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SUPREME COURT
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Nov 25, 2015, 11:59 am
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No. 91532-6

THE SUPREME COURT RECEIVED BY E-MAIL
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN SAMALIA, APPELLANT

Filed *E*
Washington State Supreme Court

DEC - 7 2015 *h/h*

Ronald R. Carpenter
Clerk

BRIEF OF AMICUS CURIAE

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible for providing advice to the duly elected sheriff of their respective counties. RCW 36.27.020.

WAPA is interested in cases, such as this, that bear on law enforcements’ statutory duties and their ability to investigate criminal activity and collect relevant evidence.

II. ISSUES PRESENTED

1. Whether law enforcement may conduct a limited search of a cellular phone without a warrant pursuant to an exigency exception to the warrant requirement where the suspected owner of the telephone is a fleeing felon actively evading apprehension?
2. Whether a law enforcement officer, having come into possession of lost or mislaid property is required to conduct a limited search of that property to determine its owner, such that this limited search is acceptable under the community caretaking exception to the warrant requirement?

III. STATEMENT OF THE CASE

The facts of this case are discussed in detail in the briefs of the parties. In short, law enforcement stopped a vehicle that was confirmed stolen. The driver exited the vehicle, faced the officer, refused commands and then fled. The officer chased the driver, but he got away. The officer

searched the car, partly to help identify the driver, and found a cell phone on or in the center console. Not knowing who the phone belonged to, the officer called some phone numbers found in the cell phone's contacts. After meeting one of the listed contacts, law enforcement determined that Mr. Samalia was the owner of the phone. He was subsequently charged with possession of a stolen motor vehicle.¹

IV. ARGUMENT

Summary

Officers should be permitted to check a cell phone if left behind by a fleeing felon if the officer's subjective intent is to simply identify the owner of the phone and if doing so is objectively reasonable in light of all circumstances. A limited search is proper under two well-recognized exceptions to the warrant requirement under established Washington law, the exigent circumstance and community caretaking exceptions.

Argument

It is without question that individuals have a significant privacy interest under both the Federal and State Constitutions in information stored in a cellular telephone, so that information should not be accessed by police without a warrant. *Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014); *State v. Hinton*, 179 Wn.2d 862, 319 P.3d

¹ These facts were taken from *State v. Samalia*, 186 Wn. App. 224, 344 P.3d 722 (2015).

9 (2014). However, warrantless searches are permissible under recognized and well-defined circumstances such as exigent circumstances or the community caretaking function of law enforcement. Either exception could apply here.

Here, Mr. Samalia's flight from felony arrest created an exigency that allowed law enforcement to conduct a limited search of the cell phone to determine solely his identity. Additionally, because officers have a statutory duty to return lost or mislaid property, they may briefly check a cell phone to determine its owner.² WAPA urges this court to hold that under well-established jurisprudence, the exigency and community caretaking exceptions to the warrant requirement permit and require officers to conduct limited searches of cell phones to determine ownership, when doing so is reasonable in light of all circumstances. Both the exigency and community caretaking exceptions to the warrant requirement can be carefully limited to prevent abuses by, for example, allowing a search for a cell phone owner's identity only where the State can establish that the officer's subjective purpose was solely to identify the owner.³

² Whether the cellular phone was *abandoned* by Mr. Samalia's flight from law enforcement is addressed in the briefs of the parties and will not be discussed herein.

³ WAPA does not suggest that these exceptions necessarily authorize the search conducted in Mr. Samalia's case. The record below may be insufficient to make this

A. RILEY PERMITS A LIMITED SEARCH OF A CELLULAR PHONE TO APPREHEND A FLEEING FELONY SUSPECT.

The court of appeals found that the exigency exception to the warrant requirement applied in Mr. Samalia's case and the search of his cellular phone to pursue a fleeing suspect was justified. *Samalia*, 186 Wn. App. at 230. That holding should be affirmed.

In *Riley*, *supra*, the Supreme Court stated:

[E]ven though the search incident to arrest exception does not apply to cell phones, other **case-specific exceptions may still justify a warrantless search of a particular phone**. "One well-recognized exception applies when "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S., at —, 131 S.Ct., at 1856 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, **to pursue a fleeing suspect**, and to assist persons who are seriously injured or are threatened with imminent injury...."

