Supreme Court No. 91532-6
(COA No. 31691-2-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Adrian Samalia, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Samalia seeks review of the published Court of Appeals decision dated March 5, 2015, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. In a published decision, two judges held that the owner of a cell phone loses his privacy interest in any data on his phone when he flees from a pursuing police officer and leaves the phone behind during this flight. The third Court of Appeals judge dissented, explaining that based on the privacy interests protected under article I, section 7, the police need a warrant to search the data contained in a cell phone even when the owner has left the phone behind when chased by police.

The United States Supreme Court has recognized that cell phones store vast amounts of highly personal information. This Court has extended article I, section 7's protections to text messages even

after they are sent to another person's cell phone. Should this Court grant review to address the divided Court of Appeals opinion regarding whether a cell phone owner retains a privacy interest in his phone's contents when not in immediate possession of the phone?

2. After Mr. Samalia ran from a pursuing, armed police officer, the officer read through the contents of Mr. Samalia's cell phone and gave it to another officer who used it for further investigation. The Court of Appeals majority concluded that Mr. Samalia abandoned his phone by not keeping it in his possession as he ran, applying a voluntary abandonment test rooted in Fourth Amendment jurisprudence, while the dissent disagreed under article I, section 7. Should this Court grant review to determine whether article I, section 7 requires a different analysis for assessing when a person abandons the private affairs contained in the contents of a cell phone?

D. STATEMENT OF THE CASE

Officer Ryan Yates's license plate reader alerted to a stolen car, which happened to be a car that had been reported stolen to him less than two weeks earlier. RP 31-34, 41. Officer Yates followed and then directed car to stop. RP 34. When the driver stepped out of the car, Officer Yates drew his gun and told the driver to get back into the car.

RP 35. The driver fled on foot. RP 35-36. A woman in the car also ran but another police officer stopped her a few minutes later. RP 36. Officer Yates chased the driver but did not catch him. RP 45-46.

Officer Yates searched through the car for evidence without obtaining a search warrant. RP 37-38, 47. He found a cell phone in the center console. RP 46; CP 29. He could not remember if he opened the console when searching the car or the console was open. RP 47.[1]

Officer Yates looked into the phone's contents to investigate who owned it. RP 48. He "scrolled through" the list of personal contacts and attempted several phone calls to the contacts listed by the phone's owner. RP 38, 48. "[E]ventually someone answered" the phone and Officer Yates spoke to Deylene Telles. RP 38, 49.

Pretending he was from out of town, Officer Yates told Ms. Telles he found the phone at a bar named Hoops and wanted help returning it. RP 56, 59. Ms. Telles is Mr. Samalia's former girlfriend and they have a child together. RP 57, 58. Because Ms. Telles wanted to "snoop in the phone," she agreed to meet the caller. RP 38, 57.

When Ms. Telles arrived at the agreed location, she was met by several police officers who asked her what she was doing. RP 61. She told them she was walking. RP 60-61. The officers arrested Ms. Telles and claimed she was trespassing on private property although Ms. Telles was on the sidewalk. RP 61. Officer Yates had given the phone to another officer, and this other officer used it to call Ms. Telles's phone from the listed contact information. CP 29; RP 61. When Ms. Telles's phone rang, the officers saw Mr. Samalia's picture, name, and phone number on the screen of Ms. Telles's phone. RP 61.

The officers took Ms. Telles's phone and asked her about the person who was pictured. RP 61. They brought Ms. Telles to an old probation office near the police station and questioned her about Mr. Samalia, pressing her for information about who he hung out with and claiming he had been involved in a robbery. RP 62. Ms. Telles did not know where Mr. Samalia was and after one hour, they let her walk home without citing her for trespassing. RP 62.

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[1] Because Officer Yates did not know whether he opened the console, the trial court refused to find that the console was open before Officer Yates entered and searched the car. RP 46-47, 75-76; CP 29 (Finding of Fact 3). The State bears the burden of proving contested facts at a suppression hearing. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Mr. Samalia was charged with one count of possession of stolen motor vehicle under RCW 9A.56.068 and RCW 9A.56.140(1). CP 3. The court initially denied Mr. Samalia's motion to suppress the evidence derived from the search of his cell phone without an evidentiary hearing. RP 17. The court reconsidered the ruling with additional information presented at a bench trial. *See* RP 40-52, 61-63. The court again denied the motion to suppress and convicted Mr. Samalia based on the cell phone evidence that he was the person who drove the stolen car. RP 28, RP 73-74, 78; CP 30-31.

