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No. 96183-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

BRIEF OF RESPONDENT

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A. INTRODUCTION

Article I, section 7 of the Washington Constitution is “a jealous protector of privacy.”¹ This protection extends to vehicles. The Court has “long recognized a privacy interest in automobiles and their contents.”² A government actor may disturb a person’s privacy interest in his or her car only with a warrant or a narrowly drawn exception to the warrant requirement.

Here, the State concedes a police officer disturbed Mr. Villela’s private affairs without a warrant when he ordered Mr. Villela’s car impounded and searched the car prior to having it towed. The State claims the impound/inventory exception to the warrant requirement applied. But that exception applies only where the officer considered reasonable alternatives to impoundment, such as releasing the car to a passenger. The State concedes this did not occur, and that the officer believed impoundment was mandatory under RCW 46.55.360.

The trial court properly suppressed the evidence obtained pursuant to the unconstitutional search and seizure, and properly ruled the statute is unconstitutional because it expands an exception to the warrant requirement. This Court should affirm.

¹ *State v. Buelna Valdez*, 167 Wn. 2d 761, 777, 224 P.3d 751 (2009).

² *State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010).

B. ISSUES

Article I, section 7 of the Washington Constitution prohibits warrantless seizures and searches unless the State proves by clear and convincing evidence that a narrow, jealously guarded exception to the warrant requirement applies. One exception is the impoundment of a car and attendant inventory search – but this exception applies only in the limited circumstance where an officer determines no reasonable alternatives to impoundment exist.

1. Did the trial court properly order suppression of evidence obtained pursuant to the warrantless impound and inventory search of Mr. Villela’s car, where the State concedes the officer believed impoundment was mandatory and did not consider reasonable alternatives like releasing the car to one of the passengers?

2. Did the trial court properly rule that RCW 46.55.360 is unconstitutional because it *requires* warrantless impoundment of a vehicle after a driver is arrested for certain offenses, with no allowance for consideration of individual circumstances or reasonable alternatives?

C. STATEMENT OF THE CASE

1. *Background on impoundment.*

When police order a car impounded, they first perform an “inventory” search to catalog the items inside. *See* CP 6. Although an inventory search is not supposed to be performed as a pretext for an evidentiary search, if police find contraband or evidence of a crime, the driver may be charged with an offense based on the items found. *See* CP 1-7, 46-50. Regardless of the results of the inventory search, the car is towed to an impound lot by a company on the designated list for a particular area. RP (6/19/18) 13.

a. Impoundment is expensive, and people lose their cars when they cannot afford the fees.

Impound fees are expensive. Auto Wrecking & Towing in Grant County charges a towing fee of \$175 per hour, with a one hour minimum. RP (6/19/18) 8-9, 11. If towing takes more than an hour, the vehicle owner is charged for the additional time in quarter-hour increments. RP (6/19/18) 11-12. According to the owner of Auto Wrecking & Towing, an average tow takes an hour and a half, for a fee of \$262.50 for the towing alone. RP (6/19/18) 15.

The car owner is also charged a storage fee of \$45 per day. RP (6/19/18) 12. If a person wishes to retrieve a car before 8:00am or after 5:00pm, there is an additional \$88 “gate fee.” *Id.*

If a person cannot afford to pay these fees, their car is auctioned off after 15 days. CP 32 (citing RCW 46.55.130). Many indigent individuals in Grant County cannot afford to redeem their vehicles following impoundment. CP 21; *see also In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 164-65, 60 P.3d 53 (2002) (Chambers, J., concurring) (“[F]or the poor, impoundment often means forfeiture. While there are procedures for an owner to recover an impounded vehicle, for the poor who cannot afford the towing and storage fees, these procedures offer little relief.”).

- b. The mandatory impoundment statute was enacted as a result of an incident in which officers failed in their duties under the prior law – the law itself was not the problem.

