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Washington State Supreme Court

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No. 91532-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Petitioner.

Filed
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DEC - 7 2015

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

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

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether or not warrantless law enforcement access to cell phone data violates article I, section 7 of the Washington Constitution?

STATEMENT OF THE CASE

A vehicle license plate scanner operated by a City of Yakima police officer indicated a stolen vehicle had driven past him. The officer pulled the vehicle over, but the driver fled the scene on foot. *State v. Samalia*, 186 Wn. App. 224, 226-27, 344 P.3d 722 (2015). The officer searched the car and found a cell phone on the center console. Without seeking a warrant, the officer opened the phone's address book and call log and dialed contacts in an attempt to identify the owner. Those efforts eventually led officers to the defendant, who was charged with possession of a stolen vehicle. Mr. Samalia moved to suppress his identification

because it resulted from the data discovered in the warrantless search of the cell phone, but the trial court denied the motion and the Court of Appeals affirmed.

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

ARGUMENT

The court below misapplied article I, section 7 when it denied suppression. In light of the wealth of personal information contained in modern cell phones and other mobile electronic devices, *amicus* respectfully asks this Court to recognize and protect the significant privacy interests in cell phone data, and prohibit warrantless access to that data. Cell phones are now “such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.” *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2484, 189 L. Ed. 2d 430 (2014).

As other new mobile devices—including tablets and smartwatches—join phones in common use, courts must be cognizant of the ubiquitous nature of mobile device technology and its heightened privacy interest under article I, section 7 compared to other pieces of

personal property. Cellular phone technology has morphed from handset-only radios into micro-computing devices more powerful than desktop computers built a few years ago. This development has constitutional significance, and *amicus* respectfully urges this Court to prohibit warrantless searches of all handheld computing devices unless the “community caretaking function” exception applies.¹

A. There is a Significant Privacy Interest in the Data and Information Contained on Cell Phones and Other Personal Electronic Devices

Washington’s constitutional privacy jurisprudence offers strong support for the proposition that a person has a significant privacy interest in the data contained in cell phones and other personal mobile electronic devices. Today’s mobile device technology is completely different from the technology available even a decade ago. Early cell phones were simply portable phones capable of making calls. The technology rapidly developed, however, so that by last year, the United States Supreme Court recognized that “[e]ven the most basic phones that sell for less than \$20 might hold photographs, picture messages, text messages, Internet

¹ Of course, searches may also be allowed pursuant to recognized exceptions to the warrant requirement in the narrow circumstances where such exceptions apply. Here the State claims that exigent circumstances justified the search. *Amicus* fully agrees with *Samalia* that no such exigency existed. Supplemental Brief at 16-17.

browsing history², a calendar, a thousand-entry phone book, and so on.” *Riley*, 134 S. Ct. at 2489. Today, cell phones have been replaced by “smartphones” with the capability of accessing, immediately, vast quantities of sensitive information. “The term ‘cell phone’ is itself misleading ... [t]hey could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps or newspapers.” *Id.* The number of biometric features and health related information that are now preinstalled on cell phones and similar devices increases with each product’s new release. Cell phones can now reveal where users have been and how far they walked to get there; who they talk to and how often; what they have eaten, when they ate it, and where; and what they spend money on and where. For good measure, every video and photo taken by these devices is often automatically geocoded for location accuracy.

Further, tablets and other devices that provide wireless access to the Internet increasingly make use of low-cost “cloud” storage. Cloud storage provides the ability to access, via a variety of devices, information stored remotely on a server at any time and any location. Use of the cloud has become integrated into our daily lifestyles, offering consumers the

² *Cf. In re: Google Inc. Cookie Placement Consumer Privacy Litigation*, --- F.3d ----, 2015 WL 6875340, *6, *7 (3d Cir. Nov. 10, 2015) (holding under the Wiretap Act that web browsing history is private and cannot be searched without a warrant).

ability to share their political beliefs on social media from any part of the world, work more efficiently, view pictures and videos, read books and magazines, conduct bank transactions and payments, and engage in religious fellowship. Not surprisingly, this capability has blurred the line between data kept “on the phone” and “on the cloud,” so that access to a single device can open a vast portal into someone’s life, capturing years of tax filings, employment records, intimate photos, or other private affairs, regardless of where the information is actually stored.