In a published decision, the Court of Appeals ruled 2-1 that the cell phone was abandoned when the police ordered Mr. Samalia to remain inside the car at gunpoint but Mr. Samalia fled. Slip op. at 7. The majority refused to find he retained a privacy interest in the contents of his cell phone when he escaped from a pursuing police officer. Slip op. at 4. Judge Siddoway dissented, relying on recent search and seizure jurisprudence to reason that "police must generally secure a warrant before conducting a search of data on a cell phone—even one that has been left behind in a place where its owner has no privacy interest." Slip op. at 3 (Siddoway, J., dissenting).

E. ARGUMENT

Due to the substantial privacy interests a cell phone owner retains in the vast data on his cell phone, this Court should grant review of the split published decision from the Court of Appeals that minimizes privacy protections for personal information contained in a cell phone.

1. *The contents of cell phones are private and protected from warrantless searches by police*

Article I, section 7 "is a jealous protector of privacy." *State v. Buelna Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). Both the Fourth Amendment[2] and article I, section 7[3] protect individuals from intrusions into their privacy, but article I, section 7 "demands a different approach than does the Fourth Amendment." *State v. Harrington*, 167 Wn.2d 656, 670, 222 P.3d 92 (2009). It is well-established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014).

Washington has a long history of strict protection of telephonic

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[2] The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

and other electronic communications in this state. *State v. Gunwall*, 106 Wn.2d 54, 66, 720 P.2d 808 (1986); *see also Lewis v. Dept. of Licensing*, 157 Wn.2d 446, 465-67, 139 P.3d 1078 (2006) (police officer violate privacy act by failing to inform arrestee that conversation is recorded); *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002) (recognizing Washington's privacy act as one of most restrictive in nation); *State v. Clark*, 129 Wn.2d 211, 222, 916 P.2d 384 (1996) (detailing historical protections for electronic communications).

The information contained on a cell phone is similar to the telephone logs and pen register at issue in *Gunwall*, where this Court held that records of completed long distance calls and numbers dialed from a telephone require a warrant due to the private nature of telephone communications. 106 Wn.2d at 68.

A cell phone also holds information akin to a global positioning satellite (GPS) tracking device. In *State v. Jackson*, 150 Wn.2d 251, 261-62, 76 P.3d 217 (2003), this Court held warrantless tracking of a car by GPS violates article I, section 7. Vehicles "are used to take people to a vast number of places that can reveal preferences,

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[3] Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life." *Id.* at 262. Police must obtain a warrant to track a person's car with GPS due to this exposure of the details of a person's private life. *Id.*

A cell phone maintains "telltale" information about a person, more than the papers contained in a person's garbage placed on the curb. *See State v. Boland*, 115 Wn.2d 571, 578, 582, 800 P.2d 1112 (1990). The location of the garbage can on the street does not provide the State with authority to search it. *Id.* at 581. Likewise, by scrolling through a cell phone's contact list or numbers dialed the police may "acquire an enormous amount of personal information about the citizen." *Jackson*, 150 Wn.2d at 264. The information is both historically protected and involves intimate details of a person's life. *Id.*

In *Riley v. California*, _ U.S. _, 134 S.Ct. 2473, 2494, 189 L.Ed 430 (2014), the Supreme Court unanimously agreed that because modern cell phones are essentially "minicomputers" capable of storing an enormous amount of information about "the privacies of life," they cannot be searched without a warrant. Searches of digital information "involve a degree of intrusiveness much greater in quantity, if not

different in kind, from searches of other containers." *United States v. Payton*, 573 F.3d 859, 861 (9th Cir. 2009). The scope of private information available on a cell phone requires "greater vigilance" from courts when authorizing a search that "could become a vehicle for the government to gain access to a larger pool of data that it has no probable cause to collect." *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013).

In *Hinton*, decided before *Riley*, this Court held that the contents of text messages are protected private affairs under article I, section 7, even after they are sent to someone else and read by the police on the recipient's phone. 179 Wn.2d at 869-70.

Mr. Samalia had a privacy interest in the information stored in his cell phone and was entitled to hold it safe from warrantless governmental trespass.

2. Substantial public interest favors review of the divided Court of Appeals opinion based on the ubiquity of cell phone possession and the breadth of personal information contained.

As Judge Siddoway explained in her dissent, "No reported Washington decision has directly addressed whether a citizen relinquishes his reasonable expectation of privacy in the data on his cell

phone by leaving the phone behind at the scene of a crime." Slip op. at 8 (Siddoway, J., dissenting).