RCW 46.55.360 requires police to have a car impounded – without a warrant or probable cause to believe the car contains evidence of a crime – any time a person is arrested on suspicion of DUI. The statute was enacted in response to a car crash in which a drunk driver seriously injured another driver.³ The drunk driver was supposed to have an ignition

³ See <https://washingtoninjury.com/case-results/haileys-story-seattle/>

interlock device on her car that would have prevented her from driving drunk, but the Whatcom County District Court Probation Department failed in its duty to ensure the device was installed. *Id.* On the night of the crash, a police officer stopped the drunk driver earlier the same night, but instead of arresting her and/or turning her car over to a sober adult, the officer drove the woman home – after which the woman immediately retrieved her car and hit the other driver. *Id.*

Because the probation department and the police officer each failed to exercise ordinary care in their duties under then-existing law, the injured driver obtained \$5.5 million in a civil suit. *Id.* Even though existing law, properly executed, would have prevented the crash, the legislature enacted RCW 46.55.360, requiring impoundment without consideration of individual circumstances or reasonable alternatives.

- c. A similar mandatory impoundment statute in New Jersey was rendered constitutional by an Attorney General's Opinion requiring individualized consideration of reasonable alternatives.

New Jersey enacted a similar law in response to a similar crash. N.J.S. 39:4-50.23. But the Attorney General issued an Opinion (“Law Enforcement Directive”) restoring individualized discretion in order to render the statute constitutional. New Jersey Attorney General Law

Enforcement Directive No. 2004-1, Appendix B at 3-4.⁴ The Directive provides:

Although the first provision of the statute, *N.J.S.A. 39:4-50.23a*, calls for an immediate impoundment of the vehicle being operated by the person arrested, that provision of the statute does not negate the Constitutional right of the arrested person to make other arrangements for the removal of the vehicle by another person who is present at the scene of the arrest. Thus, if there is a passenger in the vehicle at the time the operator is arrested, the arrestee may permit that passenger to operate the vehicle or to make arrangements for its removal without the vehicle being impounded.

Id.

There is apparently no similar Directive or Opinion in Washington that would render RCW 46.55.360 constitutional.

2. *Background on the Villela and Castro cases and the trial court's Ruling.*

- a. Mr. Villela's car was impounded even though he had two passengers, at least one of whom could have taken the car.

A police officer stopped respondent Joel Villela for driving 42 miles per hour in a 35-MPH zone. CP 5 (probable cause statement). Mr. Villela gave the officer his driver's license, registration, and proof of insurance. CP 6.

⁴ https://www.nj.gov/oag/dcj/agguide/directives/dir2004_bapp.pdf

The officer asked Mr. Villela to step out of the vehicle, but Mr. Villela “said he knows his rights and he does not have to.” CP 6.

The officer then ordered Mr. Villela out of the car, and he eventually complied. CP 6. The officer smelled alcohol and asked Mr. Villela to submit to a field sobriety test. *Id.* Mr. Villela declined. *Id.*

The officer arrested Mr. Villela on suspicion of driving under the influence of alcohol or drugs. CP 6. Although two adult passengers were in the car, the officer did not permit them to drive Mr. Villela’s car away. *Id.*; RP (6/19/18) 6. The officer did not have a warrant to search or seize the car, but he “complet[ed] an inventory search of the vehicle for the impound,” which he believed was mandatory under RCW 46.55.360. CP 6; RP (6/19/18) 6-7.

As a result of the warrantless search of the car, the officer found drugs and drug paraphernalia. CP 6.⁵ The State charged Mr. Villela with possession of a controlled substance with intent to deliver as well as DUI. CP 1-2.

Mr. Villela did not challenge the DUI charge in his pre-trial motions, but he did challenge the felony charge: he moved to suppress the

⁵ The officer also found cocaine in Mr. Villela’s pocket during a search incident to arrest. That search is not at issue.

evidence found as a result of the warrantless seizure and search of his car.
CP 9-33.