The fact that “nearly two-thirds of Americans now own a smartphone” and “10% of Americans own a smartphone but do not have broadband at home,” underscores our increasing reliance on these mobile devices, not only as personal information devices but also as a critical means of accessing the Internet and conducting general computing that in the past required a traditional computer. A. Smith, Pew Research Center, *U.S. Smartphone Use in 2015* (April 1, 2015). This dependence on personal electronic wireless devices means that a substantial population will soon be—if they are not already—walking around with the majority of their personal data on their phones.

The capabilities of these devices are, moreover, continually evolving and expanding. In *Riley*, decided just over a year ago, the Court highlighted the storage capacity of the top-selling smartphone as 16

gigabytes and marveled at how much information that would hold. *Riley*, 134 S. Ct. at 2489. Today, one of the most popular models of the iPhone 6s has 64 gigabytes of storage. Meanwhile, purchasing one terabyte (1000 gigabytes) of cloud storage can cost as little as ten dollars a month with services such as Google Drive and Dropbox.

Significantly, “those with relatively *low income* and educational attainment levels, younger adults, and *non-whites* are especially likely to be ‘smartphone-dependent,’” since the high cost of broadband access and computers make them a luxury expense for those households compared to a phone with a data plan. A. Smith at 2 (emphasis added); *see also* A. Holmes, The Center for Public Integrity, *U.S. Internet users pay more and have fewer choices than Europeans* (April 1, 2015). The result is that a statistically significant number of minority non-whites are especially likely to have sensitive information stored on or accessible through these devices because they likely serve as their only medium for connecting to the online world.

Many of the pieces of information stored on or accessed by cell phones are individually sensitive. But that pales when considered next to the sensitivity of the aggregation of all of the information. There can be little doubt that such information represents an individual’s private affairs, which cannot be disturbed without authority of law.

B. Existing Jurisprudence Recognizes the Constitutionally Significant Privacy Interest in Data and Information Contained on Cell Phones.

Since Mr. Samalia's conviction, both this Court and the United States Supreme Court have decided important cases regarding privacy and cell phone technology, *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), and *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). These cases provide the legal framework applicable to law enforcement searches of cell phones and make it clear that our privacy interests in the information contained on these phones is constitutionally significant.

Last year the United States Supreme Court unanimously recognized the constitutional significance of the characteristics discussed above, holding that “the [massive] storage capacity of cell phones has several interrelated consequences for privacy ... a cell phone collects in one place many distinct types of information— an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record.” *Riley*, 134 S. Ct. at 2489. “Most people,” the *Riley* court found, “cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so.” *Id.* (citing Kerr, *Foreward: Accounting for*

Technological Change, 36 HARV. J.L. & PUB. POL'Y 403, 404-405 (2013)). “The sum of an individual’s private life can be reconstructed through a thousand photographs” by geotagging locations, descriptions, and even hyper-advanced image recognition software. *Id.* In light of a cell phone’s special characteristics, the *Riley* court recognized applying rules from seminal search and seizure cases decided decades ago, like *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) and *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), was inappropriate. *Id.* at 2484. The Court further emphasized that the “rationales” of pre-1975 search cases have very little “force with respect to digital content on cell phones.” *Id.* at 2485.

As this Court made clear in last year’s decision involving cell phone text messages, *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), “technological advancements do not extinguish privacy interests that Washington citizens are entitled to hold.” *Id.* at 870 (holding that a text message conversation is “a private affair protected by the state constitution from warrantless intrusion”). Several justices of this Court found that when “considering the wealth of personal and private information that is potentially stored on a cell phone, we should continue to recognize a rule that *does not incentivize* warrantless searches of cell phones.” *Id.* at 881 (C. Johnson, J., concurring) (emphasis added).

