No. 91532-6

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Petitioner.

# MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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## INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of article I, section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae* or as counsel to parties.

## ISSUE TO BE ADDRESSED BY *AMICUS*

Whether or not warrantless law enforcement access to cell phone data violates article I, section 7 and has such broad public impact that review by this Court is warranted.

## STATEMENT OF THE CASE

A vehicle license plate scanner operated by a City of Yakima police officer indicated a stolen vehicle had driven past him. The officer pulled the vehicle over, but the driver fled the scene on foot. *State v. Samalia*, __ Wn. App. ____, 344 P.3d 722, 724 (2015). The officer then searched the car and found a cell phone on the center console. Without seeking a warrant, the officer manipulated the phone's address book and call log and dialed contacts in an attempt to identify the owner. Those

efforts eventually led to officers identifying the defendant, and he was subsequently charged with possession of a stolen vehicle. Mr. Samalia moved to suppress his identification, as it resulted from the data discovered in the warrantless search of the cell phone, but the trial court denied the motion and the Court of Appeals affirmed.

This case asks whether article I, section 7 of the Washington State Constitution allows for warrantless searches of the wealth of information contained in a cell phone when the State has every opportunity to obtain a warrant but chooses not to do so.

## ARGUMENT

The court below misapplied article I, section 7 when it denied suppression. In light of how cell phones and other mobile electronic devices are so integrated and "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy," this Court should grant review to offer clear guidance to lower courts and law enforcement in how to appropriately balance the significant privacy interests in cell phone data which are at stake, and legitimate policing functions. *Riley v. California,* 573 U.S. ___, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014). As other new mobile devices join phones in common use, courts must be cognizant of the ubiquitous nature of mobile device technology and the heightened

privacy interest under article I, section 7.

### A. There is an Immense Privacy Interest in Cell Phones and Other Personal Electronic Devices.

Washington's constitutional privacy jurisprudence offers strong support for the proposition that a person has an immense privacy interest in the data contained in cell phones and other personal mobile electronic devices. "Nearly two-thirds of Americans now own a smartphone" and "10% of Americans own a smartphone but do not have broadband at home," underscoring the reliance on them not only as personal information devices but also the pipeline to broadband Internet, and general computing. A. Smith, Pew Research Center, *U.S. Smartphone Use in 2015* (April 1, 2015). This dependence on personal electronic wireless devices means that a substantial population will soon be—if they are not already—walking around with their entire lives on their phones. This is not surprising; this multifaceted usage is precisely what mobile telecom network operators envisioned at the turn of the twenty-first century as cell phones became more advanced in multi-functionality. *See e.g.*, Sameer Kumar, *Mobile communications: global trends in the 21st century*, 2 INT. J. MOBILE COMMC'N 67, at 75, 80-81 (2004).

Significantly, "those with relatively *low income* and educational attainment levels, younger adults, and *non-whites* are especially likely to

be 'smartphone-dependent.'" A. Smith at 2 (emphasis added). The policy implications are abundantly evident that if law enforcement officers are not given clear guidelines about the significant privacy interest in cell phone data, it will have a disparate impact on *minority non-whites* who are dependent on cell phone and smart phone devices.

Contrary to the Court of Appeals' holding, a person's privacy interest does not extinguish merely because the property is left in a public place. A search occurs under article I, section 7 "when the government disturbs '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. Hinton*, 179 Wn.2d 862, 870, 319 P.3d 9 (2014), *citing State v. Myrick,* 102 Wn.2d 506, 511, 688 P.2d 151 (1984). If allowed to stand, the decision below threatens the privacy of anyone who accidentally leaves their phone in a public place, including parks, buses, and ride- or car-sharing services. If a person's phone slips out of the pocket in such a place, does that person surrender all privacy interest in the device? Such a result is incompatible with article I, section 7.

### B. The Limitless Amount of Personal and Sensitive Data in Cell Phones Has Constitutionally Recognized Significance.

Since Mr. Samalia's conviction, two important cases bearing significance on privacy and cell phone technology have been decided by

both this Court and the United States Supreme Court, *State v. Hinton*, 179 Wn.2d 862 (2014), and *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). Those cases provide the contours for the legal framework applicable to law enforcement searches in the context of the ubiquity of cell phones. This Court made it clear in last term's decision involving cell phone text messages, *State v. Hinton*, 179 Wn.2d 862 (2014), that "technological advancements do not extinguish privacy interests that Washington citizens are entitled to hold." *Id.* at 870. Several justices of this Court found that when "considering the wealth of personal and private information that is potentially stored on a cell phone, we should continue to recognize a rule that *does not incentivize* warrantless searches of cell phones." *Id.* at 881 (C. Johnson, J., concurring) (emphasis added). These characteristics of mobile device technology are what set the devices apart and require constitutional rules which take into account these special considerations. The number of biometric features and health related information preinstalled on cell phones and similar devices increases with each product's new release. People's cell phones can reveal where they have been, who they talk to, how they exercise, how far they walk, what they eat, what they spend money on, where they spend money, and every video and photo taken by the device is automatically geocoded for location accuracy. If, as in *Hinton*, a cell phone text

message is recognized as a privacy interest that requires a warrant, then surely the same logic applies with even greater force to a cell phone and the entirety of data it carries. Cell phone data should be more protected given the mosaic of information it collectively and qualitatively presents.