The State admitted the car was seized and searched without a warrant and without any individualized consideration of reasonable alternatives to impoundment. CP 34; RP (6/19/18) 5-7. The State acknowledged the passengers were not permitted to take the car and that instead the car was searched and seized pursuant to the “mandatory tow law,” RCW 46.55.360(1)(a). *Id.* That statute provides, “When a driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504, the vehicle ... must be impounded.”

Judge Estudillo granted the motion to suppress because the officers violated article I, section 7 of the Washington Constitution by impounding Mr. Villela’s car without a warrant and without consideration of reasonable alternatives. He also ruled the mandatory impoundment law is unconstitutional because it does not permit consideration of reasonable alternatives. In his order, he adopted the findings and conclusions of Judge Knodell in another case, *State v. Castro*. CP 45-50.

- b. Mr. Castro's car was impounded even though his grandmother wanted to take the car.

In the Castro case, an officer stopped Enrique Castro's car because one of the headlights was out. CP 47. Mr. Castro "immediately pulled over and parked the car safely off the side of the road." *Id.*

Mr. Castro's grandmother arrived shortly thereafter and took charge of a young girl in the car. *Id.*

Mr. Castro did not have a valid driver's license and there was an outstanding warrant for his arrest. *Id.* The officer also thought Mr. Castro "displayed signs of intoxication." *Id.* The officer arrested him. *Id.*

Because one of reasons for arrest was suspicion of driving under the influence, the officer impounded Mr. Castro's car pursuant to RCW 46.55.360(1)(a) without considering any reasonable alternatives. CP 48. Mr. Castro's grandmother wanted to take the car, and the officer did not permit her to do so. *Id.*

During an "inventory search" of the car, the officer found evidence that led to felony charges. CP 48. Mr. Castro moved to suppress the evidence obtained pursuant to the warrantless seizure and search of his car. *See id.*

- c. The trial court suppressed the evidence because officers did not consider reasonable alternatives to impoundment, and ruled the statute unconstitutional because it prohibits individualized consideration of reasonable alternatives.

The court granted the motion to suppress because officers impounded and searched the car without a warrant and without consideration of reasonable alternatives, in violation of article I, section 7 of the Washington Constitution. The court further ruled that RCW 46.55.360 is unconstitutional because it *requires* impound (which automatically results in a search of the car), without consideration of reasonable alternatives. CP 48, 50. Under article I, section 7, the seizure and search of a vehicle pursuant to impound-and-inventory is supposed to be a narrow exception to the warrant requirement that applies only when reasonable alternatives to impoundment do not exist. CP 48.

The court explained, “the statute forbids arresting officers to undergo the very individualized weighing process mandated by the Washington Constitution before impounding a car driven by one arrested for driving under the influence.” CP 50. And “while a state may impose more restrictive standards than the constitution requires, it may not, as the Washington legislature did when it enacted RCW 46.55.360, expand the scope of police authority to [search] and seize under the constitution.” *Id.* “That statute, therefore, is unconstitutional.” *Id.*

D. ARGUMENT

1. **The trial court properly suppressed the evidence obtained as a result of the warrantless impoundment because the State conceded officers did not consider reasonable alternatives as required under article I, section 7.**

The trial court properly suppressed the evidence obtained as a result of an unconstitutional seizure and search. The State admits the officer seized and searched Mr. Villela's car without a warrant. It relies on the impound/inventory exception to the warrant requirement, but that exception applies only where no reasonable alternative to impoundment exists. The State concedes the officer did not consider reasonable alternatives like releasing the car to a passenger. It claims a statute mandated impoundment, but a statute cannot override the constitutional requirement of a warrant or expand an exception to a constitutional rule. This Court should affirm.

- a. Article I, section 7 prohibits the disturbance of private affairs absent authority of law.

Article 1, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. It is more protective than the Fourth Amendment, which prohibits unreasonable searches and seizures.

