for a “balancing of interests,” instead emphasizing the right to privacy. *See, e.g., State v. Winterstein*, 167 Wn. 2d 620, 632, 220 P.3d 1226 (2009) (rejecting Fourth Amendment’s inevitable discovery exception to the exclusionary rule and stating a “balancing of interests should not be carried out when evidence is obtained in violation of a defendant's constitutional rights”).

The Fourth Amendment protects only against “unreasonable searches” by the State, leaving individuals subject to any manner of warrantless, but reasonable searches. U.S. Const. amend. IV (“The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated....”) ....

By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is because “[u]nlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article I, section 7 of the Washington Constitution.” *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

*State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008) (rejecting

Fourth Amendment's "private search" doctrine); accord *State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) (holding warrantless garbage search violated article I, section 7 even though it did not violate Fourth Amendment).

Thus, the only appropriate use of the word "reasonable" in this case is in relation to the rule that each officer in each individual circumstance may not impound a vehicle and perform an inventory search unless they have determined there are no "reasonable alternatives" to impoundment. This Court has explained that this limitation is critical to protecting the privacy rights of Washingtonians, because once an impound is ordered, the search of the car is automatic – there is no right to refuse consent to search. *Tyler*, 177 Wn.2d at 707-08. The search and seizure of a car is not a minor intrusion, but a significant disturbance of a private affair. See *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988) ("From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles."). The rule requiring consideration of reasonable alternatives to impoundment protects that privacy right. But here, the officers conceded they did not consider reasonable alternatives to impoundment; therefore the search and seizure was unconstitutional.

Because RCW 46.55.360 prohibits consideration of reasonable alternatives, the statute is also unconstitutional. Contrary to WSP's claim, this statute is not like the arrest statute at issue in *State v. Walker*, 157 Wn.2d 307, 319, 138 P.3d 113 (2006). WSP brief at 13. That statute is valid because it does not dispense with any constitutional requirement – it still requires probable cause for an arrest. *Walker*, 157 Wn.2d at 318-19. If the legislature had lowered the predicate for arrest for certain crimes from probable cause to reasonable suspicion, this Court would no doubt find such statute unconstitutional, even if it were enacted with laudable intentions like reducing domestic violence. *See id.* at 319; *Miles*, 160 Wn.2d at 252.

WSP then makes a tremendous leap of logic and constitutional law: it concludes that because “probable cause for arrest” is sufficient to support an *arrest*, it must also be sufficient to support the search and seizure of the arrestee's car. WSP brief at 13. It is well-settled that this is not the law. *See State v. Snapp*, 174 Wn.2d 177, 190, 194, 275 P.3d 289 (2012) (arrest alone does not justify search of car); *Buelna Valdez*, 167 Wn.2d at 777 (same); *see also State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (even where there is probable cause to believe evidence of a crime is in a car, car may not be searched without a warrant or established exception).

In sum, whether the statute is “reasonable” is not the question; the question is whether it violates article I, section 7. The legislature is free to make policy choices improving public health and safety, but it must do so within the constraints of the Constitution. *See Mesiani*, 110 Wn.2d at 755 (sobriety checkpoints violate article I, section 7 even though they improve public safety). The legislature achieved this goal when it enacted a statute requiring officers to arrest a person when they have probable cause to believe the person committed felony DUI. Laws of 2014, Ch. 110, § 2; RCW 10.31.100(16). The State Patrol concedes that this statute “may very well” address the public safety risk without impounding vehicles. WSP brief at 18. And unlike the mandatory impound statute, the mandatory arrest statute does not appear to dispense with any constitutional requirements. The mandatory impound statute dispenses with the constitutional requirement of considering reasonable alternatives to impoundment on a case-by-case basis, and therefore it is invalid. This Court should reject WSP’s arguments to the contrary.<sup>1</sup>

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<sup>1</sup> *See also* New Jersey Attorney General Law Enforcement Directive No. 2004-1, Appendix B at 3-4 (mandatory impound statute “does not negate the Constitutional right of the arrested person to make other arrangements for the removal of the vehicle by another person”). [https://www.nj.gov/oag/dcj/agguide/directives/dir2004\\_bapp.pdf](https://www.nj.gov/oag/dcj/agguide/directives/dir2004_bapp.pdf)

- b. Mr. Villela does not have a reduced right to privacy, and the new test the WSP invokes does not apply here; it applies only to people who are serving sentences after being convicted of crimes.

