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**Apr 03, 2017**

Court of Appeals

Division III

State of Washington

No. 34233-6-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

BISIR BILAL MUHAMMAD,  
Defendant/Appellant.

APPEAL FROM THE ASOTIN COUNTY SUPERIOR COURT  
Honorable Scott D. Gallina, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Mr. Muhammad’s motion to suppress evidence. CP 219–21, 223–25.
2. The trial court erred in finding the stop was lawful. CP 219–21.
3. The trial court erred in finding Mr. Muhammad had no reasonable expectation of privacy under the Fourth Amendment or article 1, section 7 in the location coordinates provided to law enforcement by AT&T without a warrant. CP 223–25.
4. The trial court erred in finding exigent circumstances justified the warrantless “pinging” of Mr. Muhammad’s cell phone to obtain his real-time location. CP 225.
5. The trial court erred in finding the convictions for rape and felony murder predicated on rape did not violate the Fifth Amendment prohibition on double jeopardy. CP 603 (paragraph 5), 604 (Finding of Fact 6 (summary)).
6. The trial court erred in finding the sentencing “merger doctrine” did not apply. CP 603 (paragraphs 5–6), 604 (Finding of Fact 6 (summary)).
7. The sentencing court erred in imposing a separate sentence for both felony murder and the predicate crime.

8. The trial court erred imposing an exceptional sentence of consecutive terms totaling a minimum of 866 months.

*Issues Pertaining to Assignments of Error*

1. Should evidence obtained from an unlawful stop in Washington and the subsequent seizure of a car in Idaho as a result of a warrantless search be suppressed?

2. Did Mr. Muhammad have a reasonable expectation of privacy under article 1, section 7 and the Fourth Amendment in the transmissions between his cell phone and cell towers—i.e., the “pings”—such that police were required to obtain a warrant before obtaining coordinates derived from those “pings” from AT&T?

3. Was the conclusion that exigent circumstances justified the warrantless “pinging” of Mr. Muhammad’s cell phone to obtain his real-time location unsupported by facts and reasonable inferences therefrom that would justify the warrantless intrusion into his reasonable expectation of privacy?

4. In violation of RCW 9.73.260, was Mr. Muhammad’s seizure based on use of a cell phone simulator device and its location information without authority of law?

5. The United States Supreme Court and Washington Supreme Court have held that the double jeopardy clause of the Fifth Amendment prohibits convictions for both rape and felony murder predicated on rape. Here, Mr. Muhammad was convicted of both rape and felony murder predicated on rape. Did the entry of convictions for both crimes violate double jeopardy, requiring vacation of the rape conviction?

6. Under the sentencing “merger doctrine,” where a charge of felony murder is brought and the predicate crime is also charged, that conviction merges into the felony murder for sentencing. Should the separate sentence imposed for the predicate crime of rape have merged into the felony murder where the two crimes were alleged to be for the same acts?

**B. STATEMENT OF THE CASE**

On November 7, 2014, a couple on a morning walk discovered a nude female body next to an access road to Beachview Park in Clarkston, Washington, and called police. The victim was soon identified as 69-year-old Ina Clare Richardson, a resident of Lewiston, Idaho. Evidence at the scene indicated a sexual assault had taken place and the potential homicide may have occurred elsewhere. CP 72, 85–88; RP 265–66, 286–91, 304–05, 308–11, 314–15, 324–25, 331, 333.

During preliminary investigation law enforcement officers learned Ms. Richardson was last seen the evening of November 6 at the Albertsons store and neighboring businesses in Clarkston. A video surveillance tape showed Ms. Richardson enter the Albertsons store around 9:17 p.m., leave the store around 11:09 p.m. and walk through the parking lot in the direction of McDonalds, and then the tape stopped recording for 25 seconds apparently from lack of motion from the petite female and the surrounding darkness. CP 73–74, 94; RP 263, 270, 276–77, 331–32, 334–35, 545–46, 569–70, 794–95.

On November 10, Officer Boyd was asked to study the Albertsons parking lot video and, in particular, a distinctive car that might yield a suspect or a witness. The vehicle had appeared and parked in the lot near McDonalds while Ms. Richardson was in Albertsons and left sometime after the parking lot video resumed recording. CP 94, 101–02; RP 334–36. A while later, the officer saw what appeared to be the same car and initiated a stop. The defendant, Bisir Bilal Muhammad, gave the officer his name and cell phone number. In response to questions about the night in question, Mr. Muhammad said he'd gone straight home after getting off work at the nearby Quality Inn and denied being in the Albertsons parking lot. He was released and drove away. CP 101–02.

Based on Mr. Muhammad's statements and other information, review of Walmart and Quality Inn surveillance tapes showing the car was seen in those places at the relevant times, and an autopsy finding confirming homicide by strangulation, police applied for a vehicle search warrant of Mr. Muhammad's car. Officer Boyd was sent back to keep the car under surveillance. He found the car at Mr. Muhammad's home. CP 95, 102, 104-05.

After leaving his post for some reason, the officer returned to find the car was no longer at the home. Police obtained "pings" on his phone from Mr. Muhammad's phone company. They located the car in the Lewiston Orchards area of Lewiston, Idaho, where Mr. Muhammad was helping a friend build a fence. Police seized his cell phone and impounded the car. Mr. Muhammad was asked to accompany police back to the Clarkston police station for an interview. CP 90-91, 102-03, 105; RP 338.

In the November 10 interview, Mr. Muhammad said he'd gone straight home after working at the Quality Inn. Upon further questioning, he'd gotten paid that day and may have stopped to cash it at Walmart. Motel 6 is near the Albertsons store and he may've parked at the nearby Dollar Tree to meet up with his friend Mike, to smoke marijuana. He

didn't want his wife to know about it. He had only met Ms. Richardson once, when he was working at Albertsons. He denied she'd been in his car that night. RP 344, 356–57, 367, 374, 385–86, 390–91, 394–95, 418–19, 421, 425–27, 435, 439.

The various videos showed Mr. Muhammad's car left the Quality Inn around 10:15 p.m., drove across the street into the Walmart lot where it stayed about thirty minutes. It was then driven to the Albertsons lot and parked near McDonalds, which is not near the Dollar Tree. Leaving Albertsons at 11:20 p.m., the car was driven to an access road behind Quality Inn, where it stayed for about an hour. The vehicle left the loading area about 12:37 a.m. Two earlier Albertsons videos from October 25 and 30 showed Mr. Muhammad talking with Ms. Richardson in the store and helping her take her cart outside. RP 361, 367–69, 376, 383–85, 392–95, 407–08, 429–34, 453, 517, 519–21, 544–.

While executing the vehicle search warrant police found items including a box of latex gloves, a container of personal lubricant, a container of condoms of the same brand and model as an empty condom wrapper later found at a loading area in the back of the Quality Inn, and blood on fabric in the passenger area matching Ms. Richardson's blood profile. RP 490, 492, 497–99, 502, 504, 508, 657–59.

While executing the cell phone search warrant police found evidence of calls between Mr. Muhammad and his wife that used cell towers coinciding with his alleged whereabouts on the night in question. RP 681–83.

Dr. John Dale Howard, forensic pathologist, stated there were signs of blunt force injury to Ms. Richardson’s vaginal area that were consistent with sexual assault. The cause of death was strangulation. RP 464, 471–43.

Mr. Muhammad was arrested on November 17 and charged with rape and felony murder. CP 22–23; RP 134, 575.

Prior to trial defense counsel moved under CrR 3.6 to suppress evidence. CP 28–62, 63–182, 183–85, 203–16. After hearing argument, the court issued its written order denying the motion. CP 219–26; RP 38–65.

Mr. Muhammad was convicted on both counts, and the jury found he knew or should have known the victim of the crimes was particularly vulnerable. Regarding the rape, the jury found Mr. Muhammad inflicted serious physical injury on Ms. Richardson but could not agree whether he

kidnapped her. CP 395–99. The court imposed an exceptional sentence of a minimum of 866 months. CP 576.

Additional relevant facts are set forth in the argument sections below.

## **C. ARGUMENT**

### **1. The vehicle search warrant was based upon unlawfully obtained facts.**

On review of the denial of a CrR 3.6 motion, findings of fact must be supported by substantial evidence (*State v. O'Neil*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003)) and conclusions of law are reviewed de novo to determine whether they are supported by the trial court's findings of fact. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Warrantless seizures are generally presumed to be unconstitutional. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The burden is on the State to prove that an exception to the warrant requirement applies.

The vehicle search warrant obtained on November 10, 2014, was issued upon the November 10, 2014, affidavit of Detective Jackie Nichols. That affidavit included information obtained from Mr. Muhammad by

Officer Boyd during his "traffic stop." Because that stop was unlawful, information obtained from that stop must be suppressed. Without the information from the unlawful stop, the search warrant affidavit does not establish probable cause to search Mr. Muhammad's vehicle.

a. Officer Boyd's November 10, 2014, "traffic stop" violated the Fourth Amendment.

Fourth amendment protection against unreasonable searches and seizures apply to any police conduct that restrains one's freedom to leave.

*Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Although not all investigatory stops require a search warrant, they at least must not be unreasonable. *Id.* at 20. A "Terry stop" is reasonable if there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Officer Boyd's report dated December 18, 2014, describes a "traffic stop" he made on Mr. Muhammad on November 10, 2014, in Clarkston, Washington. CP 101-03. In that report, Officer Boyd relates that earlier on 11/10/2014, he had observed video from Albertsons taken from the night of 11/6/2014. On the video he saw a "suspicious vehicle" drive into

the parking lot and noted that nobody got out of the vehicle. He states he observed Ms. Richardson leave Albertsons in the direction of the vehicle, and that he did not see her again after disappearing in the video "near where the suspicious vehicle is parked." CP 101.