This Court should grant review because "the voluminous private information likely to be found on a cell phone remains protected by article I, section 7 of the Washington constitution even when the phone is left behind in a place where the defendant has no privacy interest." *Id.* Courts must subject cell phone searches by police officers to "greater vigilance" because such searches could give the government unfettered access to data that they lack probable cause to collect. *Schesso*, 730 F.3d at 1042.

Requiring a search warrant will appropriately limit police actions when combing through a phone's contents by tethering the search to the necessary level of suspicion connected to specified criminal activity. It is not an onerous burden. They could have obtained a warrant telephonically, but did not do so. *See, e.g.*, *State v. Schultz*, 170 Wn.2d 746, 752, 248 P.3d 484 (2011) ("Officer Hill sought and received a search warrant by telephone."). The police were not permitted to rifle through this closed container that accesses a vast array of private information without a warrant.

3. *Mr. Samalia did not voluntarily abandon his privacy interest in his telephone when he allegedly fled from the police*

The Court of Appeals majority affirmed the trial court's conclusion that "because the driver ran from the vehicle, he voluntarily abandoned the cell phone located in the vehicle." CP 31; RP 46; Slip op. at 4-6. It also excused the search for a reason not found by the trial court, the "exigency" exception for pursuing a fleeing suspect recognized under the Fourth Amendment and insisted any information gained from the cell phone was attenuated because it lured Ms. Telles to provide the connection between Mr. Samalia and the phone. The dissenting opinion correctly disposes with each contention. Slip op. at 5-8 (Siddoway, J., dissenting). The majority misconstrued the legal requirements of abandonment and the nature of the privacy interest in the private information stored in a person's cell phone.

Unlike the Fourth Amendment, article I, section 7 does not confine the right to be free from governmental intrusion to "to 'a protected places' analysis, or 'to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.'" *Hinton*, 179 Wn.2d at 869-70 (internal citation

omitted). The extreme scope of private information contained in a cell phone cannot be forgotten in analyzing the authority of the police to search it without a warrant. *See Riley,* 134 S. Ct. at 2489-91.

To abandon a privacy interest, one dispositive question is whether a defendant tried to hide his ownership in property as opposed to failing to ask for it or forgetting it. *See e.g., State v. Dugas,* 109 Wn.App. 592, 595, 36 P.3d 577 (2001) (property not abandoned even though defendant never tried to retrieve jacket during or after arrest, where he did not intentionally distance self from jacket to hide it); *State v. Kealey,* 80 Wn.App. 162, 165, 168-69, 907 P.2d 319 (1995) (mislaid purse not purposefully left behind in store and therefore defendant did not relinquish her expectation of privacy); *cf. State v. Reynolds*, 144 Wn.2d 282, 284-85, 291 27 P.3d 200 (2001) (by taking a coat out of a car, putting it on the ground underneath the car and denying ownership, defendant voluntarily abandoned it).

Only by affirmative conduct does a person abandon her privacy interest. It requires "act and intent." *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007). Mr. Samalia is accused of fleeing from a car without remembering to take his cell phone. He did not toss it into the bushes. He left it in the car, in the console. CP 29. Given the wealth of

private information contained in the phone, it is hard to believe that he wanted to abandon it. Unlike the jacket in *Reynolds*, the cell phone did not contain drugs that would prompt Mr. Samalia to divorce himself from it. Instead, it contained private information which no person would want revealed to the government without permission or a warrant, which the State did not have.

A cell phone is a readily recognizable personal effect that is protected from search without a warrant. *See State v. Parker*, 139 Wn.2d 486, 498–500, 987 P.2d 73 (1999). Mr. Samalia did not intentionally abandon it voluntarily in order to distance himself from his phone and because his privacy interest remained, the State needed a warrant to search its contents.

The voluntary abandonment test used in *Evans*, *Dugas* and the cases on which they rely is rooted in the Fourth Amendment. This test asks whether the owner had a reasonable expectation of privacy in the property. 159 Wn.2d at 409. These cases do not separately consider whether article I, section 7 requires a different inquiry, even while mentioning the broader protections afforded under article I, section 7. *See Evans*, 159 Wn.2d at 412; *Dugas*, 109 Wn.2d at 595-96.

It is well-established that article I, section 7 is broader than the Fourth Amendment and uses a different analytical framework. *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Article I, section 7 requires a two-part analysis: (1) whether state action constituted a disturbance of private affairs and (2) whether the intrusion was justified by authority of law. *Buelna Valdez,* 167 Wn.2d at 772 (quoting *York v. Wahkiakum Sch. Dist. No. 200,* 163 Wn.2d 297, 306, 178 P.3d 995 (2008)).