The WSP argues in the alternative that this Court's new strict scrutiny test should apply in this context, and that the mandatory impound statute passes muster because it is narrowly tailored to serve a compelling government interest. WSP brief at 16-20. But this new test applies *only* to individuals who have been convicted and are serving suspended sentences; these individuals, like those serving sentences in prison, have reduced privacy rights because they have been found guilty and are in legal custody. *State v. Olsen*, 189 Wn.2d 118, 124-25, 399 P.3d 1141 (2017). Thus, in *Olsen*, this Court upheld court orders requiring random urinalysis for people who had been convicted of DUI and were serving suspended sentences, because people serving sentences have a reduced right to privacy and the court orders were narrowly tailored to serve the compelling interest of public safety. *Id.* at 127-30.

But this Court has already held to the contrary for people who have merely been charged with DUI and not yet convicted; such individuals do not have a reduced right to privacy. *Blomstrom v. Tripp*, 189 Wn.2d 379, 408-10, 402 P.3d 831 (2017). After the petitioners in *Blomstrom* were charged with DUI, courts found the charges were supported by probable

cause and ordered the petitioners to participate in random urinalysis as a condition of pretrial release. *Id.* at 384; *see also id.* at 414-15 (Gonzalez, J., dissenting in part). The State argued these requirements were necessary to protect public safety. *Id.* at 384-85. Like the petitioners in *Olsen*, the petitioners in *Blomstrom* challenged these conditions under article I, section 7. *Id.* at 384. Unlike in *Olsen*, in *Blomstrom* this Court agreed the intrusion violated article I, section 7. *Id.* This Court rejected application of the *Olsen* strict scrutiny test to people on pretrial release, and emphasized that individuals who have merely been charged but not convicted do not have a reduced right to privacy. *Id.* at 408-10.

It goes without saying that if people who have already been charged with a crime (and subjected to a judicial finding of probable cause) do not have a reduced right to privacy, then people who have merely been arrested do not have a reduced right to privacy. Thus, the *Olsen* test does not apply here. *Blomstrom*, 189 Wn.2d at 408-10.

The WSP's opposing argument is incorrect. Amicus quotes *Blomstrom* for the proposition that courts "have not yet commented on the privacy expectations of a defendant released on his or her own recognizance." WSP brief at 16 (quoting *Blomstrom*, 189 Wn.2d at 409). But after making this statement, this Court went on to decide that very issue. This Court noted, "persons not yet convicted have substantially

greater privacy rights than probationers.” *Blomstrom*, 189 Wn.2d at 409. “Thus, even taking up the State’s belated and unsupported argument concerning the petitioners’ privacy interests, we disagree.” *Id.* at 410. The defendants who had been charged with DUI but not convicted “suffered no diminution of their privacy rights” and could not be subjected to warrantless urinalysis testing. *Id.* (citing Const. art. I, § 7).

Similarly here, Mr. Villela had not been convicted of DUI. In fact, he had not even been charged or subjected to a judicial finding of probable cause. He had merely been arrested. Thus, he suffered no diminution of his privacy rights, and could not be subjected to a warrantless seizure and search of his car with no consideration of reasonable alternatives to impoundment. *See Blomstrom*, 189 Wn.2d at 408-10; Const. art. I, § 7.

### C. CONCLUSION

The trial court properly found the warrantless seizure and search of Mr. Villela’s car violated article I, section 7 because the officer did not consider reasonable alternatives to impoundment like releasing the car to one of the passengers. The court also correctly concluded that the mandatory impound statute violates article I, section 7 because it “forbids arresting officers to undergo the very individualized weighing process

mandated by the Washington Constitution[.]” CP 50. This Court should affirm.

Respectfully submitted this 26th day of August, 2019.

A handwritten signature in black ink, reading "Lila J. Silverstein" with a long horizontal flourish extending to the right.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

JOEL VILLELA,

Respondent.

NO. 96183-2

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# WASHINGTON APPELLATE PROJECT

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