After noting the details of the vehicle, Officer Boyd states that around 10:00 am on November 10, 2014, he observed a vehicle that appeared to match the description of the vehicle in the video. CP 101-02. At that point he performed a traffic stop on Mr. Muhammad's car and began asking him questions. He articulates no reason for the stop other than that it was "[b]ased upon my observations from the video of the vehicle and them matching the vehicle currently in front of me .... " CP 102. The traffic stop occurred three days after Ms. Richardson's body was found. No other reason for the traffic stop is given in either the search warrant affidavit or Officer Boyd's report.

Generally speaking, *Terry* stops in Washington are limited to crimes and traffic infractions observed by an officer. *See State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002). "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. Even in

investigations of felony crimes, it is still necessary "that the circumstances at the time of the stop be more consistent with criminal than innocent conduct." *State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991) (citing *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986)).

No criminal conduct is reported to have been seen in the video or before the stop. Officer Boyd's stop was therefore unreasonable under Fourth Amendment principles. Mr. Muhammad's statements during that investigatory stop were unlawfully obtained.

b. The Boyd stop violated Washington Constitution Article 1 § 7.

Traffic stops are always considered a seizure. "Whether pretextual or not, a traffic stop is a 'seizure' for the purpose of constitutional analysis, no matter how brief." *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833, 838 (1999) (citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)).

The issue in *Ladson* was whether law enforcement could follow suspicious cars long enough to observe a traffic infraction, giving them the "pretext" to stop the vehicle in order to search for evidence of other crimes. *Id* at 345. The Supreme Court held that, although such stops may be permitted by Fourth Amendment decisions, they are not permissible under Washington's more protective Constitution.

We conclude the citizens of Washington have held, and are entitled to hold, a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement. We therefore hold pretextual traffic stops violate article 1, section 7, because they are seizures absent the "authority of law" which a warrant would bring.

*Ladson*, 138 Wn.2d at 358.

The "authority of law" language comes from Washington Constitution article 1, § 7, which provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under an Art. 1 §7 analysis, the presumption is that a warrant is required for any search or seizure unless there is an exception to the warrant requirement. *Id.* at 349. Those exceptions are described as "a few 'jealously and carefully drawn' exceptions ... which provide for those cases where the societal costs of obtaining a warrant ... outweigh the reasons for prior recourse to a neutral magistrate." *Id.* (citations and internal quotes omitted). Those exceptions are: "consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops." *Id.* (citing *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)).

"Article 1, section 7 of our state constitution requires that an investigatory stop be based on articulable particularized facts that support

a substantial possibility that a person is engaged in criminal activity." *State v. Martinez*, 135 Wn. App. 174, 177, 143 P.3d 855 (2006) (quoting *Kennedy*, 107 Wn. 2d at 6). As noted above, Officer Boyd articulated no particularized facts supporting the possibility that Mr. Muhammad was engaged in a crime at the time of the stop.

Officer Boyd's traffic stop was a seizure of Mr. Muhammad. He activated his emergency lights to pull Mr. Muhammad over. The search was not consensual or incident to a valid arrest or an inventory search or a "plain view" search. And, because it occurred days after an alleged crime was discovered, there were no exigent circumstances. None of Washington's exceptions to the search warrant requirement were met in Officer Boyd's stop. His pulling over Mr. Muhammad on November 10, 2014, was without lawful authority.

Similarly, no probable cause justified the stop. In *State v. Quezadas-Gomez*, 165 Wn. App 593, 267 P.3d 1036 (2011), review denied, 173 Wn. 2d 1034, 277 P.3d 668 (2012), the court addressed the constitutionality of an obvious non-pretextual investigatory stop. There, the defendant had been engaged in sales of cocaine to a confidential informant over the course of several days. These were "controlled buys" done in cooperation with law enforcement. Nine days later an officer

stopped the defendant's vehicle solely to obtain his identity and address. Officers used that address to conduct additional surveillance, and then, based upon information obtained from the vehicle stop and subsequent surveillance, police obtained a search warrant for the defendant's vehicles and house. *Quezadas-Gomez*, 165 Wn. App at 596-597.

The trial court suppressed the evidence obtained by the search warrant on the basis that the investigatory stop was unlawful. In so ruling, the trial court followed the rationale of *Ladson* that evidence flowing from information obtained in a pretextual stop was unlawful and therefore must be suppressed. *Quezadas-Gomez*, 165 Wn. App. at 597–98. Because the trial court found that the stop was "for the sole purpose of obtaining his identification and residence, this was a pretext stop." *Id.* at 598–99.

The Court of Appeals disagreed, ruling the stop was not pretextual because the officer did not claim to make the stop for a traffic offense while seeking evidence of a more serious crime. *Quezadas-Gomez*, 165 Wn. App. at 601. The court noted the case involved the "apparently unique circumstances"

where law enforcement acquires probable cause *before* an investigative stop, conducts the investigative stop for the sole purpose of obtaining identifying information to be used to further the investigation, and then releases the suspect and continues the investigation. Thus, this case presents an issue of first impression.

*Id.* at 602 (emphasis in original). The Court of Appeals reversed the suppression ruling, holding that because the officer "had probable cause to arrest" the defendant **at the time of stop**, the investigatory vehicle stop was not an unlawful pretextual stop. *Quezadas-Gomez*, 165 Wn. App. at 604 (emphasis added).

While Officer Boyd reported no pretext of a traffic violation to pull over the vehicle, the sole purpose apparently was to obtain Mr. Muhammad's identity, take photos of his vehicle, obtain his cell phone number, and ask him questions. These facts do not fit the "unique circumstances" of *Quezadas-Gomez* because there was no probable cause for arrest at the time of the stop. Under *Ladson*, the stop was pretextual.

*After the fact*, Detective Nichols drafted the search warrant affidavit using statements obtained during the stop to attempt to provide probable cause for the search warrant. Even the holding of *Quezadas-Gomez* plainly implies that a vehicle stop for no reason other than investigation violates Article 1 §7. Unless there is actual probable cause to arrest *prior to* the investigatory vehicle stop, the stop is unlawful. Officer Boyd's "traffic stop" of Mr. Muhammad and the ensuing questioning and identification of him was without authority of law. The facts derived from that stop, including a recitation of Mr. Muhammad's

statements to Officer Boyd, were unlawfully included in the search warrant affidavit. All evidence subsequently obtained by the November 10, 2014 vehicle search warrant is required to be suppressed as "fruits of the poisonous tree". *Ladson*, 138 Wn.2d at 359 (citation omitted).

c. The November 10, 2014 vehicle search warrant was issued based on an affidavit containing unlawfully obtained evidence.

A summary of the facts in the affidavit for search warrant that are relevant to this issue is as follows:

1. On 11/7/2014, a body was found in the area of Beachview Park in Clarkston WA. CP 71.
2. The body was later determined to be that of Ina Richardson. CP72.
3. Tire marks and other evidentiary items were discovered. CP 71-72.
4. On 11/9/2014, Sgt. Daniel of Clarkson Police investigated Albertsons employees and obtained timeline information of Ms. Richardson's whereabouts on 11/6/2014. CP 73.
5. Ms. Richardson entered Albertsons at 9:17 PM on 11/6/2014. CP 73.
6. Ms. Richardson leaves Albertsons at 11:08 PM on 11/6/2014. CP 73.
7. At 11:09 PM, Ms. Richardson is seen walking in the Albertsons parking lot heading east, and then the video skips 27 seconds and she no longer is visible. CP 73.

8. Ms. Richardson apparently asked a Lewiston firefighter for a ride home at some point, but the fireman declined to give her a ride. CP 73.

9. There was a vehicle in the Albertsons parking lot “at the same time Richardson was in Albertsons and still in the parking lot when she walked out. CP 74.

10. The vehicle had entered the parking lot at an unspecified time, drove past Albertsons, and parked on the east side of the parking lot. CP 74.

11. The vehicle was “distinctive.” CP 74.

12. On 11/10/2014, Officer Boyd “made a traffic stop” of Mr. Muhammad’s vehicle. Officer Boyd obtained his identity at that traffic stop. He also learned from questioning Mr. Muhammad during the traffic stop that he denied being at Albertsons, that he worked at Quality Inn, and that he drove home from work on the evening of 11/6/2014. CP 74.

13. From this information, Officer Daniel looked at a video from the Walmart parking lot. He observed the vehicle had come from the Quality Inn parking lot and had parked in the Walmart lot for “a period of time,” that no one got out of the vehicle, and that the vehicle left and was then see in the Albertsons video. CP 74.

Viewed alone, items 1–11 do not establish probable cause for a search. At best, the items establish Ms. Richardson was alive and at Albertsons up to 11:09 PM on November 6, 2014, and there was at least one vehicle in the parking lot. Probable cause is "reasonable grounds for suspicion coupled with evidence of circumstances to convince a cautious or disinterested person that the accused is guilty." *State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967). Items 1–11 do not rise to that level

because the mere presence of an auto, even a "distinctive" auto, in a parking lot at the time a video quits recording the presence of a person is not a circumstance that would convince someone that the owner of that vehicle is guilty of a crime.