"Under Const. art. 1, § 7, the focus is whether the 'private affairs' of an individual have been unreasonably violated rather than whether a person's expectation of privacy is reasonable." *Boland*, 115 Wn.2d at 580. The Fourth Amendment protects a person's from "unreasonable" searches while "article I, section 7 prohibits any disturbance of an individual's private affairs 'without authority of law.'" *Buelna Valdez*, 167 Wn.2d at 772; *State v. Jorden*, 160 Wn.2d 121, 136, 156 P.3d 893 (2007) (after decades of review, "now well-established" that court should "engage in independent state constitutional analysis" when facing claimed violation of article I, section 7).

The location of the search "is indeterminitive" when the issue is whether the State unreasonably intruded into an individual's private affairs. *Boland*, 115 Wn.2d at 580. There is no "automobile exception" allotting a reduced expectation of privacy in cars under article I, section 7. *State v. Snapp*, 174 Wn.2d 177, 191-92, 275 P.3d 289 (2012). The State bears the burden of proving an exception to the warrant requirement. *Id.* at 188.

Mr. Samalia's cell phone contains an array of private information that is protected by article I, section 7 from governmental trespass without a warrant. Because his phone is a private affair and he did not consent to its search, article I, section 7 requires authority of law, such as a warrant. Officer Yates did not have a warrant when he looked through private information stored on Mr. Samalia's cell phone. He read through content on the phone, including listed contacts and dialed numbers from Mr. Samalia's phone based on people Mr. Samalia had contacted. Examining who Mr. Samalia knew and called from his cell phone is no different from looking at the history of phone numbers dialed at issue in *Gunwall*. There is no reason to believe Mr. Samalia left behind his cell phone intentionally. He could not have returned to

the scene and retrieved it because Officer Yates kept it, passing it to another officer to continue the investigation. *See* CP 29; RP 61.

This Court should grant review of the published and divided Court of Appeals opinion to determine whether police have authority of law to access data on a cell phone when the owner leaves the cell phone behind without disavowing ownership of it.

F. CONCLUSION

Petitioner Adrian Samalia respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 2nd day of April 2015.

Respectfully submitted.

s/ Nancy P. Collins
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APPENDIX A

FILED
MARCH 5, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ADRIAN SUTLEJ SAMALIA, Appellant.	)	No. 31691-2-III PUBLISHED OPINION

BROWN, J. – Adrian Samalia appeals his conviction for possessing a stolen motor vehicle. He contends the trial court erred by denying his CrR 3.6 motion to suppress evidence leading to his identification derived from a cell phone found in an abandoned stolen vehicle after he fled from the vehicle and evaded pursuit. Because the cell phone was abandoned, used in pursuit of the fleeing suspect, and not directly used to identify Mr. Samalia, we hold the trial court did not err in denying suppression of his later identification from a police database. Accordingly, we affirm.

FACTS

The facts are derived mainly from the trial court's unchallenged CrR 3.6 findings of fact that are, therefore, verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Yakima Police Officer Ryan Yates was on patrol when his vehicle

license plate reader indicated he had passed a stolen vehicle. Officer Yates confirmed the vehicle was stolen by radio and then followed the vehicle that stopped shortly thereafter. The driver got out of the vehicle and faced towards Officer Yates. The driver would not obey Officer Yates' command to get back in the vehicle and fled. Officer Yates pursued the male driver but he got away.

Officer Yates returned and searched the car, partly to help identify the driver. He found a cell phone on or in the center console. Not knowing who the phone belonged to, he called some phone numbers found in the cell phone's contacts section. He spoke to Deylene Telles who agreed to meet him. Officer Yates reported to his sergeant what happened and gave the phone to him. The sergeant met with Ms. Telles and called her cell phone from the abandoned cell phone. Her cell phone displayed Mr. Samalia's name and picture. The sergeant gave the name to Officer Yates, who located Mr. Samalia's picture in a police database. Officer Yates then identified Mr. Samalia from the database picture as the fleeing man who had been driving the stolen vehicle.

The State charged Mr. Samalia with possession of a stolen motor vehicle. He moved unsuccessfully to suppress the cell phone evidence under CrR 3.6. From the above facts, the trial court concluded the cell phone was abandoned, therefore, Mr. Samalia no longer had an expectation of privacy in it. Following a bench trial, the court found Mr. Samalia guilty as charged. He appealed.