U.S. Const. amend. IV; *State v. Mayfield*, ___ Wn.2d ___, 434 P.3d 58, 64 (2019); *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998).

The text of our state constitutional provision “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). Unlike the Fourth Amendment, article 1, section 7 is not grounded in “reasonable expectations” of privacy. *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012) (citing *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012)). “Instead, article 1, section 7 is grounded in a broad right to privacy and the need for legal authorization in order to disturb that right.” *Id.* “Further, while the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article I, section 7 holds the line by pegging the constitutional standard to ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (internal citation omitted).

Application of article I, section 7 requires “a two-part analysis.” *State v. Miles*, 160 Wn.2d 236, 243, 156 P.3d 864 (2007). First, the court asks whether the action at issue constitutes a disturbance of one’s “private

affairs” – what would in Fourth Amendment parlance be described as a “search” or a “seizure.” *Id.* at 243-44. Second, if a privacy interest has been disturbed, the court asks “whether ‘authority of law’ justifies the intrusion.” *Id.* at 244. “In general terms, the authority of law required by article I, section 7 is satisfied by a valid warrant.” *Id.*

b. The State concedes impoundment disturbs a private affair.

The State concedes the first question: “Going through someone’s car is disturbing their private affairs.” Br. of Petitioner at 6. Indeed, “[f]rom the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles.” *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988). Thus, impounding a car constitutes a seizure and “going through” the car constitutes a search; each intrusion disturbs a private affair which must be justified by authority of law. *State v. Hill*, 68 Wn. App. 300, 304, 842 P.2d 996 (1993); *State v. Reynoso*, 41 Wn. App. 113, 116, 702 P.2d 1222 (1985).

Although the Fourth Amendment provides significant protection of a person’s privacy interest in his or her car, article I, section 7 provides even greater protection. *See Arizona v. Gant*, 556 U.S. 332, 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (prohibiting warrantless search of vehicle

incident to a secured person's arrest except where reason to believe car contains evidence of the crime of arrest); *Snapp*, 174 Wn.2d at 195 (prohibiting warrantless search of vehicle incident to a secured person's arrest even where reason to believe car contains evidence of the crime of arrest – “the warrant *must be obtained*”). There is no such thing as a reduced “expectation of privacy” in a vehicle in Washington – a vehicle is a fully protected “private affair.” *Snapp*, 174 Wn.2d at 191-92; Const. art. I, § 7.

While the Fourth Amendment has an “automobile exception” to the warrant requirement so long as the officer has probable cause to believe the car contains evidence of a crime, a warrant is required prior to disturbing a person's privacy interest in his or her car in Washington. *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Sobriety checkpoints violate article I, section 7, even though they pass Fourth Amendment muster. *Mesiani*, 110 Wn.2d at 457-58; *contrast Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). Under the Fourth Amendment, police may stop cars based on pretext, while Washington prohibits vehicle seizures unless the purported basis for the stop is the real reason for the intrusion. *Compare Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) *with Ladson*, 138 Wn.2d at 352-53; *accord Chacon Arreola*,

176 Wn.2d at 294. And, as particularly relevant here, article I, section 7 provides greater protection of vehicle privacy in the impound/inventory context. *White*, 135 Wn.2d at 766 (citing *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980)).

In sum, the Washington Constitution recognizes a significant privacy interest in vehicles, and the State properly concedes the “private affair” portion of the analysis.

- c. The authority of law necessary to disturb a private affair is a warrant, absent a narrow exception to the warrant requirement.

The second question is whether “authority of law” justified the intrusion. Const. art. I, § 7; *Miles*, 160 Wn.2d at 244. “Authority of law” generally means a warrant, and “warrantless seizures are per se unreasonable.” *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). “The warrant requirement is especially important under article I, section 7, of the Washington Constitution as it is the warrant which provides the ‘authority of law’ referenced therein.” *Ladson*, 138 Wn.2d at 350.