In addition to establish a finding of probable cause to justify the issuance of a search warrant, the affidavit must establish "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFare, *Search and Seizure* § 3.7(d), at 372 (3d ed. 1996)). The warrant application must identify specific facts and circumstances from which the reviewing magistrate can draw the required inference that evidence of a crime will be found in the premises to be searched. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). Noting a vehicle is "distinctive" and it parked in a particular location for an unspecified time falls well short of the specificity and nexus required.

The only basis for the magistrate to find probable cause in the 11/10/2014 affidavit would have to come from the additional information acquired from Mr. Muhammad's statements to Officer Boyd during the stop. Because these must be suppressed, the vehicle search warrant was

not supported by probable cause and the evidence flowing from that search warrant must be suppressed.

The unlawful stop led to evidence used in each subsequent search warrant application. All of the search warrants issued in reliance on those applications are unlawful and the evidence obtained from them must be suppressed. This rule applies to the following search warrants and their returns:

Buccal (saliva) swabs dated 11/11/2014 (CP 120–28)

Cell phone warrant dated 11/11/2014 (CP 153–63)

Personal property of Mr. Muhammad dated 11/12/2014 (CP 129–42)

Search warrant of Mr. Muhammad's home dated 11/12/2014 (CP 144–52)

Cell phone location records directed to ATT dated 11/12/2014 (CP 77–84)

Search warrant for evidence testing, dated 11/14/2014 (CP 173–82)

All evidence resulting from the searches performed under these unlawful warrants must be suppressed. *Ladson*, 138 Wn. 2d at 359.

**2. The use of cell phone “pings” to obtain Mr. Muhammad’s location in Idaho was an illegal search in violation of article 1, section 7, the Fourth Amendment, and state law.**

Supplemental police reports describe how Mr. Muhammad’s vehicle was located:

I had obtained Bisir's phone number from him at the stop[,] which is 541-992-5366[,] and had dispatch contact his phone company to start a ping on his number as he was no place in Clarkston to be found. (CP 102)

Due to the rising concerns regarding Muhammad's involvement in this case, a search and seizure warrant for his vehicle was petitioned for and obtained. Muhammad's vehicle was not at his residence, so his cell phone was pinged and his whereabouts were determined to be in Lewiston, ID. Officers from the Clarkston Police Department and the Lewiston Police responded to the area of the cell phone ping and located the vehicle. (CP 95)

a. Mr. Muhammad had a reasonable expectation of privacy under art. I, section 7.

It is well-established that article 1, section 7 of the Washington Constitution provides greater protections than those afforded by the Fourth Amendment. *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (citing *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). The Washington Supreme Court has recognized privacy interests in telephonic and other electronic communications. See, e.g., *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Similarly, both the Washington Supreme Court and the U.S. Supreme Court have found that placement of a GPS device on a defendant's vehicle for purposes of tracking location requires a warrant. *U.S. v. Jones*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012); *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003).

In determining whether a search violates article 1, section 7, the court must first decide whether the action in question intruded upon a person's "private affairs." *McKinney*, 148 Wn.2d at 27 (citing *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997)). Generally, private affairs are "those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). This determination is not "merely an inquiry into a person's subjective expectation of privacy, but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold." *McKinney*, 148 Wn.2d at 27 (citing *McReady*, 123 Wn.2d at 270)).

In the present case, Mr. Muhammad has a reasonable expectation of privacy in the transmission of information between his cell phone and cell towers, which information may be used to determine his specific location. "Cell phones, including the information that they contain, are 'private affairs' under article 1, section 7. As a private affair, the police may not search a cell phone without a warrant or applicable warrant exception." *State v. Samalia*, 185 Wn.2d 262, 268, 272, 375 P.3d 1082 (2016). As observed in *Gunwall*,

A telephone subscriber ... has an actual expectation that the dialing of telephone numbers from a home telephone will be free from

governmental intrusion. A telephone is a necessary component of modern life. It is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society ... The concomitant disclosure to the telephone company, for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government.

106 Wn.2d at 67 (quoting *People v. Sporleder*, 666 P.2d 135, 141

(Colo.1983)). Likewise, in *Jones*, Justice Alito recognized the growing ubiquity of cell phones and the ability to use them to track the location of cell phone users:

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. For older phones, the accuracy of the location information depends on the density of the tower network, but new “smart phones,” which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining (“crowdsourcing”) the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as “social” tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

132 S. Ct. at 963 (J. Alito, concurring) (footnotes omitted).

Simply put, a cell phone is a modern necessity just as a land line phone was determined to be a necessity of modern life in *Gunwall*. Yet,

the simple act of turning on the cell phone may enable a cellular service provider to triangulate the location of the phone to a specific latitude and longitude. It is entirely unreasonable to suggest that, but the act of turning on one's cell phone, one intends to thereby waive all privacy interests in the phone's transmissions with the cell phone towers and the real-time (and historical) location information that can be derived from those transmissions.

In an analogous setting, the Supreme Court has protected electric consumption records. *Maxfield*, 133 Wn.2d 332. In *Maxfield*, the employee of a public utility district volunteered information about the defendant's increased electric utility consumption to law enforcement. 133 Wn.2d at 335. Police used the information to obtain a search warrant, leading to the discovery of a marijuana grow operation. *Id.* The *Maxfield* court concluded, "While the privacy interest in electric consumption records may be characterized as 'minimal,' it is still a privacy interest subject to the protections of article 1, section 7." 133 Wn.2d at 340. If one has a privacy interest in the information that can be read from one's electrical meter, surely one has a similar expectation of privacy in the "pings" between one's phone and the service provider's cell towers.

Another line of cases has prohibited the use of GPS technology to track a suspect's location without a warrant. In *Jackson*, for example, the Washington Supreme Court disagreed with the State that the placement of GPS tracking devices simply augmented the senses of the officers in tracking the defendant's location. 150 Wn.2d at 261–62. In distinguishing between the ability to directly observe and to follow a vehicle using GPS tracking technology, the *Jackson* court stated,

It is true that an officer standing at a distance in a lawful place may use binoculars to bring into closer view what he sees, or an officer may use a flashlight at night to see what is plainly there to be seen by day. However, when a GPS device is attached to a vehicle, law enforcement officers do not in fact follow the vehicle. Thus, unlike binoculars or a flashlight, the GPS device does not merely augment the officers' senses, but rather provides a technological substitute for traditional visual tracking. Further, the devices in this case were in place for approximately two and one-half weeks. It is unlikely that the sheriff's department could have successfully maintained uninterrupted 24-hour surveillance throughout this time by following Jackson. Even longer tracking periods might be undertaken, depending upon the circumstances of a case. We perceive a difference between the kind of uninterrupted, 24-hour a day surveillance possible through use of a GPS device, which does not depend upon whether an officer could in fact have maintained visual contact over the tracking period, and an officer's use of binoculars or a flashlight to augment his or her senses.

*Id.* (footnote omitted). Similarly here, the State could not have located Mr. Muhammad's location by simple use of an officer's senses had it not effectively converted Mr. Muhammad's phone into the kind of tracking device held to require a warrant in *Jackson* and *Jones*.

In surveillance cases, the question whether the defendant enjoys a reasonable expectation of privacy turns in large part on whether the information has been exposed to the public. *U.S. v. Maynard*, 615 F.3d 544, 558 (2010) (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Although *Katz* establishes that “[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection,” courts have recognized the degree of surveillance permitted by modern technology vastly exceeds what the public reasonable expects another may do. *Katz*, 389 U.S. at 351. In *Maynard*, the Court of Appeals for the D.C. Circuit held that a warrant was required to install a GPS device on the defendant’s vehicle and track the vehicle’s location over a substantial length of time. The *Maynard* court reasoned,

“What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene.” Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular

individuals or political groups—and not just one such fact about a person, but all such facts.

*Maynard*, 615 F.3d at 562 (internal citations omitted). Yet this is precisely the kind of information that would be readily available to police without any warrant requirement should this court determine that Mr. Muhammad lacks a reasonable expectation of privacy in the cell phone transmissions used to track his location.

Any suggestion that *Jackson* and *Jones* are distinguishable because the use of a GPS requires placement of a physical object where the use of cell phone tracking technology does not is a distinction without a difference. Physical intrusion, or trespass, is no longer the touchstone of whether an unlawful intrusion occurs. As held by the U.S. Supreme Court, “the Fourth Amendment protects people, not places.” *Jones*, 132 S.Ct. at 950 (quoting *Katz*, 389 U.S. at 351). The question is simply whether a person has a reasonable expectation of privacy in the area searched. *Id.* It would be revolutionary for this court to hold that a person lacks a reasonable expectation of privacy in the transmissions from his cell phone.

The use of cell tracking technology without a warrant is equivalent to converting Mr. Muhammad’s cell phone into a GPS device without his

knowledge or consent.<sup>1</sup> Such technology, unchecked, permits the State to obtain an extraordinary amount of private, personal information by monitoring the person's whereabouts. There is no precedent for the trial court's conclusion that Mr. Muhammad lacked a reasonable expectation of privacy in the "pings" between his phone and the cell towers, and compelling reasons are present why this court should conclude that such a privacy interest exists.

A contrary holding would effectively require the public to choose between using a necessary medium of modern communications, or revealing private information about one's location to the government at will. Moreover, there is no evidence in the record to suggest that the public has any knowledge that such technology is readily available, such that use of a cell phone could be construed as an assumption of the risk that the cellular transmission information could be secretly monitored. A reasonable person expects that his or her cell phone is used to make phone calls, not to continuously transmit information to the government.