ANALYSIS

The issue is whether the trial court erred by denying Mr. Samalia's CrR 3.6 motion to suppress evidence obtained from his cell phone. He contends the evidence was constitutionally protected and could not be accessed without a warrant.

We review a trial court's decision on a motion to suppress to determine whether the findings are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. *O'Neill*, 148 Wn.2d at 571. We defer to the trier of fact on "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). As previously mentioned, unchallenged findings of fact are verities on appeal. *O'Neill*, 148 Wn.2d at 571. We review conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Under the Washington Constitution, article I, section 7, "No person shall be disturbed in his private affairs . . . without authority of law." Our Supreme Court recently held private affairs include information obtained through a cell phone. *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014). Additionally, the Supreme Court of the United States recently noted, "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life[.] The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the

protection for which the Founders fought." *Riley v. California*, ___U.S. ___, 134 S. Ct. 2473, 2493, 189 L. Ed. 2d 430 (2014).

A warrantless search violates article I, section 7 unless it falls under one of "'a few jealously guarded exceptions.'" *State v. MacDicken*, 179 Wn.2d 936, 940, 319 P.3d 31 (2014) (quoting *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010)).

Searching voluntarily abandoned property is an exception to the warrant requirement. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007); *see also State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001) (law enforcement may retrieve and search voluntarily abandoned property without a warrant or probable cause). "Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent." *Evans*, 159 Wn.2d at 408 (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.6(b), at 574 (3d ed.1996)). "'Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.'" *Evans*, 159 Wn.2d at 408 (quoting *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001)). The question is whether the defendant relinquished his reasonable expectation of privacy by discarding the property. *Evans*, 159 Wn.2d at 408. The defendant bears the burden of showing he had an actual, subjective expectation of privacy and that his expectation was objectively reasonable. *Evans*, 159 Wn.2d at 409.

A critical factor in determining whether abandonment has occurred is the status of the area where the searched item was located. *State v. Hamilton*, 179 Wn. App. 870,

885, 320 P.3d 142 (2014). "Generally, no abandonment will be found if the searched item is in an area where the defendant has a privacy interest." *Id.* Here, the search area was an unattended stolen vehicle that Mr. Samalia had been driving and had fled from when a police officer approached and directed him to return to the vehicle. A suspect's hasty flight under these circumstances is sufficient evidence of an intent to abandon the vehicle. *See United States v. Tate*, 821 F.2d 1328, 1330 (8th Cir.1987) (suspect who fled unlocked vehicle parked on public road abandoned expectation of privacy); *see also Kurtz v. People*, 494 P.2d 97, 103 (Colo. 1972), *overruled on other grounds by People v. Howard*, 599 P.2d 899 (Colo. 1979) (items seized from vehicle were admissible based on the abandonment of the vehicle, the flight of the accused from the scene on foot, and the fact the accused remained at large at the time of the search). Thus, the status of the area searched shows abandonment. We conclude, Mr. Samalia did not have a privacy interest in the searched area.

We next look to the reasonableness of the officer's actions and Mr. Samalia's intent. Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered. *Evans*, 159 Wn.2d at 408. The question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of article I, section 7.

Officer Yates spotted and followed a stolen vehicle until it stopped. The driver saw the officer, ignored instructions to remain in the vehicle, fled, and, evaded pursuit.

The officer reasonably returned to the vehicle to search for evidence of the driver's identity and continue his pursuit. Mr. Samalia's flight from the stolen vehicle under these circumstances shows his intent to abandon the vehicle, including its contents.

Citing *Hinton* and *Riley,* Mr. Samalia incorrectly argues a warrant is always required to search a cell phone. In *Hinton*, police confiscated a cell phone from an arrestee. 179 Wn.2d at 865. The cell phone received calls and messages at the police station leading to Mr. Hinton's arrest and controlled substance conviction. The *Hinton* court held, "We find that the officer's conduct invaded Hinton's private affairs and was not justified by any authority of law offered by the State." *Id.* at 870. The *Riley* court concluded the search incident to arrest exception to the warrant requirement does not apply to digital data on a cell phone in an arrestee's possession. *Riley*, 134 S. Ct. at 2493-94. But, the *Riley* court reasoned "other case-specific exceptions may still justify a warrantless search of a particular phone." *Riley*, 134 S. Ct. 2473 at 2494. Specifically, the *Riley* court noted the "well-reasoned" exigency exception, "to pursue a fleeing suspect," as a case that may excuse a cell phone search warrant. *Id.*

Mr. Samalia's case is distinguished from *Hinton* and *Riley* because the cell phone was not seized from Mr. Samalia's person during his arrest, but was found abandoned in a stolen vehicle. Voluntarily abandoned property is an exception to the warrant requirement. *Evans*, 159 Wn.2d at 407. The use of the cell phone in Mr. Samalia's case comes within both the *Evans* abandonment exception and the exigency exception to pursue a fleeing suspect recognized in *Riley.* Moreover, the use of Mr.