If, as in *Hinton*, a warrant is required to search cell phone text messages, surely the same logic applies with even greater force to a cell phone and the entirety of the data it carries. Washington's article I, section 7 jurisprudence demands the conclusion that cell phone data and data in other personal mobile electronic devices are equally deserving of heightened privacy protection under the state constitution. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (requiring warrant under article I, section 7 for pen register, which allows police to identify the numbers dialed in telephonic communication, virtually the same information as is revealed by contact logs in cell phones); *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003) (requiring warrant to attach GPS device to vehicle for purposes of tracking it; similar location information is available from smartphones); *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007) (banking records); *State v. Jordan*, 160 Wn.2d 121, 156 P.3d 893 (2007) (motel registry information).

C. Abandonment Is a Legal Fiction in This Case and Should Be Applicable to Phones and Other Personal Electronic Devices Only Under Extraordinary Circumstances

Contrary to the Court of Appeals' holding, a person's privacy interest does not extinguish merely because the property is left in a public place. A search occurs under article I, section 7 "when the government disturbs 'those privacy interests which citizens of this state have held, and

should be entitled to hold, safe from governmental trespass absent a warrant.” *Hinton*, 179 Wn.2d at 870 (citing *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). If allowed to stand, the decision below threatens the privacy of anyone who accidentally leaves their phone in a public place—including parks, buses, and ride- or car-sharing services—and is incompatible with article I, section 7.

Applying centuries old property analysis to sophisticated modern technological personal devices is a disservice to article I, section 7. As Judge Siddoway’s dissent in the lower court cogently points out: “Recent search and seizure jurisprudence recognizes that conventional cell phones are fundamentally different from other property, and that exceptions to the warrant requirement might not apply or might apply more narrowly where a cell phone or similar device is at issue.” *Samalia*, 186 Wn. App. at 233. As noted by Judge Siddoway, Mr. Samalia did not abandon his cell phone under any property law standard—at most, he misplaced or lost track of the phone during the heat of the interaction. *Id.* at 232. Although there might be circumstances where a cell phone is abandoned in the traditional sense, the legal fiction of abandonment of privacy interests when property is left in a public place should not be stretched to cover the circumstances here where a personal electronic mobile device, with heightened privacy interests at stake, was involved. Cell phones and other mobile devices not

only contain numerous pieces of personal information, but also function as digital keys to the cloud and the wealth of private, confidential information locked in there. It would be patently absurd to suggest that abandonment of a traditional key means that warrantless access is allowed to the house it locks; the same must be true of digital keys to electronic information.

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990), is particularly instructive. There, this Court reasoned that just like the telephones in *Gunwall*, garbage collection is “a necessary component of modern life,” “a personal and business necessity indispensable to one’s ability to effectively communicate in today’s complex society.” *Id.* at 581 (quoting *Gunwall*, 106 Wn.2d at 67). Its holding that garbage placed out in public on the curb—garbage that is clearly abandoned, even under traditional property law—is protected from warrantless searches by law enforcement should apply equally strongly to misplaced cell phones. Similarly, the *Hinton* court made clear the “right to privacy under the state constitution is not confined to a ‘protected places’ analysis; what is significant is the nature of information at issue, not its physical location.” *Hinton*, 179 Wn.2d at 869-70. “[T]he mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it” beyond the scope of article

I, section 7's protection. *Hinton*, 179 Wn.2d at 869-70.

Law enforcement should not have carte blanche authority to search lost cell phones found in public spaces (much less private ones). As discussed below, the constitutionally permissible scope of any warrantless search of such phones should only be that which is minimally necessary to identify the cell phone's owner. Here, where the officer used the phone as part of a criminal investigation, a warrant is clearly required. *Gunwall*, *Boland*, *Jackson*, *Miles*, *Jorden*, and *Hinton* taken together, "compel the conclusion that voluminous private information likely to be found on a cell phone remains protected under article I, section 7 ... even when the phone is left behind in a place where there is ... no privacy interest." *Samalia*, 186 Wn. App. at 237-38.