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<sup>1</sup> Accord, *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 577 (D. Md. 2011) ("This judge now joins others who have found that cell phones, to the extent that they provide prospective, real time location information, regardless of the specificity of that location information, are tracking devices. Thus, a cell phone's prospective, real time location data —whether cell site or GPS—is a communication from a tracking device . . . .").

Accordingly, this court should hold that Mr. Muhammad had a privacy interest in the cellular transmissions that law enforcement intercepted.<sup>2</sup>

The second prong of article 1, section 7 requires “authority of law” before an individual’s private affairs can be disturbed.

Generally speaking, the ‘authority of law’ required by Const. Art. I, § 7 in order to obtain records includes authority granted by a valid (i.e. constitutional) statute, the common law or a rule of this court. In the case of long distance toll records, ‘authority of law’ includes legal process such as a search warrant or subpoena.

*Gunwall*, 106 Wn.2d at 68–69 (citations omitted).

The State did not obtain a warrant prior to intercepting the cellular transmissions. As such, all information obtained by exploiting the illegality is fruit of the poisonous tree and must be excluded. *State v. Early*, 36 Wn. App. 215, 220, 674 P.2d 179 (1983) (citing *State v. Aydelotte*, 35 Wn. App. 125, 131, 665 P.2d 443 (1983)).

b. Mr. Muhammad had a reasonable expectation of privacy under the Fourth Amendment.

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<sup>2</sup> Compare, a portion of the trial court’s findings: “In 2015 it can fairly be said the cell phone users (including non-adult users) are aware of both the capacity for their phone to be located by GPS, and their ability to avoid that function by turning off their phone or disabling phone location services on their device. Based on both the side use of this technology for car navigation, location of lost cell phones, and apps which use a phone’s location to provide attractive services, it can no longer be said that one can reasonably expect that a cell phone that is turned on will have its location remain private. This is not a function of surreptitious police investigative intrusions *but rather is part of the package for cell phone users.*” CP 224–25 (emphasis added). There is no precedent for the court’s conclusion waiver of constitutional privacy rights may be assumed from a consumer’s purchase and use of cell phone technology.

Because the article 1, section 7 violation is dispositive, there is no need to engage in a Fourth Amendment analysis. See *State v. Patton*, 167 Wn.2d 379, 396 n.9, 219 P.3d 651 (2009) (court does not reach Fourth Amendment arguments when the article 1, section 7 provides "independent and adequate state grounds" to resolve the issue). Should this Court determine otherwise, a Fourth Amendment analysis is provided. Police violated the Fourth Amendment in pinging Mr. Muhammad's cell phone for real-time location information because he had a subjective and objectively reasonable expectation of privacy in the CSLI<sup>3</sup>.

The trial court reasoned that "Mr. Muhammad's phone was being used by him in Idaho at the time the information was gathered thus making the Fourth Amendment analysis more appropriate to the circumstances." CP 224. However, article 1, section 7 of the Washington Constitution, unlike the federal constitution, explicitly protects the privacy rights of Washington citizens. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (emphasis added). Moreover, article 1, section 7 affords its citizens greater protection than does the Fourth Amendment. *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986). Washington law enforcement requested and obtained real-time cell site location information in order to

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<sup>3</sup> CSLI stands for "cell site location information."

track the whereabouts of Mr. Muhammad, a Washington citizen. The court cited no authority to support its “finding” that in the context of the location of a personal cell phone, a Washington citizen loses the protection of the state constitution simply by crossing the several mile distance from Clarkston, WA to the Lewiston Orchards area in nearby Lewiston, ID. The court’s finding is further diluted where Mr. Muhammad’s vehicle was last seen at his Washington residence (CP 102) and the record does not disclose that the “pings” occurred exclusively in Idaho.

Emerging Fourth Amendment jurisprudence in this area also does not support the court’s finding. Thus far the federal trial courts appear to have unanimously decided that under the Fourth Amendment, a reasonable expectation of privacy exists in real-time pings used to provide location information, and almost all have found that the same exists in historical ping data. See, e.g. *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F.Supp.2d 526 (D. Md. 2011) (finding that suspects have a Fourth Amendment reasonable expectation of privacy in their cell phone "pings"); *In re U.S. for an Order Authorizing the Release of Historical Cell-Site Info.*, 809 F.Supp.2d 113 (E.D.N.Y. 2011) (same); *In re Application of U.S. for an Order Authorizing Release of Historical Cell-Site Info.*, 736 F.Supp.2d

578 (E.D.N.Y. 2010) (same); *In re Application of U.S. for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification Sys.*, 402 F.Supp.2d 597 (D. Md. 2005) (same).

Other state jurisdictions have recognized Fourth Amendment privacy rights in real-time phone location information using a cell phone network. Florida, for example, recognizes a privacy interest in real-time cell phone location data:

Therefore, we hold that regardless of Tracey's location on public roads, the use of his cell site location information emanating from his cell phone in order to track him in real time was a search within the purview of the Fourth Amendment for which probable cause was required. Because probable cause did not support the search in this case, and no warrant based on probable cause authorized the use of Tracey's real time cell site location information to track him, the evidence obtained as a result of that search was subject to suppression.

*Tracey v. State*, 152 So.3d 504, 526, 39 Fla.L.Weekly S 617 (Fla. 2014).

Massachusetts similarly finds a warrant requirement:

Having so concluded, the central question here remains to be answered: whether, given its capacity to track the movements of the cellular telephone user, CSLI<sup>4</sup> implicates the defendant's privacy interests to the extent that under art. 14, the government must obtain a search warrant to obtain it.

*Commonwealth v. Augustine*, 467 Mass. 230, 4 N.E.3d 846, 863 (2014).

New Jersey requires a warrant as well: "Because we find that cell phone

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<sup>4</sup> CSLI stands for "cell site location information."

uses have a reasonable expectation of privacy in their cell phone location information, and that police must obtain a search warrant before accessing that information, we reverse the judgment of the Appellate Division.”

*State v. Earls*, 214 N.J. 564, 569, 70 A.3d 630, 94 A.L.R.6<sup>th</sup> 785 (N.J. 2013).<sup>5</sup>

The federal appellate courts have not definitively addressed the Fourth Amendment in this context. For example, in *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014), the court ruled:

In short, we hold that cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data without a warrant is a Fourth Amendment violation. Nonetheless, for reasons set forth in the next section of this opinion, we do not conclude that the district court committed a reversible error.

*Id.* at 1217. The court found a good faith exception applied because officers followed a court order rather than a warrant.<sup>6</sup> *Id.* at 1218. (See **update noted below**).<sup>7</sup> See also, *In re Application of United States for*

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<sup>5</sup> In addition, Montana recently passed legislation requiring a warrant for cell phone location information. Montana Code Annotated 46-5-110. The exclusionary rule is statutorily implemented. MCA 46-5-110(c) ("Any evidence obtained in violation of this section is not admissible in a civil, criminal, or administrative proceeding and may not be used in an affidavit of probable cause in an effort to obtain a search warrant.").

<sup>6</sup> Washington does not allow a "good-faith" exception. *State v. Williams*, 171 Wn.2d 474, 251 P.3d 877, 883 (2011) ("Based upon the text of article 1 section 7, however, we have declined to follow federal courts in creating " good faith" exceptions to the exclusionary rule for warrantless searches.").

<sup>7</sup> On May 5, 2015, the 11th Circuit reversed itself in *Davis*, finding that officers obtained a court order for business records pursuant to the Electronic Communications Act, and

*Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013) (holding that a court order under the "specific and articulable facts" standard under the Stored Communications Act, 18 USC §2703 was a constitutional application of the "third-party records" doctrine); *cf. State v. Skinner*, 690 F.3d 772 (2012) (defendant did not have a reasonable expectation of privacy in data emanating from his cell phone to determine its real-time location as he transported drugs along the public highway).

This court should find Mr. Muhammad had a reasonable expectation of privacy under a Fourth Amendment analysis.

c. The exigent circumstances exception to the warrant requirement does not apply.

The trial court's alternative ground for noncompliance with the search warrant requirement was that "exigent circumstances, as previously discussed, existed justify[ing] immediate action by the police." CP 225. In its earlier ruling that participation by Idaho law enforcement in seizure by impoundment of the car in Idaho was justified, the court had noted "[i]t was only hours after Mr. Muhammad had been contacted for the first time by law enforcement concerning a heinous crime to which they believed he was connected. The [Idaho] officers could reasonably infer that the window for collection of evidence would be closing rapidly now that the

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that such an order did not constitute a search under the 4th Amendment. *U.S. v. Davis*,

vehicle owner had reason to believe that he was suspected of a violent crime involving the vehicle.” CP 223.

The stop of Mr. Muhammad’s car occurred three days after Ms. Richardson’s body was discovered. Officer Boyd noted in his report:

I told Bisir that I was looking into a crime that occurred in the Albertsons parking lot on this last Thursday. I told Bisir that a vehicle matching his was seen in the parking lot and may have seen the crime occur and be a witness to it. ... I asked Bisir again if he was down at the Albertsons parking on Thursday night ... I asked Bisir if he was sure he wasn’t at the Albertsons parking lot that night and parked near McDonalds. ...

Bisir then asked me what crime occurred that night and I asked him if he had been following the paper at all and he stated no. Bisir then asked me if McDonalds had been robbed and I told him no.