Riley, 134 S.Ct. at 2494 (emphasis added).⁴

determination as it does not appear that the trial court made any specific findings as to the officer's subjective intent in searching the cell phone, CP 27-32, although the officer testified that he searched the contacts of the phone "to see who the phone belonged to" and that it was "fair enough" to say that he hoped the person who ran was also the person who owned the phone. RP 48-49.

⁴ *Riley* involved searches of defendants' cell phones incident to their arrest. These cellular telephones were taken from the defendants' persons upon arrest and searched without a warrant. The facts of *Riley* are not instructive in this case as law enforcement was neither able to effectuate an arrest on Mr. Samalia, nor knew whether the cellular phone located in the stolen car belonged to him.

Since *Riley*, few courts have had the occasion to reexamine the exigency exception to the warrant requirement in the context of cell phone searches. One such court stated, in the context of tracking a murder suspect's cellular phone:

Exigent circumstances exist if, “measured against the time needed to obtain a warrant,” and under the facts known at the time, it was objectively reasonable for law enforcement to conduct a warrantless search when: (1) law enforcement was engaged in a “hot pursuit”; (2) there was a threat to the safety of either the suspect or someone else; (3) there was a risk of destruction of evidence; or (4) the suspect was likely to flee ... The objective exigent circumstances test asks “whether a police officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or **greatly enhance the likelihood of the suspect's escape.**”

State v. Subdiaz-Osorio, 357 Wis.2d 41, 83, 849 N.W.2d 748, 769 (2014) (internal citations omitted) (emphasis added).

To be reasonable, a search under this exception must be limited in scope so that it is “strictly circumscribed by the exigencies which justify its initiation.” *See, Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (internal quotation marks omitted); *see also, United States v. Reyes–Bosque*, 596 F.3d 1017, 1029 (9th Cir. 2010) (“In order to prove that the exigent circumstances doctrine justified a warrantless search, the government must [also] show that ... the search's scope and manner were reasonable to meet the need.”)

Washington courts consider six factors in determining whether exigent circumstances justify the warrantless search of a residence:

(1) [T]he gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.

State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127 (2002) (citing *State v. Terranova*, 105 Wn.2d 632, 716 P.2d 295 (1986)).⁵

The fourth and sixth factors are irrelevant to non-residential searches. The other four factors, however, are logical inquiries into whether a warrantless search of personal property such as a cellular phone is reasonable and justified under the totality of the circumstances.

In the context of searching personal property, this Court has discussed the emergency exception to the warrant requirement for the purpose of rendering medical aid. Limited searches of otherwise private personal property have been approved in medical emergencies where the search has been conducted for the express purpose of finding identification, medical alert cards, or the names of emergency contacts.

⁵ Other states have held exigency searches of homes for non-violent felons reasonable when imminent escape is likely. See, e.g., *State v. Sanders*, 233 Or.App. 373, 226 P.3d 82, 83 (2010) (possible felon in possession of a firearm and drug suspect's likely imminent escape from defendant's home justified warrantless search of defendant's home under Oregon Constitution).

See, State v. Loewen, 97 Wn.2d 562, 567-568, 647 P.2d 489 (1982) (holding a “medical emergency search” was invalid as the Court was not satisfied that the search was both subjectively motivated and objectively reasonable to meet the perceived need to render aid); *Cf. State v. Gibson*, 104 Wn. App. 792, 797, 17 P.3d 635 (2001) (warrantless search must be strictly circumscribed by the exigencies which justify its initiation--search under the emergency exception may not exceed the scope of a reasonable search to effectuate the purpose of the entry).