There are a few exceptions to the warrant requirement, but they must be “jealously and carefully drawn[.]” *Id.* at 349 (quoting *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). The State bears the burden of demonstrating that a warrantless seizure or search falls within a narrowly drawn exception. *Doughty*, 170 Wn.2d at 61. The State must

establish the exception by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

- d. The narrow “impoundment” exception to the warrant requirement applies only where no reasonable alternatives to impoundment exist, but here the State conceded the officers failed to consider reasonable alternatives.

Here, the State concedes the officers did not have a warrant before searching and seizing Mr. Villela’s car. Thus, the State must prove an exception applies by clear and convincing evidence. *Id.*

The State relies on the “inventory search after an impound” exception to the warrant requirement. Br. of Petitioner at 6. But this exception applies only where no reasonable alternatives to impoundment exist. *State v. Tyler*, 177 Wn.2d 690, 698-99, 302 P.3d 165 (2013); *Houser*, 95 Wn.2d at 153. Both here and in the *Castro* case, the State conceded the officers believed impound was mandatory and did not consider the reasonable alternative of releasing the cars to available passengers or relatives. RP (6/19/18) 6; CP 45, 48.

The State protests that “[t]he impound was conducted under clear authority of law passed by the legislature.” Br. of Petitioner at 6. But “[e]xcept in the rarest of circumstances, the ‘authority of law’ required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate.” *Ladson*, 138 Wn.2d

at 352 n.3 (quoting *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 345-46, 945 P.2d 196 (1997) (Madsen, J., concurring)). “This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes ‘authority of law’ justifying an intrusion into the ‘private affairs’ of its citizens.” *Id.*

In *Miles*, for example, the State obtained the defendant’s bank records without a warrant, based on the administrative subpoena authority granted by the Securities Act of Washington, chapter 21.20 RCW. *Miles*, 160 Wn.2d at 240. The defendant argued the State wrongfully disturbed his private affairs without authority of law, and this Court agreed, holding, “the statute did not provide authority of law.” *Id.* at 247. The legislature could not diminish the *constitutional* warrant requirement, under which “a search warrant or subpoena must be issued by a neutral magistrate[.]” *Id.*

This Court explained, “a subpoena is not authority of law simply because it is authorized by statute.” *Miles*, 160 Wn.2d at 248. The Court pointed out that if citizens have a constitutionally protected privacy interest, a legislative or administrative body cannot render the warrantless intrusion of the privacy interest lawful “by the simple expedient of adopting a rule to that effect[.]” *Id.* (quoting *State v. Butterworth*, 48 Wn. App. 152, 158, 737 P.2d 1297 (1987)). “[E]specially in the context of a criminal investigation, a statute cannot authorize the state to invade a

person's otherwise private matters." *Id.* at 249. "Regardless of the investigation's purpose or purposes, a disturbance of private affairs must satisfy article I, section 7's authority of law requirement." *Id.* at 250.

The same is true when it comes to the impound/inventory exception to the warrant requirement. "[C]ourts have long held it is a *constitutional* requirement to consider reasonable alternatives to impoundment before impounding a vehicle." *Chevrolet Truck*, 148 Wn.2d at 155 n.8 (emphasis added); *accord id.* at 151 n.4. Thus, "even when authorized by statute, 'impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties[.]'" *Tyler*, 177 Wn.2d at 699 (quoting *Hill*, 68 Wn. App. at 305).

Under our constitution, "impoundment is inappropriate when reasonable alternatives exist[.]" *Tyler*, 177 Wn.2d at 699 (quoting *Hill*, 68 Wn. App. at 306). Although an officer "does not have to exhaust all possible alternatives," he or she "must consider reasonable alternatives" to impoundment. *Tyler*, 177 Wn.2d at 699. "Reasonableness of an impoundment must be assessed in light of the facts of each case." *Id.*

This rule is particularly important for protecting the privacy rights of Washingtonians because once a car is impounded, an inventory search automatically follows – there is no right to refuse consent to such a search. *Id.* at 707-08; CP 6.