I thanked Bisir for his time and ap[o]logized for any inconvenience [that] may have occurred.

CP 102. After he was released, Mr. Muhammad drove away.

Officer Boyd reported results of his stop. CP 102. After gathering more information, Officer Boyd was asked to watch the car and police obtained a search warrant for Mr. Muhammad’s vehicle. CP 95, 104–05. Officer Boyd saw Mr. Muhammad pick up a female from his house, drive to Walmart and go inside, and the couple returned to his home. The officer saw Mr. Muhammad move the car to the rear of the apartment

building. Officer Boyd left the area for an unknown reason and when he came back, Mr. Muhammad's car was gone. CP 102.

Police asked AT&T to provide them with location information by "pinging" Mr. Muhammad's cell phone that was obtained during the stop, as "he was no place in Clarkston to be found." CP 102. Officer Boyd gave the following reasons for the stop:

Bisir became a[] person of interest in this case and needed to be interviewed in detail. The phone ping was done for the fear of destruction of evidence as well as we were now investigating a homicide and other persons['] lives may be in danger.

CP 102-03.

Exigent circumstances exist to excuse the warrant requirement if demand for immediate investigatory action makes it impracticable for the police to obtain a warrant. *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127, 57 P.3d 1156 (2002). Washington courts have held that danger to the public or the possibility that a suspect may escape can constitute an exigent circumstance. *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983); *State v. Gallo*, 20 Wn. App. 717, 724, 582 P.2d 558, review denied, 91 Wn.2d 1008 (1978). To determine if exigent circumstances exist, the court looks to six factors for guidance: (1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is reasonably trustworthy information of the suspect's guilt,

(4) whether there is a strong reason to believe the suspect is on the premises, (5) whether the suspect is likely to escape if not apprehended, and (6) whether the entry is made peaceably. *Cardenas*, 146 Wn.2d at 406. While every single factor need not be present to establish exigency, in the aggregate, the factors must establish the need to act quickly. *State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10 (1989). A court must look to the totality of the circumstances in determining whether exigent circumstances exist. *State v. Smith*, 165 Wn.2d 511, 518, 199 P.3d 386 (2009).

To prove that exigent circumstances are present, the State must “point to specific, articulable facts and the reasonable inferences therefrom which justify the intrusion.” *State v. Diana*, 24 Wn. App. 908, 911, 604 P.2d 1312 (1979). The mere possibility of escape or mere suspicion that a suspect will destroy evidence is not sufficient to satisfy the “particularity” requirement. *State v. Coyle*, 95 Wn. 2d 1, 9, 621 P.2d 1256, 1260–61 (1980) (citations omitted). Thus, the particularity requirement must generally be satisfied in either of two ways: (1) police have specific prior information that a suspect has resolved to act in a manner which would create an exigency, or he has made specific preparations to act in such a manner, or (2) police are confronted with some sort of contemporaneous

sound or activity alerting them to the possible presence of an exigent circumstance. *Coyle*, 95 Wn.2d at 10 (citations omitted).

Considering the relevant factors in determining an exigency, the State has not shown that exigent circumstances justified the warrantless search of Mr. Muhammad's cell phone to obtain location information. The situation in this case stands in sharp contrast to other situations in which courts have held exigent circumstances to exist.

In *State v. Patterson*, exigent circumstances justified entry into a parked vehicle where a burglary had very recently been committed, the suspect was likely in the immediate vicinity of the vehicle because the officers discovered the vehicle a mere five minutes after the robbery, information in the automobile could help identify and locate the suspect, and a delay in searching the vehicle could have allowed the suspect to flee the area. 112 Wn.2d at 735–36. Similarly, exigencies in *Smith* were found where there was a tanker truck filled with 1,000 gallons of a dangerous chemical parked next to a house, a rifle had been seen in the house, the rifle went missing, and the two known occupants of the house did not possess the rifle. 165 Wn.23 at 518.

Likewise, in *Com. v. Rushing*, the appellant had just committed a triple homicide, was armed and dangerous, and had indicated he intended

to continue his crime spree. Exigent circumstances existed because “[t]he seriousness of Appellant’s crimes cannot be understated, he was armed, police had probable cause to arrest him, and he was a danger to others. . . . As both probable cause and exigent circumstances were present, the Commonwealth acted within its constitutional bounds in obtaining the real-time cell site information after receiving a court order from the trial court.” 2013 PA Super 162, 71 A.3d 939, 965–66 (2013), rev'd on other grounds, 627 Pa. 59, 99 A.3d 416 (2014). In *Riley v. California*, holding the search incident to arrest exception does not apply to cell phones, the court noted the exigent circumstances exception to the Fourth Amendment’s warrant requirement *could* be available for the “extreme hypotheticals” posited by the government, such as a bomb that is about to detonate or a child abductor whose cell phone shows the child’s location. The “critical point” was that the trial court would be able to examine the circumstances “in each particular case” to determine whether there was an emergency justification for a warrantless search. \_\_U.S. \_\_, 134 S.Ct. 2473, 2494, 189 L.Ed.2d 430 (2014).

The facts of the above cases and reasonable inferences therefrom have in common the closeness in time between the crime and the

warrantless search, and articulated details of immediacy of the risk of harm or risk of flight or risk of destruction of evidence.

The facts here do not show any need for particular haste. When the “ping” was requested three days after the crime scene was discovered, the crime was over and completed. Mr. Muhammad had obviously not fled because he was pulled over by Officer Boyd that morning prior to the “ping” request. Although the officer asked if he’d been in the Albertsons parking lot and whether he’d seen a crime, no mention was made of a homicide, and Mr. Muhammad was left to go on his way after the stop. There are no articulated facts suggesting risk of harm, flight or destruction of evidence.

Officer Boyd reported to his superiors. New information was obtained about Mr. Muhammad’s sex offender level status and out-of-state criminal history. CP 105. While other personnel applied for a search warrant for the vehicle, the officer was sent to Mr. Muhammad’s house to conduct surveillance of the car. He saw Mr. Muhammad and a female get into the car, go to Walmart and return to his house, and saw Mr. Muhammad move the car to park in back of the complex. These specific and innocent facts do not suggest risk of harm to others, flight or destruction of evidence.

Officer Boyd then “left for another reason and when I came back the car was gone.” CP 102. Det. Muszynski returned to the police station with the vehicle search warrant in hand, only to find the present location of the vehicle was not known. CP 105. Around this time the autopsy results came in, finding that the death was a homicide. CP 102. Based on this accumulating information, Officer Boyd requested the warrantless “ping” of Mr. Muhammad’s cell phone to determine his real-time location. These additional bare facts similarly do not present the exigent circumstances of imminent destruction of evidence or flight or that “other persons’ lives may be in danger.”

The exigent circumstances cannot be created by the police themselves. *State v. Hall*, 53 Wn. App. 296, 303, 766 P.2d 512, 517 (1989) (citing to *United States v. Rosselli*, 506 F.2d 627, 229, 630 (7th Cir.1974) (where police observed drug deliveries made to two apartments, if the risk of a warning call created an apparent emergency, it would have been avoided by leaving an agent with Miss Ackley and the Anderson children in the arrestee’s apartment while a warrant was being secured to search the other apartment)). Officer Boyd was sent to keep an eye on the vehicle and was aware his fellow officers were in the process of obtaining a warrant to search it. If destruction, flight or harm to others were truly

feared, a prudent officer would have called for back-up assistance before leaving sight of the vehicle.

The court must also be satisfied that the invocation of exigency is not simply a pretext for conducting an impermissible search. *Smith*, 165 Wn.2d at 523 (citing *Ladson*, 138 Wn.2d at 356). The police may not invoke an exception as pretext to an evidentiary search. *Id.* (also citing *State v. Lawson*, 135 Wn. App. 430, 435–36, 144 P.3d 377 (2006)). Police had no probable cause to arrest Mr. Muhammad. They wanted to continue gathering evidence because he had “become a person of interest” and “needed to be interviewed in detail.” Officer Boyd’s action in leaving his surveillance of the vehicle with no replacement is inconsistent with the stated purpose of preventing imminent harm, flight or destruction of evidence. Claiming exigency necessitated the warrantless search of Mr. Muhammad’s cell phone to locate him was merely pretext to allow police investigation to be resumed as quickly as possible.

Additionally, the State has not established that obtaining a warrant was otherwise impracticable. If time was of the essence, police can seek an immediate telephonic warrant. CrR 3.2(c); *State v. Komoto*, 40 Wn. App. 200, 214, 697 P.2d 1025 (1985) (availability of telephonic warrant factor in assessing exigent circumstances); see also RCW 9.73.260(6)

(providing for an emergency court order). For example, we do not know whether Officer Boyd could have used a cell phone or radio to procure a telephonic warrant. The record contains no evidence of what he would have had to do to procure a warrant at the time of the intrusion into the cell phone data. See *State v. Tibbles*, 169 Wn.2d 364, 371, 236 P.3d 885, 889 (2010).<sup>8</sup>

In sum, the mere possibility or suspicion of risk of flight or danger or destruction of evidence is insufficient to establish exigent circumstances. *Coyle*, 95 Wn. 2d at 9. Expediency is similarly insufficient even where police had obtained a search warrant for Mr. Muhammad's car. "[W]hatever relative convenience to law enforcement may [result] from forgoing the burden of seeking a warrant once probable cause to search arises in circumstances such as here, we adhere to the view that "mere convenience is simply not enough." *Tibbles*, 169 Wn.2d at 372 (citing *Patterson*, 112 Wn.2d at 734).