D. Cursory Warrantless Searches Should be Permitted Solely to Return Devices to Their Owners

The foregoing discussion presumes that police officers wish to search a phone as part of a criminal investigation, as in the present case. In other cases, police officers may have no interest beyond a desire to return a lost phone to its owner—but believe the best manner to accomplish that task is to search through the phone. Thus, although there is no question that a warrant was required in the present case, *amicus* respectfully suggests that it may also be useful for the Court to provide

guidance to law enforcement as to the rules for searching phones for purposes other than criminal investigation.

This Court has recognized that the constitutional strictures of article I, section 7 function differently when a police officer is performing a “community caretaking” role as opposed to investigating crime. *See e.g., State v. Smith*, 177 Wn.2d 533, 303 P.3d 1047 (2013). The “community caretaking function” is broad, encompassing virtually all activities other than law enforcement, “including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid.” *State v. Acrey*, 148 Wn.2d 738, 748, 64 P.3d 594 (2003) (quotation omitted). It is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *State v. Kinzy*, 141 Wn.2d 373, 385, 5 P.3d 668 (2000) (quotation omitted).

Presumably, returning lost property falls within the scope of community caretaking, and law enforcement has an arguable duty to “attempt to notify the apparent owner” when it comes into possession of lost or mislaid personal property. RCW 63.21.060. Nonetheless, due to the high sensitivity of cell phone data, law enforcement should be limited in their physical interaction and handling of mobile devices even when functioning as “community caretakers” to return lost phones.

Modern phone technology makes it entirely possible to identify device owners with only very limited searches of those devices. All current fourth generation (4G) cell phone technology in the U.S.—irrespective of the wireless provider—operates with handsets that require a Subscriber Identity Module (SIM) card that can be physically ejected or removed from the handset.³ Each SIM card has a unique international mobile subscriber identity (IMSI) number, which the police can use to query the wireless provider in order to identify the owner. For older handsets or legacy devices using non-SIM technology, the electronic serial number (ESN) is typically discerned by removing the battery. To the extent a mobile telecom provider has subscriber information, an ESN is sufficient to locate it. If law enforcement’s purpose is to identify the phone’s owner under the “community caretaking” exception, then this limited physical inspection of the SIM or ESN should more than adequately meet that goal.

Amicus recognizes that prepaid or Pay-As-You-Go cell phones may not have accessible subscriber information. In such cases—*i.e.*, only if the physical inspection fails to provide evidence of ownership—it may be appropriate for law enforcement acting in the community caretaking

³ For a glossary of related wireless terms, *see e.g.*, CTIA—The Wireless Association, Resource Library, <http://www.ctia.org/resource-library?Types=Glossary&OrderBy=SortTitle>.

capacity to make a cursory examination of a limited amount of electronic information on the phone, solely for the purpose of identifying the owner in order to return the phone. Only a cursory search should be allowed, and there should be no attempt to defeat any security or encryption the device owner has implemented.⁴

In summary, when law enforcement encounters a lost or misplaced cell phone and/or other electronic mobile devices, their “community caretaking” exception enables them to perform a limited, usually only physical, search of the handset to identify the owner.

In the case at bar, the officer’s only purpose for searching the phone was investigating criminality. *Samalia*, 186 Wn. App. at 227. There is no reason why the officer could not have obtained a warrant based upon probable cause; he simply chose not to. Under these circumstances, article I, section 7 demands a warrant be issued before law enforcement is allowed to invade one’s immense privacy interest in the mosaic of data contained in cell phones and similar mobile electronic devices.

⁴ One common example of such security measures, available on almost all phones, is a “lock screen,” requiring the input of a security code before the phone’s data may be accessed. Nearly all corporate entities require employees to enable a lock screen after a defined period of inactivity, and it is relatively common for many consumers to utilize a lock screen as well. This Court should unequivocally hold that no attempt to defeat a device’s lock screen should be permitted without a warrant.

CONCLUSION

For the reasons set forth herein, *amicus* respectfully requests that the Court of Appeals' ruling be reversed.

Respectfully submitted this 25th day of November 2015.

By



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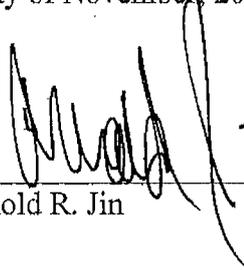
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