In *Tyler*, this Court affirmed the denial of a suppression motion because the officer *did* explore multiple alternatives. *Tyler*, 177 Wn.2d at 700. The officer would have permitted the passenger to take the car, but the passenger lacked a valid driver's license. *Id.* The officer even asked the defendant to loan his cell phone to the passenger to call someone else to take the car, but no one was available. *Id.* Only after the officer had exhausted these alternatives did he order the car impounded. *Id.* But here, the officers did not even permit available passengers or relatives who were present at the scene to take the cars in question. RP (6/19/18) 6; CP 48.

In other cases where officers failed to consider reasonable alternatives, courts ordered suppression of the evidence that was unconstitutionally obtained. *E.g. State v. Froehlich*, 197 Wn. App. 831, 834, 391 P.3d 559 (2017); *Hill*, 68 Wn. App. at 306-07; *Reynoso*, 41 Wn. App. at 116. In *Froehlich*, the defendant crashed into another car at a stop sign. *Froehlich*, 197 Wn. App. at 834. Her car came to rest on the shoulder, and was not obstructing traffic. *Id.* at 834-35. But an officer determined that the car was a traffic hazard and appeared to contain exposed valuables, so he ordered the car impounded without asking the driver what she wanted to happen to the car or considering reasonable alternatives to impoundment. *Id.* at 835-36.

As in Mr. Villela's case, the officer found items during an inventory search that led to a charge of possession of controlled substances with intent to deliver. *Id.* at 836. The trial court granted the defendant's motion to suppress the unconstitutionally obtained evidence because the officer did not consider reasonable alternatives to impoundment. *Id.*

The appellate court affirmed the trial court's suppression order. It noted that law enforcement may impound a car (1) if it is evidence of a crime, or (2) under the "community caretaking" exception (e.g. if the car impedes traffic), or (3) when the driver has committed an offense "for which the legislature has expressly authorized impoundment." *Id.* at 838 (citing *Tyler*, 177 Wn.2d at 698). "But even if one of these reasons exists, an officer may impound a vehicle *only if there are no reasonable alternatives.*" *Froehlich*, 197 Wn. App. at 838 (emphasis added) (citing *Tyler*, 177 Wn.2d at 698-99). Thus, although a statute, RCW 46.55.113, authorized impoundment of a car left unattended at the scene of an accident, the officer's impoundment of the car was unconstitutional because he did not consider reasonable alternatives to impoundment. *Id.* at 844-46. The same is true here. CP 48, 50.

Hill was also a case in which the defendant was charged with possession of a controlled substance with intent to deliver based on

evidence found as a result of an impound and inventory search. *Hill*, 68 Wn. App. at 303. Although the officer had not considered reasonable alternatives to impoundment, the State argued impoundment was lawful under a statute, RCW 46.32.060, which authorized impoundment of cars found to be defective and unsafe. *Id.* at 305. The appellate court disagreed and reversed the denial of a suppression motion. The court noted, “Although authorized by statute, impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties.” *Id.* (citing Const. art. I, § 7).

In *Reynoso*, Juan Reynoso was stopped for a traffic violation and then arrested for driving without a valid license. *Reynoso*, 41 Wn. App. at 115. Although Charlotte Reynoso indicated by telephone that she was willing to retrieve the car, and a licensed passenger was also available to drive it, the officer nonetheless called for an impoundment and performed an inventory search. *Id.* The trooper found multiple baggies of marijuana and Mr. Reynoso was charged with unlawful drug possession. *Id.* at 115-16. The trial court denied a suppression motion, but the Court of Appeals reversed. The State argued a statute, RCW 46.20.435, authorized impoundment where drivers lack valid licenses. *Id.* at 118. The court disagreed that the statute permitted impoundment without consideration of individualized circumstances. *Id.* at 119. But the court noted that

regardless of the statutory language, “enforcement of RCW 46.20.435 must be reasonable in order to satisfy constitutional requirements.” *Id.* And it is unconstitutional to impound a car unless “there are no reasonable alternatives to impoundment.” *Id.* at 116.