Mr. Muhammad's expectation of privacy in his cell phone does not constitute an exception to the requirement of a warrant under article 1

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<sup>8</sup> It appears law enforcement officers did see the need to obtain a search warrant after the fact. On November 12, 2014, a search warrant was obtained for Mr. Muhammad's location information records from AT&T. CP 77-84. The application for search warrant and resulting search warrant were obtained within minutes of each other. *Id.* Similarly the November 11, 2014, application for search warrant of Mr. Muhammad's cell phone

section 7. The State did not satisfy the exigent circumstances exception to the warrant requirement because it did not prove the imperative of a warrantless search, including the unavailability of a telephonic warrant in the circumstances of this particular case. *Smith*, 165 Wn.2d at 518.

d. The use of cell phone “pings” to obtain Mr. Muhammad’s location was done without authority of law.

Washington has a “long history of extending strong protections to telephonic and other electronic communications.” *State v. Hinton*, 179 Wn.2d 862, 871, 319 P.3d 9 (2014) (citing *Gunwall*, 106 Wn.2d at 66). A cell phone is a “private affair” within the meaning of article 1, section 7, and intrusion into its contents or a search of the data it supplies must be done under authority of law. *Hinton*, 179 Wn.2d 862, 873–74, 319 P.3d 9 (2014); *cf.*, also, *Riley v. California*, 134 S.Ct. at 2488–89. RCW 9.73.260 generally prohibits law enforcement’s collection and/or use of a person’s electronic data without a court order that specifies the person, place, or thing to be searched or seized. Here, it is undisputed police did not obtain a prior court order.

An emergency court order may be obtained for qualifying collection and use of electronic data under the statute if police and a prosecuting attorney jointly determine there is probably cause to believe an

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(now in police possession) and resulting search warrant were obtained within minutes of

emergency situation exists that involves immediate danger of death or serious bodily injury to any person. RCW 9.73.260(6)(a). No emergency order was sought in this case and the record would not have supported the issuance of one.

Law enforcement's use of real-time location information from AT&T to find Mr. Muhammad was a seizure performed without authority of law. The State bears the burden of justifying a warrantless seizure. *State v. Gantt*, 163 Wn. App. 133, 138, 257 P.3d 682 (2011). This Court should conclude the State did not meet its burden to show the seizure was lawful.

**3. All evidence flowing from the illegal searches and seizures should be suppressed under article I, section 7 of the state constitution.**

When police engage in a search or seizure in violation of article 1, section 7, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Ladson*, 138 Wn.2d at 359. This strict rule applies not only to evidence obtained during an illegal search or seizure, but also evidence derived therefrom, and "saves article 1, section 7 from becoming a meaningless promise." *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005); *Ladson*, 138 Wn.2d at 359 (quoting

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each other. CP 153-61.

Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 WASH. L. REV. 459, 508 (1986)).

The Washington Supreme Court has recently reaffirmed that, unlike the federal exclusionary rule, Washington's rule is "nearly categorical," rejecting both the federal "good faith" and "inevitable discovery" exceptions. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) (good faith); *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (inevitable discovery). The question in this case is whether the federal attenuation exception also runs afoul of article 1, section 7.<sup>9</sup>

"In determining the protections of article 1, section 7 in a particular context, 'the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.'" *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007) (quoting *City of Seattle v. McCready*, 123 Wn.2d at 267). The federal and state exclusionary rules are based on different concerns and aimed at achieving very different goals. While the federal attenuation doctrine (like the good faith and inevitable discovery doctrines) serves its

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<sup>9</sup> The State raised this doctrine in its responsive memorandum below. (CP 196–97) and trial counsel did not specifically address it in reply. See CP 212–13. However, courts review unlawful searches for the first time on appeal because they are manifest constitutional errors. *State v. Harris*, 154 Wn. App. 87, 224 P.3d 830 (2010).

intended goals under the Fourth Amendment, it is inconsistent with article 1, section 7's unique purpose and history.

Article 1, section 7's greater privacy protections are well established. *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). While Fourth Amendment protections turn on the reasonableness of government action, article 1, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” *Afana*, 169 Wn.2d at 180 (quoting *White*, 97 Wn.2d at 110).

This difference in purpose impacts the remedy available for any violation. With its focus on the reasonableness of officers’ actions, the primary justification for excluding evidence under the Fourth Amendment is deterrence of police misconduct.<sup>10</sup> *Herring v. United States*, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009); *Michigan v. DeFillippo*, 443 U.S. 31, 38 n.3, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979); *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). “The [federal] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard

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<sup>10</sup> An additional, though perhaps more limited, justification for the exclusion of evidence under the Fourth Amendment is maintaining the integrity of the federal courts. *Powell*, 428 U.S. at 485-486; *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

it.” *Elkins v. United States*, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960). As a creature of the federal exclusionary rule, the attenuation doctrine is heavily rooted in this same goal of deterring police misconduct.

It requires federal courts to examine the admissibility of evidence “in light of the distinct policies and interests of the Fourth Amendment.” *Brown v. Illinois*, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Thus, in *Brown*, the U.S. Supreme Court refused to apply a “but for” rule of exclusion and, instead, adopted a case-by-case balancing approach for determining when the causal connection between a Fourth Amendment violation and subsequently discovered evidence is sufficiently attenuated. *Id.* at 603. Factors to consider under the doctrine are (1) temporal proximity of the unlawful detention and discovery of evidence, (2) the presence of intervening circumstances, (3) “and, particularly, the purpose and flagrancy of the official misconduct.” A fourth factor is whether *Miranda* warnings were given after the initial illegality. *Id.*

In his concurring opinion in *Brown*, Justice Powell elaborated on the connection between these factors and the distinct interests of the Fourth Amendment:

[S]trict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement

than can be justified by the rule's deterrent purposes. The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.

*Id.* at 609 (Powell, J., concurring). Justice Powell continued, "[t]he basic purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests." *Id.* at 610. "[T]he *Wong Sun* inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." *Id.* at 612.

The Supreme Court also focused on this goal of deterrence in another seminal attenuation case, *United States v. Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). In *Ceccolini*, the Court examined the admissibility of a witness's trial testimony where that witness's information was discovered as a consequence of an unlawful search. Noting the federal rule's "broad deterrent purpose," the Court emphasized "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 275 (quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)).

In short, the federal attenuation doctrine concedes a connection between the illegality and the evidence in question but, rather than

automatically exclude the evidence, aims to determine whether deterrence of police misconduct requires that result.<sup>11</sup>

The Washington Supreme Court has never explicitly adopted the federal attenuation doctrine under article 1, section 7. *State v. Smith*, 177 Wn.2d 533, 552, 303 P.3d 1047 (2013) (Madsen, C.J., concurring in the result); *id.* at 559–60 (Chambers, J., dissenting); *State v. Eserjose*, 171 Wn.2d 907, 919, 259 P.3d 172 (2011) (plurality opinion); *id.* at 939–40 (C. Johnson, J., dissenting). While the court has employed or mentioned the doctrine in several cases, critically, in none of those cases did the appellant specifically challenge its compatibility with article 1, section 7 in light of its greater privacy protections.<sup>12</sup> See, e.g., *State v. Armenta* 134 Wn.2d 1, 10 n.7, 17, 948 P.2d 1280 (1997); *State v. Warner*, 125 Wn.2d 876, 888–89, 889 P.2d 479 (1995); *State v. Rothenberger*, 73 Wn.2d 596,

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<sup>11</sup> See *New York v. Harris*, 495 U.S. 14, 19, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (attenuation analysis “appropriate where, as a threshold matter, courts determine that ‘the challenged evidence is in some sense the product of illegal governmental activity.’” (quoting *United States v. Crews*, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)); see also *Nardone v. United States*, 308 U.S. 338, 340-341, 60 S. Ct. 266, 84 L. Ed. 307 (1939) (“Sophisticated argument may prove a causal connection between information obtained [illegally] and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint”; exclusion “must be justified by an over-riding public policy expressed in the Constitution”).

<sup>12</sup> In *Eserjose*, Justice Alexander cited this line of cases in asserting the court had, “at least, implicitly adopted the attenuation doctrine.” 171 Wn.2d at 920 (lead opinion). However, “[g]eneral statements in every opinion are to be confined to the facts before the court, and limited in their application to the points actually involved.” *State ex rel. Wittler v. Yelle*, 65 Wn.2d 660, 670, 399 P.2d 319 (1965). The Washington Supreme

600–01, 440 P.2d 184 (1968); *State v. Vangen*, 72 Wn.2d 548, 554–55, 433 P.2d 691 (1967).

Article 1, section 7’s exclusionary rule is not tethered to the Fourth Amendment. Not until 1961 did the U.S. Supreme Court hold the Fourteenth Amendment compelled the extension of Fourth Amendment protections to defendants in state prosecutions. See generally *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). By that time, Washington had applied a rule of automatic exclusion to article 1, section 7 violations for more than 40 years, frequently rejecting attempts to weaken the rule. See Pitler, *supra*, at 473-485.