Similarly, as unanimously recognized by the United States Supreme Court last year in *Riley v. California*, "the [massive] storage capacity of cell phones has several interrelated consequences for privacy ... 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." *Riley*, *supra*, at 2489-90. "Most people," the *Riley* court found, "cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so." *Id.*, *citing* Kerr, *Foreward: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 404-405 (2013). And from a storage capacity standpoint, "[e]ven the most basic [cell] phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone, and so on." *Id.* Consider how *Riley* was decided barely more than eleven months ago. Yet, just months after the issuance of the decision, the standard storage limit offerings for data in one of the

most popular smartphones doubled in capacity—from 32 gigabytes to 64 gigabytes in the latest iPhone 6. In light of these special characteristics, the *Riley* court further recognized that rules from seminal search and seizure cases like *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) and *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), were decided at a time when cellular "technology [was] nearly inconceivable just a few decades ago," and thus inappropriate for constitutional analysis. *Riley*, *supra*, at 2484. Even more significantly, the *Riley* court emphasized the "rationales" of pre-1975 search cases has very little "force with respect to digital content on cell phones." *Id.* at 2485.

A full canvassing of Washington's article I, section 7 jurisprudence demands the conclusion that cell phone data and data in other personal mobile electronic devices are equally deserving of heightened privacy protection. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (warrant required under article I, section 7 for pen register, which allows police to identify the numbers dialed in telephonic communication, virtually the same information as is revealed by contact logs in cell phones); *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003) (warrant necessary to attach GPS device to vehicle for purposes of tracking it; similar location information is available from smartphones); *State v.*

*Jorden*, 160 Wn.2d 121, 129, 156 P.3d 893 (2007) (motel registry information is a private affair because of all that it individually or collectively reveals, similar to the mosaic of information provided by cell phone data).

*State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990), is particularly instructive. Its holding that garbage cans placed out in public on the curb are protected from warrantless searches by law enforcement should apply equally strongly to cell phones misplaced, even in public. Similarly, the *Hinton* court made clear the "right to privacy under the state constitution is not confined to a 'protected places' analysis." *Hinton* 179 Wn.2d at 869-70.

Cellular phone technology has morphed from handset only radios into micro-computing devices, which are more capable and powerful than desktop computers a few years ago. This has constitutional significance, and this Court should craft a rule applicable to all handheld computing devices, giving clear guidance to law enforcement on the parameters of the search.

### C. This Court's Guidance is Needed About The Rules Under Article I, Section 7 for Police Warrantless Searches of Cell Phones And Other Personal Mobile Electronic Devices.

Applying centuries old property analysis to sophisticated modern technological personal devices is a disservice to article I, section 7. As

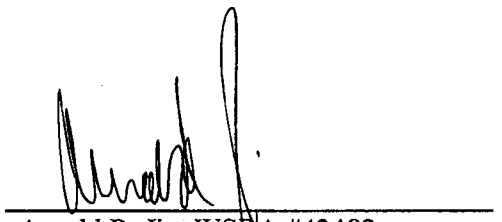
Judge Siddoway's dissent cogently points out: "Recent search and seizure jurisprudence recognizes that conventional cell phones are fundamentally different from other property, and that exceptions to the warrant requirement might not apply or might apply more narrowly where a cell phone or similar device is at issue." *Samalia, supra*, at 727. As noted by Judge Siddoway, Mr. Samalia did not abandon his cell phone under any property law standard—at most, he misplaced or lost track of the phone during the heat of the interaction. *Id.* The legal fiction of abandonment should not be stretched to cover the circumstances here where a personal electronic mobile device, with heightened privacy interests at stake was involved.

Law enforcement must not have carte blanche authority to search lost cell phones found in public spaces. At most, the scope of any search should only be what is minimally necessary to navigate the device in order to identify the cell phone's owner, and invade privacy no further than that. Certainly a warrant is required before officers may use a phone in a deceptive manner. *See Hinton. Gunwall, Boland, Jackson, Jorden*, and *Hinton* taken together, "compel the conclusion that voluminous private information likely to be found on a cell phone remains protected under article I, section 7 ... even when the phone is left behind in a place where there is ... no privacy interest." *Samalia, supra*, at 728.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully request the Court to accept Mr. Samalia's Petition for Review. It meets multiple criteria of RAP 13.4(b), the decision of the Court of Appeals conflicts with decisions of this Court, it involves a significant question of law under the Washington Constitution, and it is a matter of substantial public interest.

Respectfully submitted this 29th day of May 2015.

By 

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Dear Clerk,

Please accept for filing in State v. Samalia (No. 91532-6) the attached documents:

1. Motion for Leave to File Amicus Curiae Brief
2. Brief of Amicus Curiae American Civil Liberties Union of Washington.
3. Certificate of Service

The documents are filed by Arnold Jin, Bar No. 42482 / 206-549-0393). Counsel have previously agreed to service by email in this case and are copied above.

Thank you,

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