The Petitioner notes that two other states (New Jersey and Utah) and one city (Chicago) have similar impoundment laws, and it avers that these laws have not been found unconstitutional. Br. of Petitioner at 6 (citing N.J.S. 39:4-50.23; U.C. 41-6a-527; Chicago Muni Code 7-24-226). But Utah’s statute, unlike Washington’s, permits police to release the car to an available, licensed owner or co-owner upon the arrest of the driver. U.C. § 41-6a-527(2). Washington’s statute does not permit release of the car to another until *after* it has already been searched and impounded. RCW 46.55.360. And as noted above in the Statement of the Case, New Jersey’s attorney general determined that their statute was unconstitutional unless construed to require individualized consideration of reasonable alternatives to impoundment.⁶ *See* New Jersey Attorney General Law Enforcement Directive No. 2004-1, Appendix B at 3-4.⁷

⁶ It is not clear whether the attorney general was relying on the New Jersey Constitution, the U.S. Constitution, or both. Although New Jersey’s privacy provision is not as protective as Washington’s, it is more protective than the Fourth Amendment. *E.g. State v. Hunt*, 91 N.J. 338, 344-46, 450 A.2d 952 (1982).

⁷ https://www.nj.gov/oag/dcj/agguide/directives/dir2004_bapp.pdf

The State also cites numerous statutes requiring arrests in certain contexts. Br. of Petitioner at 5-6. These statutes are inapposite, as they do not dispense with any constitutional requirements – they require arrests to be based on probable cause. *See* RCW 10.31.100; *State v. Walker*, 157 Wn.2d 307, 318-19, 138 P.3d 113 (2006). In contrast, RCW 46.55.360 dispenses with the constitutional requirement that officers consider reasonable alternatives to impoundment on a case-by-case basis. CP 48, 50.

The State notes that the legislature was merely attempting to improve public safety by enacting mandatory impoundment. Br. of Petitioner at 4. This is obviously a laudable goal, but it is equally obvious that such goals must be achieved within constitutional constraints. *E.g. Mesiani*, 110 Wn.2d at 457-58 (sobriety checkpoints violate article I, section 7 even though they improve public safety). As noted above, the legislature has achieved such goals within constitutional constraints when enacting mandatory arrest statutes that still require probable cause. And in fact, a recent addition to the mandatory arrest statute requires officers to arrest a person when the officer has probable cause to believe the person committed felony DUI. Laws of 2014, Ch. 110, § 2; RCW 10.31.100(16). This provision, whose constitutionality Mr. Villela does not challenge, should reduce traffic accidents like the one that spurred the mandatory

impound law. In this case, the officers had authority of law to arrest Mr. Villela, thereby removing him from the roads, but they lacked authority of law to seize and search his car.

In sum, the State has not met its burden to prove by clear and convincing evidence that a valid exception to the warrant requirement applied. Indeed, the State concedes the officer seized and searched Mr. Villela's car without any individualized consideration of reasonable alternatives to impoundment. Because the narrow impound/inventory exception to the warrant requirement applies only when no reasonable alternatives to impoundment exist, the trial court properly concluded the evidence was obtained pursuant to an unconstitutional seizure and search of Mr. Villela's car. The government disturbed Mr. Villela's private affairs without authority of law, in violation of article I, section 7.

- e. The trial court properly suppressed the evidence because it was obtained pursuant to a warrantless impoundment where officers did not consider reasonable alternatives.

The trial court properly ruled that the remedy for the constitutional violation was suppression of the evidence illegally obtained. CP 46, 50.

“The language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *State v. Boland*, 115

Wn.2d 571, 582, 800 P.2d 1112 (1990) (quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). “The constitutionally mandated exclusionary rule provides a remedy for individuals whose rights have been violated and protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence.” *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009). Washington’s exclusionary rule is “nearly categorical[.]” *Id.* at 636.