In the years following *Mapp*, which compelled states to apply—at a minimum—the federal exclusionary rule, the Washington Supreme Court was content to simply rely upon federal precedent when ordering exclusion under article 1, section 7. Pitler, *supra*, at 486. “As long as the U.S. Supreme Court continued to require state courts to automatically apply the federal exclusionary remedy whenever they found a fourth amendment violation, the Washington court had little reason to independently apply the Washington exclusionary rule.” *Id.* at 487. That changed, however, in light of the Burger Court’s “retrenchment in the area

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Court’s failure to ever consider the constitutionality of the attenuation doctrine under article 1, section 7 should not be deemed an implicit adoption.

of federally guaranteed civil liberties,” triggering an eventual return to independent application of the rule of automatic exclusion under article 1, section 7. *Id.* at 487–488.

In *White*, the Washington Supreme Court declared a statute making it a crime to “obstruct a public servant” unconstitutionally vague. 97 Wn.2d at 95–101. White was arrested for violating the statute and subsequently confessed to a burglary. At issue was whether White’s unlawful arrest required suppression of the confession. *Id.* at 101. In *DeFillippo*, the U.S. Supreme Court (Justice Burger writing for the majority) upheld the defendant’s arrest, and use of the fruits of that arrest, for violating a similar obstruction statute under the federal good faith exception to the Fourth Amendment exclusionary rule. *White*, 97 Wn.2d at 102.

In holding article 1, section 7 required suppression, the *White* court noted the difference in purpose behind the state and federal rules:

The result reached by the United States Supreme Court in *DeFillippo* is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be served. This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable government intrusions. Const. art. 1, [§] 7 differs from this interpretation of the Fourth Amendment in that it clearly

recognizes an individual's right to privacy with no express limitations.

. . . We think the language of our state constitutional provision constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions. This view toward protecting individual rights as a paramount concern is reflected in a line of Washington Supreme Court cases predating [*Mapp*], which first made the exclusionary rule applicable to the states. The important place of the right to privacy in Const. art. 1, [§] 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.

*Id.* at 109–10 (footnotes omitted) (citations omitted). Recognizing *DeFillippo* controlled under the Fourth Amendment, the *White* court declined to follow it and held article 1, section 7 mandated exclusion of White's confession. *Id.* at 102, 112.

More recently, the Washington Supreme Court again highlighted the difference in purpose between the federal and state exclusionary rules:

The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful government intrusions.

*Chenoweth*, 160 Wn.2d at 472 n.14 (citing cases, including *White*). Given the material differences between the state and federal rules, it would be

very odd indeed if Washington's exclusionary rule were tied to its Fourth Amendment counterpart. Examining the factors federal courts use to find the point at which the deterrent effect no longer justifies exclusion under the Fourth Amendment further highlights these differences.

Under the attenuation doctrine, the most important factor is "the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 604; see also *Ceccolini*, 435 U.S. at 279–80 (emphasizing there was "not the slightest evidence" the officer intended unlawful discovery of evidence). Yet, this factor should be largely irrelevant under article 1, section 7 given its primary concern with protecting privacy rights. Under our provision, the purpose and flagrancy of the constitutional violation matters little. What matters is that there was a violation at all.

The same is true for the other attenuation factors. As previously noted, when deciding whether to suppress evidence obtained through an illegal search or seizure, federal courts weigh competing interests and examine the temporal proximity of the arrest and the discovery of evidence, the presence of intervening circumstances, and, if relevant, whether *Miranda* warnings were given. *Brown*, 422 U.S. at 603–04.

While these factors may help federal courts in their cost-benefit analysis aimed at deterring police misconduct, they do not ensure the

protection of Washington’s greater privacy rights and are inconsistent with our “nearly categorical” exclusionary rule. *Winterstein*, 167 Wn.2d at 636. None of these factors converts a violation of article 1, section 7 into a non-violation or the fruits of that violation into non-fruit. As four justices in *Eserjose* emphasized, “Evidence obtained in violation of a person’s constitutional rights, even if attenuated, still lacks the authority of law [required by article 1, section 7] and should be suppressed.” 171 Wn.2d at 940 (C. Johnson, J., dissenting).

Rejecting the federal attenuation doctrine is also consistent with the reasoning in *Winterstein*, where the Washington Supreme Court found the inevitable discovery doctrine “necessarily speculative.” 167 Wn.2d at 634. Inevitable discovery rests on the State’s ability to prove, despite unlawful police conduct, the evidence in question would necessarily have been discovered through proper means. *Id.* at 634–35.

Attenuation is similarly speculative. Attenuation rests on the State’s ability to prove, despite unlawful police conduct, the individual would have confessed or the evidence would have been discovered anyway. See *Eserjose*, 171 Wn.2d at 942 (Alexander, J., lead opinion) (positing *Eserjose* maintained his innocence until his accomplice confessed, “which suggests that it was this information, not the illegal

arrest, that induced the confession”). In short, both doctrines call for a speculative hindsight examination of the same question: “What if the police had not acted unlawfully?” It is not clear why one would be permissible under article 1, section 7 and the other would not.

In his concurrence in *Ceccolini*, Justice Burger—in arguing for a per se rule of non-exclusion for live testimony of witnesses discovered illegally—highlighted the speculative nature of the majority’s test, describing it as “scholastic hindsight . . . in which speculation proceeds from unfounded hypotheses as to the probable explanations for the decision of a live witness to come forward and testify.” *Ceccolini*, 435 U.S. at 283 (Burger, C.J., concurring). Burger believed that only a per se rule could “alleviate the burden—now squarely thrust upon courts—of determining in each instance whether the witness possessed that elusive quality characterized by the term ‘free will.’” *Id.* at 285.

On this one point, Justice Burger was correct: because the attenuation doctrine is inherently speculative, only a per se rule will suffice. But under article 1, section 7’s “nearly categorical exclusionary rule,” it is not the per se rule he envisioned. *Winterstein*, 167 Wn.2d at 636. This Court should hold that the federal attenuation doctrine—like the

federal good faith and inevitable discovery exceptions—is incompatible with article 1, section 7.

The evidence found in Mr. Muhammad’s car was the fruit of the seizure of the car itself, which was only possible because of the illegal interception and use of the cell phone number obtained through the illegal stop. All evidence flowing from these illegalities and search warrants based upon the illegalities is fruit of the poisonous tree and “must be suppressed” under article 1, section 7, regardless of any attenuation. *Ladson*, 138 Wn.2d at 359.

**4. The convictions for rape and felony murder predicated on rape violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the rape conviction.**

a. A defendant's Fifth Amendment right to be free from double jeopardy is violated by convictions for both felony murder and the predicate felony.

A double jeopardy violation may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Jackman*, 156 Wn.2d 736, 746, 132 P3.d 136 (2007). This Court reviews *de novo* the question of whether two convictions violate double jeopardy. *Jackman*, 156 Wn.2d at 746.

The Fifth Amendment to the United States Constitution provides, “No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....” U.S. Const. amend. V. Similarly, article 1,

section 9 of our state constitution provides, "No person shall be ... twice put in jeopardy for the same offense." Const. art. I, §9. These clauses protect defendants against "prosecution oppression." *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFare, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 25.1(b) at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, courts apply the "same evidence" test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Id.*; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. *Freeman*, 153 Wn.2d at 772 (citing *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896)).

Prosecutors may not "divide a defendant's conduct into segments in order to obtain multiple convictions." *Jackman*, 156 Wn.2d at 749. Furthermore, if the prosecution has to prove one crime in order to prove

the other, entering convictions for both crimes violates double jeopardy.

*Id.* In other words, entering convictions for two crimes violates double jeopardy if “it was impossible to commit one without also committing the other.” *Id.*

In light of the above rules, both the United States Supreme Court and Washington Supreme Court have recognized that entering convictions for both felony murder and the underlying felony violates the Fifth Amendment right to be free from double jeopardy. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *In re the Personal Restraint of Francis*, 170 Wn.2d 517, 522 n.2, 242 P.3d 866 (2010); *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004) (citing *Harris*, 433 U.S. 682). This is so because “t[o] convict a defendant of felony murder the State is required to prove beyond a reasonable doubt each element of the predicate felony.” *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987). It is therefore impossible to commit felony murder without committing the underlying felony, and entering convictions for both violates double jeopardy. *See Jackman*, 156 Wn.2d at 749.

b. Mr. Muhammad was convicted of both rape and felony murder predicated on the rape in violation of his constitutional right to be free from double jeopardy.

In violation of the Fifth Amendment and *Harris*, the trial court here entered convictions for both rape and felony murder based on the rape. CP 572 (judgment and sentence); CP 22–23 (amended information). The remedy is vacation of the rape conviction. *See Womac*, 160 Wn.2d at 656; *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2006) (remedy for double jeopardy violation is vacation of the lesser offense).

This Court, the Washington Supreme Court, and the U.S. Supreme Court have all required that convictions be vacated for double jeopardy violations in similar circumstances. This Court reversed an attempted robbery conviction where the defendant had been convicted of felony murder based on the attempted robbery in *Williams*, 131 Wn. App. 488, *supra*. The court recognized, "the attempted robbery count merged into the felony murder because it was the predicate offense." *Id.* at 491–92. In other words, "the essential elements of the homicide include all the elements of the robbery, such that the facts establishing one necessarily also establish the other." *Id.* at 498.

This Court similarly reversed predicate convictions in *State v. Fagundes*, 26 Wn. App. 477, 614 P.2d 198 (1980). There, the defendant was convicted of first-degree felony murder as well as the predicate felonies of first-degree kidnapping and first-degree rape. *Id.* at 485. The

court vacated the convictions for kidnapping and rape, noting that these convictions violated double jeopardy because proof of the underlying felonies provided essential elements of the first-degree murder. *Id.* at 485–86. *Accord, State v. Bryant*, 65 Wn. App. 428, 438, 828 P.2d 1121, *review denied*, 119 Wn.2d 1015 (1992) (The specific felony underlying a charge of felony murder is an “essential element” of the murder).