Samalia's cell phone was attenuated because the cell phone information used to get his name came from Ms. Telles' cell phone, not the abandoned cell phone, and the officer used the name to identify Mr. Samalia from existing police records. Further, the police were unsure who owned the abandoned cell phone.

Given our reasoning, we conclude the officer did not require a warrant to use the abandoned cell phone in the manner described here. Further, a warrant was unnecessary under *Riley* because the abandoned cell phone was used to pursue the fleeing suspect. Finally, the use of the abandoned cell phone was too attenuated because the information leading to Mr. Samalia's identification in a police database came in the form of a name appearing on Ms. Telles' cell phone. Therefore, we hold the trial court did not err in denying Mr. Samalia's CrR 3.6 suppression motion concerning his identification. Given our analysis, we do not reach the State's arguments concerning standing, ownership of the cell phone, and the State's right to impound the stolen vehicle.

Affirmed.

Brown, J.

Brown, J.

I CONCUR:

Korsmo, J.

Korsmo, J.

No. 31691-2-III

SIDDOWAY, J. (dissenting) — One of the few jealously and carefully drawn exceptions to the warrant requirements of the Fourth Amendment to the United States Constitution and Washington Constitution article I, section 7 is voluntarily abandoned property. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). The issue is not abandonment in the strict property right sense but, rather, whether the defendant in leaving the property has relinquished his reasonable expectation of privacy so that the search and seizure is valid. *Id.* (citing *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001), citing, in turn, *United States v. Hoey*, 983 F.2d 890, 892-93 (8th Cir. 1993)). Courts ordinarily find that a defendant has relinquished his reasonable expectation of privacy by leaving property behind in an area where the defendant does not have a privacy interest. *Evans*, 159 Wn.2d at 409. "The great majority of the court decisions having to do with the abandonment of effects in a search and seizure context are [those in which] it appears the defendant tried to dispose of certain incriminating objects upon the lawful approach of or pursuit by the police." 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(b), at 875 (5th ed. 2012).

By contrast, when a defendant like Adrian Samalia flees the scene of a crime and leaves behind his cell phone, it is reasonable to assume that it is *not* because he prefers

that police recover it outside his possession but is instead through inadvertence or lack of an opportunity to retrieve it. Nonetheless, as observed by Professor LaFave (although not directly addressing cell phones) even an inadvertent leaving of effects in a public place, whether or not an abandonment in the true sense of that word, has historically amounted to a loss of any justified expectation of privacy. *Id.*; *but cf. State v. Hamilton*, 314 Mont. 507, 67 P.3d 871 (2003) (an individual who loses or misplaces property continues to have an expectation of privacy but it is diminished to the extent that the finder may examine the contents as necessary to identify the owner); *Morris v. State*, 908 P.2d 931 (Wyo. 1995) (same); *State v. Kealey*, 80 Wn. App. 162, 175, 907 P.2d 319 (1995) (same).[1]

"Involuntary" abandonment has been held to exist only where property is abandoned in response to illegal police conduct; that in turn, requires showing "'(1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment.'" *State v. Reynolds*, 144 Wn.2d 282, 288, 27 P.3d 200 (2001) (quoting *State v. Whitaker*, 58 Wn. App. 851, 853, 795 P.2d 182 (1990)). The trial court correctly found that the conduct of Officer Ryan Yates, who recovered Mr. Samalia's cell phone

[1] *Kealey* held that police have a right, if not an obligation to attempt to identify and notify the owner of lost property. 80 Wn. App. at 175 & n.47 (citing RCW 63.21.060). Here, though, police did not identify themselves to Ms. Telles as law enforcement seeking to return an abandoned telephone nor, according to the evidence, was that their purpose in searching data on the phone.

from the console of the stolen car, was lawful, and from that concluded that Mr. Samalia had not made the showing required for voluntary abandonment.