This Court should affirm the order excluding the evidence obtained in violation of article I, section 7.

2. The trial court properly ruled the mandatory impoundment statute is unconstitutional because it does not permit individualized consideration of reasonable alternatives.

This Court should also affirm the trial court’s ruling that the mandatory impound statute is unconstitutional. CP 46, 50.

When possible, courts should construe statutes in a manner that renders them constitutional. *Chevrolet Truck*, 148 Wn.2d at 155 n.8 (citing *Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976) (“Where a statute is susceptible to more than one interpretation, it is our duty to adopt a construction sustaining its constitutionality if at all possible.”). In *Chevrolet Truck*, for example, this Court was able to avoid the question of whether a RCW 46.55.113 was constitutional by construing it to retain

individualized discretion of law enforcement officers to consider reasonable alternatives to impoundment. *Id.* at 154-55. That statute provided that whenever a driver was arrested for driving with a suspended license, “the vehicle is subject to impoundment ... at the direction of a law enforcement officer.” *Id.* at 153 (citing Laws of 1998, ch. 203, § 4). Thus, “the express language of RCW 46.55.113 does not require every vehicle driven by a suspended driver be impounded.” *Id.* at 157.

In contrast, the express language of RCW 46.55.360 does require that every car driven by a person arrested for DUI be impounded: “When a driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504, the vehicle ... must be impounded.” The word “must” is a synonym of the word “shall.” *State v. Petterson*, 190 Wn.2d 92, 100, 409 P.3d 187 (2018). The word “shall” is presumptively mandatory, not discretionary. *State v. Rice*, 174 Wn.2d 884, 896, 279 P.3d 849 (2012). In some cases, the presumption is overcome by evidence the legislature intended to confer discretion. *See id.* at 896-97. But here, the legislative findings indicate an intent “to mandatorily impound the vehicle[.]” CP 49; *see also* RCW 46.55.350(2)(b) (“The legislature intends by chapter 167, Laws of 2011 ... [t]o require that officers have no discretion as to whether or not to order an impound after they have arrested a vehicle driver with

reasonable grounds to believe the driver of the vehicle was driving while under the influence of alcohol or drugs).

Moreover, it does not appear that our Attorney General has saved the statute the way the New Jersey Attorney General's Office saved their statute by issuing a directive requiring individualized consideration of reasonable alternatives to impound. The State has not cited any AG opinion, and the officers in these cases appeared to believe impound was mandatory. Thus, the trial court properly ruled that RCW 46.55.360 is unconstitutional, and this Court should affirm. *See Miles*, 160 Wn.2d at 252 (holding "invalid" a portion of RCW ch. 21.20).

E. CONCLUSION

The trial court properly suppressed the evidence obtained from Mr. Villela's car because it was obtained without a warrant and without a valid exception to the warrant requirement. The State failed to prove the impound/inventory exception applied because that exception applies only where officers considered reasonable alternatives to impoundment. The State concedes the officer did not consider any reasonable alternatives such as permitting one of the passengers to take the car. This Court should affirm the ruling suppressing the evidence.

The trial court also properly ruled that RCW 46.55.360 is unconstitutional because it mandates impoundment and forbids the

individualized consideration of reasonable alternatives required by article I, section 7. Unlike the similar New Jersey statute, it does not appear that our statute has been rendered constitutional by an Attorney General directive requiring consideration of reasonable alternatives. This Court should hold that RCW 46.55.360 is unconstitutional.

Respectfully submitted this 1st day of April, 2019.

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

Lila J. Silverstein – WSBA 38394
Washington Appellate Project - 91052
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
APPELLANT,)	
)	
v.)	NO. 96183-2
)	
JOEL VILLELA,)	
)	
RESPONDENT.)	

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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF APRIL, 2019.

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