Similarly in *Womac*, the defendant was convicted of homicide by abuse, felony murder predicated on assault, and assault, but the Washington Supreme Court ordered the latter two convictions vacated. *Womac*, 160 Wn.2d at 647. Only one of the first two convictions could be sustained because there was only one homicide, and the assault conviction could not stand because "Womac could not have committed felony murder in the second degree without committing assault in the first degree." *Id.* at 656.

In *Harris*, the U.S. Supreme Court held the Fifth Amendment prohibited the defendant's conviction for robbery following a conviction for felony murder predicated on robbery. *Harris*, 433 U.S. 682. The Court similarly vacated a conviction for a predicate felony in *Whalen v. United States*, 445 U.S. 684, *supra*. There, the defendant was convicted of

both rape and felony murder predicated on rape. *Id.* at 685–86. In

vacating the rape conviction, the Court noted:

[R]esort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that ‘each provision requires proof of a fact which the other does not.’ A conviction for killing in the course of a rape cannot be had without proving all of the elements of the offense of rape.

*Id.* at 693–94.

The same is true here. Mr. Muhammad could not have committed felony murder without also committing the underlying rape. *Quillin*, 49 Wn. App. at 164; *Williams*, 131 Wn. App. at 498–99; *Fagundes*, 26 Wn. App. at 485–86. Thus, his convictions for both crimes violate the Fifth Amendment prohibition on double jeopardy. *Harris*, 433 U.S. 682; *Orange*, 152 Wn.2d at 818; *Jackman*, 156 Wn.2d at 749. The conviction on rape should be vacated, and the case remanded for resentencing. *Weber*, 159 Wn.2d at 266; *Fagundes*, 26 Wn. App. at 486.

**5. The court erred in imposing a separate sentence for both the predicate crime and the felony murder.**

The sentencing “merger” doctrine prevents the prosecution from “pyramiding the charges” against a defendant and thereby gaining greater punishment. *See State v. Johnson*, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979). The doctrine is a tool of statutory construction, designed to

determine whether the Legislature intended that the defendant should be punished multiple times for a particular act. *State v. Saunders*, 120 Wn. App. 800, 86 P.2d 232 (2004). Whether the merger doctrine bars double punishment is a question of law that the court reviews de novo. *State v. Zumwalt*, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), *aff'd sub nom.* *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005); *State v. Vladovic*, 99 Wn.2d 413, 419 & n. 2, 662 P.2d 853 (1983).

Thus, the court in *Fagundes* held that because proof of an underlying felony was an essential element of the proof for elevating the death to a felony murder, the underlying felonies charged against the defendant merged into the felony murder. *Fagundes*, 26 Wn. App. at 846. The court reached this conclusion even though it agreed with the state that the underlying felony serves an additional purpose other than just elevating the murder charge. *Id.* at 486. The predicate felony also relieves the prosecution of the burden of proving the mental element normally required to prove first-degree murder. *Id.* Regardless of that additional function, because it was essential for elevating the death to a felony murder, the predicate felony merged into that felony murder and a separate sentence for the predicate offense had to be dismissed. *Fagundes*, 26 Wn. App. at 486.

Similarly, in *Williams, supra*, the defendant was tried on first-degree felony murder with a predicate crime of robbery or attempted robbery. *Williams*, 131 Wn. App. at 497–98. On appeal, the prosecution argued that the robbery was “factually disconnected” and served “a different purpose or intent” than the murder, and thus did not merge. 131 Wn. App. at 499; *see e.g. State v. Peyton*, 29 Wn. App. 701, 630 P.2d 1362, *review denied*, 96 Wn.2d 1024 (1981).

In rejecting the prosecution’s argument, the *Williams* Court first noted that two offenses merge if “to prove a particular degree of crime, the State must prove that the crime ‘was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.’” *Williams*, 131 Wn. App. at 498, quoting *Vladovic*, 99 Wn.2d at 419 & n. 2. Next, the court looked at the statutes, “to determine whether the legislature intended to impose a single punishment for a homicide committed in furtherance or in immediate flight from” the predicate offense. *Williams*, 131 Wn. App. at 498–99. Because the elements of the first degree felony murder statute specifically required proof of the predicate crime, the court noted that to find the defendant guilty of the felony murder, the jury had to find him guilty of the underlying crime and of killing the victim in the course,

furtherance, or immediate flight “therefrom.” 131 Wn.2d at 499. As a result, the predicate crime merged with the felony murder. *Id.*

In reaching its conclusion, the *Williams* Court rejected the argument that the “general merger law” applied and, under that law, “criminal acts with a different purpose and effect do not merge,” regardless whether one is an element of the other. 131 Wn.2d at 498. Cases involving felony murder are different from regular “merger” cases, the court held, because the lesser offense is “an essential element of the greater offense” under the felony murder statute. 131 Wn.2d at 499–500. Without proof of the underlying crime, there could be no first-degree murder conviction. *Id.* It was therefore improper to impose a separate sentence for the underlying or predicate felony, which merged into the felony murder offense. 131 Wn.2d at 499–500.

Here, Mr. Muhammad was charged with and convicted of committing first degree felony murder under RCW 9A.32.010(1)(c), by causing Ms. Richardson’s death while “committ[ing] or attempt[ing] to commit the crime of rape in the first or second degree.” CP 22, 395, 572. He was also charged with and convicted of the very same first degree rape. CP 23, 395, 572. In order to find Mr. Muhammad guilty of first degree murder, the jury had to find him guilty of rape and of killing Ms.

Richardson in the course of or in furtherance of or in immediate flight from that crime. RCW 9A32.010(1)(c). The rape would not merge only if it was “merely incidental’ to the homicide. *Williams*, 131 Wn. App. at 499, quoting *Vladovic*, 99 Wn.2d at 421. That is not the case here. The rape “was integral to the killing. The [strangulation] had no purpose or intent outside of accomplishing the [rape] or facilitating [Mr. Muhammad’s] departure from the scene.” *Williams*, 131 Wn. App. at 499. The rape should have been merged into the first-degree felony murder for sentencing. *Williams*, 131 Wn. App. at 498–99; *Fagundes*, 26 Wn. App. at 485–86.

In response, the state may attempt to rely on *Peyton*, *supra*, and argue that this Court has declined to follow *Fagundes*. Any such argument should be rejected. In *Peyton* this Court did not reject *Fagundes*. Instead the court simply held that under the unique facts of *Peyton*, the crimes of robbery and felony murder were not “intertwined” and thus did not merge. *Peyton*, 29 Wn. App. at 719–20; *see State v. McJimpson*, 79 Wn. App. 164, 176–77, 901 P.2d 354 (1995), *review denied*, 129 Wn.2d 1013 (1996).

In *Peyton*, after a completed bank robbery, the robbers fled in one vehicle, abandoned it, fled again in another vehicle, and then shot a law

enforcement officer in a gunfight. The robbery did not merge with the homicide because it was disconnected in time, place, and circumstances. 29 Wn. App. at 719–20. Thus in *Peyton* the predicate felony was over and the murder was an entirely separate act—unlike here, where the underlying felony is alleged to have been committed by essentially the same acts as the felony murder.

As this court explained in *Williams*, if the predicate crime and homicide are “factually disconnected,” the defendant could not be convicted of *felony murder*:

If, as the State suggests, the jury found the attempted robbery was complete when Mr. Williams took some undefined substantial step earlier in the evening, then it could not have found that the shooting was in furtherance of ... that attempt. And the first degree murder conviction could not stand. Likewise, the State's assertion that the two crimes were completely unrelated is inconsistent with the felony murder charge.

*Williams*, 131 Wn. App. at 499. In any event, unlike in *Peyton*, the decedent here was not killed after the perpetrator raped someone else and fled the scene of the rape. The state had insufficient evidence to establish the rape and homicide were disconnected in time, place, and circumstances. This is why Mr. Muhammad was charged with and convicted of felony murder as opposed to intentional murder. The jury

determined Ms. Richardson was killed by Mr. Muhammad in the course of or in furtherance of the rape or in immediate flight therefrom.

If, as the trial court suggests in its findings, the jury instead found the rape was complete before the murder was committed, then it could not have found that the murder was in furtherance of or in flight from the rape. And, the first degree murder conviction could not stand. *Williams*, 131 Wn. App. at 499. Likewise, the trial court’s assertion that the two crimes were completely unrelated is inconsistent with the felony murder charge. *Id.*

As this Court explained in *Williams*, the two convictions merged, and the conviction for first degree rape must be reversed and the matter remanded for resentencing. *Williams*, 131 Wn. App. at 499–500.

**6. Appeal costs should not be assessed.**

Pursuant to RAP 15.2(f), “[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” The trial court found Mr. Muhammad indigent for purposes of appeal. CP 597–600. Appellate counsel anticipates filing a report as to his continued indigency no later

than 60 days following the filing of this brief. Mr. Muhammad should not be assessed appellate costs if the State were to substantially prevail.

**D. CONCLUSION**

For the reasons stated, the matter should be remanded for a new trial without the suppressed evidence or, alternatively, for resentencing.

Respectfully submitted on April 3, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 3, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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