Recent search and seizure jurisprudence recognizes that conventional cell phones are fundamentally different from other property, and that exceptions to the warrant requirement might not apply or might apply more narrowly where a cell phone or a similar device is at issue. As observed last year by the United States Supreme Court, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley v. California*, __ U.S. __, 134 S. Ct. 2473, 2488-89, 189 L. Ed. 2d 430 (2014). I dissent in this case because I conclude, considering Washington's search and seizure jurisprudence under article I, section 7 of the Washington constitution as a whole, that police must generally secure a warrant before conducting a search of data on a cell phone—even one that has been left behind in a place where its owner has no privacy interest.

In a series of decisions, our Supreme Court has found that certain information revealing intimate aspects of life that citizens have held, and should be entitled to hold safe from government trespass, is entitled to protection under article 1, section 7 of the Washington constitution regardless of whether the citizen has a privacy interest in the place where it is found.

In *State v. Gunwall*, 106 Wn.2d 54, 65-66, 720 P.2d 808 (1986), the court held that while the United States Supreme Court had found that Fourth Amendment protection did

not extend to telephone toll billing records or pen registers, our state constitution required separate analysis because it "focuses on the protection of a citizen's private affairs," justifying a "more expansive interpretation" than under the Fourth Amendment, and because the State of Washington "has a long history of extending strong protections to telephonic and other electronic communications." The court concluded that when police obtained records of the defendant's calls without benefit of the issuance of any valid legal process, "they unreasonably intruded into her private affairs without authority of law and in violation of Washington Const. art. [I], § 7." *Id.* at 68.

In *State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990), our Supreme Court held that article I, section 7 of our constitution protects garbage cans placed on the curb from warrantless searches by law enforcement, affirming that "the location of a search is indeterminative when inquiring into whether the State has unreasonably intruded into an individual's private affairs."

In *State v. Jackson*, 150 Wn.2d 251, 262, 76 P.3d 217 (2003), the court held that a warrant was required in order to install a GPS device on a vehicle for purposes of tracking it, observing that

> the intrusion into private affairs made possible with a GPS device is quite extensive as the information obtained can disclose a great deal about an individual's life. . . . In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life.

In *State v. Jorden*, 160 Wn.2d 121, 129, 156 P.3d 893 (2007), the court held that the information contained in a motel registry is a private affair under article I, section 7, reasoning that not only may an individual's very presence in a motel or hotel be a sensitive piece of information, but that the registry may also reveal co-guests in the room; individually or collectively, the information may provide intimate details about a person's activities and associations.

It was in a different context that our Supreme Court addressed the private character of personal information maintained on a cell phone in *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), but the court's discussion of the historically strong protection for the type of information a cell phone can contain compels the conclusion that it, like the information procured by law enforcement in *Gunwall*, *Boland*, *Jackson*, and *Jorden*, is subject to the warrant requirement regardless of where law enforcement finds the phone. In *Hinton*, the defendant was not the cell phone owner, but an individual who sent inculpatory text messages to a cell phone that police had seized following the arrest of a drug dealer. Armed with the drug dealer's phone, police responded to at least two incoming texts—one of them, Mr. Hinton's—by arranging meetings for drug transactions and then arresting the would-be purchasers at the proposed meeting site.

The court readily concluded that reviewing the cell phone for text messages was an intrusion into private affairs:

> Viewing the contents of people's text messages exposes a "wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring) (discussing GPS (global positioning system) monitoring). Text messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law. Although text message technology rendered Hinton's communication to Lee more vulnerable to invasion, technological advancements do not extinguish privacy interests that Washington citizens are entitled to hold. The right to privacy under the state constitution is not confined to "a 'protected places' analysis," or "to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives." *Myrick*, 102 Wash.2d at 513, 511, 688 P.2d 151.

Hinton, 179 Wn.2d at 869-70.[2]

The United States Supreme Court described the uniquely extensive and sensitive character of cell phone data in even greater detail in *Riley*. What follows is only a portion of its discussion of why a search of data from a cell phone is unlike a search for other property:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand

[2] A four-member dissent disagreed with the *Hinton* majority, but on standing grounds; it stated that "[w]hile the constitutionality of a warrantless search of one's own cell phone is certainly in need of clarification, it is a question for another day." *State v. Hinton*, 179 Wn.2d 862, 882, 319 P.3d 9 (2014) (Johnson, J., dissenting).

> photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.
>
> . . . [C]ertain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. . . .

Riley, 134 S. Ct. at 2489-90.

Summarizing its discussion of the type and volume of personal information found on a cell phone, the *Riley* court quoted Learned Hand as having observed in 1926 that "it is 'a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him;'" the Court then observed that if the man's

> pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Id. at 2490-91 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (C.A.2) (1926)).

In this case, Adrian Samalia pulled over and stopped the stolen car he was driving, while being followed by Officer Yates. The officer had confirmed the car was stolen and was following Mr. Samalia while awaiting backup. Mr. Samalia's stop caused Officer Yates to activate his lights. After Mr. Samalia stepped out of his car and saw that Officer Yates had pulled out his service weapon and intended to detain him, Mr. Samalia fled. It is reasonable to assume that he either forgot about his cell phone in the console of the stolen car or decided that if he hoped to escape, retrieving the phone was not an option.

No reported Washington decision has directly addressed whether a citizen relinquishes his reasonable expectation of privacy in the data on his cell phone by leaving the phone behind at the scene of a crime. In my view, the *Gunwall* to *Jorden* line of cases, together with *Hinton*, collectively compel the conclusion that the voluminous private information likely to be found on a cell phone remains protected by article I, section 7 of the Washington constitution even when the phone is left behind in a place where the defendant has no privacy interest. Requiring a search warrant will assure that there is probable cause to believe that the defendant is involved in criminal activity and that evidence of the criminal activity can be found in the data on the cell phone. In this case Officer Yates presumably would have been able to demonstrate probable cause to a magistrate, as long as he first spoke to the owner of the stolen car and confirmed that the phone did not belong to her or some innocent prior passenger.

The only other exception to the warrant requirement for the data on Mr. Samalia's cell phone identified by the majority is the exigency exception that it notes was recognized in *Riley*. Majority at 7. But *Riley* holds that obtaining a warrant to search data on a cell phone should be the rule because "data on the phone can endanger no one." *Riley*, 134 S. Ct. at 2485. While recognizing that the exigent circumstances exception will be available in some cases, the Court observed that the exception "requires a court to examine whether an emergency justified a warrantless search in each particular case." *Id.* at 2494 (citing *Missouri v. McNeely*, __ U.S. __, 133 S. Ct. 1552, 1559, 185 L. Ed. 2d 696 (2013)). Here, the State did not argue that exigent circumstances existed nor did the trial court find any. *See* Clerk's Papers (CP) at 11–16 (State's opposition to motion to suppress); CP at 27–32 (findings and conclusions). The only crime as to which Officer Yates had probable cause was Mr. Samalia's possession of a stolen car, and the stolen car had been left behind. There was no evidence that Mr. Samalia was armed, was suspected of any other crime, or otherwise presented a danger.

Finally, the majority concludes that the use of Mr. Samalia's cell phone was attenuated because officers obtained his name from the telephone of Deylene Telles, Mr. Samalia's former girlfriend. Majority at 7. But the evidence was clear that officers identified Ms. Telles only by searching "contacts" on Mr. Samalia's cell phone, and that it was only after using Mr. Samalia's phone to lure her to a meeting at which they arrested her, used Mr. Samalia's phone to call her, and then took her phone to see who it

identified as the caller, that they obtained Mr. Samalia's name.[3] Officer Yates thereafter recognized Mr. Samalia as the driver of the stolen car from a photograph that he located using the name from Ms. Telles's phone. But the officer had no prior knowledge of Mr. Samalia nor did he have other information connecting Mr. Samalia to the stolen car. The independent source exception to the exclusionary rule does not apply.

"The attenuation test suggests that where there are intervening independent factors along the chain of causation, the taint of illegally obtained evidence becomes so dissipated as to preclude suppression of derivative evidence as 'fruit' of the illegal police action." Charles W. Johnson and Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 SEATTLE U. L. REV. 1581, 1765 (2013) (citing *State v. Eserjose*, 171 Wn.2d 907, 919, 259 P.3d 172 (2011)). "Washington courts have not explicitly adopted the attenuation doctrine, but they have applied it." *Id.* The majority fails to explain any step along the causal chain leading to Officer Yates' review of Mr.

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[3] Ms. Telles's testimony at Mr. Samalia's bench trial, at which the trial court revisited its suppression decision following a motion for reconsideration, was as follows:

> They were about to handcuff me and right when they—he was like—to walk around me, the other police officer had a phone and they called from that phone to my phone, and that's when my phone brought up a picture and a phone number and a name. And he took the phone out of my hands and he said, "Who is this?"

Report of Proceedings (RP) at 61.

Samalia's photograph that was independent of use of the cell phone.

For these reasons, I respectfully dissent.

Siddoway, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ADRIAN SAMALIA, Petitioner.	)))))))))	COA NO. 31691-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF APRIL, 2015.

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