This Court should apply these well-settled principles to warrantless searches of cellular phones or other personal property in the exigent circumstance created by an actively fleeing felon. In so holding, the Court should require law enforcement to have the subjective motivation to conduct a limited warrantless search of a cellular phone to determine only the identity of the fleeing felony so as to prevent imminent escape, and not to search for other incriminatory evidence, as was discussed in *Loewen, supra*.⁶ Such a holding would also require law enforcement’s intent in

⁶ In *Riley*, the government also proposed a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered. The court stated: “This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.” *Riley*, 134 S.Ct. at 2492. However, this rejection of limited cell phone searches to determine a suspect’s identity did not address whether law enforcement may conduct a limited search under an exigency rationale, where an unidentified fleeing felon must be identified to prevent his or her imminent escape.

conducting such a search to be objectively reasonable under the circumstances of the particular case. The requirements of subjective motivation and objective reasonableness would safeguard against pretextual searches for evidence. *See, e.g., State v. Hutchison*, 56 Wn. App. 863, 866, 785 P.2d 1154 (1990).

Secondly, the Court's holding should require that in order for the exception to be applicable, the felony suspect is *currently* in flight from law enforcement.⁷ In so holding, the Court could ensure that, under the circumstances, a search warrant would be impracticable or impossible to obtain without greatly enhancing the suspect's likelihood of escape. The holding should also consider the *Cardenas* factors, specifically: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) a likelihood that the suspect will escape if not swiftly apprehended.

Here, several factors indicate that law enforcement conducted a reasonable search to determine the identity of a fleeing felony suspect. The officer had probable cause to believe the suspect had committed the

⁷ WAPA does not suggest that this approach is reasonable in the case of misdemeanants who attempt to flee from law enforcement.

felony of possession of a stolen motor vehicle. The suspect and his passenger *immediately* fled from law enforcement, precluding law enforcement from conducting any investigation into the crime or the identity of the driver. Law enforcement abandoned the chase of the suspect driver of the stolen car only because it became too dangerous.⁸ The officer viewed only the telephone's contacts list,⁹ and did not search photographs, calendar entries, Facebook updates, text messages, or other areas more likely to contain personal information. This extremely limited search to determine only the identity of the fleeing felony suspect to effectuate quick apprehension should be deemed reasonable under the circumstances and an exception to the warrant requirement.

B. LAW ENFORCEMENT HAS A DUTY TO RETURN LOST OR MISLAID PROPERTY; A LIMITED WARRANTLESS SEARCH TO DETERMINE OWNERSHIP IS PERMISSIBLE TO FULFILL THAT STATUTORY DUTY.

The court of appeals rested its decision below on its determination that Mr. Samalia abandoned his cellular phone when he fled. Even if this Court disagrees with that holding, it should affirm the result.¹⁰ Law

⁸ "I've worked the area for five years. I'm not going to chase a guy through there ... there's too many – too many obstacles." RP 45.

⁹ "I pushed Contacts button on the phone ... I had to turn on the phone – I either had to turn the phone on or push the Contact [sic] button." RP 48.

¹⁰ This Court may affirm on any grounds supported by the record. *State v. Bryant*, 97 Wn. App. 479, 490-91, 983 P.2d 1181 (1999), *review denied*, 140 Wn.2d 1026, 10 P.3d 406, *cert. denied*, 531 U.S. 1016, 121 S.Ct. 576, 148 L.Ed.2d 493 (2000).

enforcement has a statutory duty to determine the owner of a lost or mislaid phone. This statutory duty is related to law enforcement's community caretaking function and common law personal property principles.¹¹

Fourth Amendment and article 1, section 7 interests are not co-extensive with common law property rights, but a review of the common law may be instructive to the Court for assistance in deciding this matter. *State v. Kealey*, 80 Wn. App. 162, 170-171, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021, 919 P.2d 599 (1996). Distinctions exist at common law between "found" property, i.e., property that is abandoned, lost, or misplaced. *Id.* at 171. Property is abandoned when the owner intentionally relinquishes possession and all rights in the property. *Id.* Property is lost when the owner has parted with possession unwittingly and no longer knows its location. *Id.* Property is mislaid when the owner intentionally puts the item in a particular place, and then forgets and leaves it there. *Id.* There is little distinction between lost and mislaid property for the analysis here as the owner could have intentionally placed

¹¹ The community caretaking function of law enforcement is totally divorced from criminal investigation. *State v. Kinzy*, 141 Wn.2d 373, 385, 5 P.3d 668 (2000). Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled. *Id.* at 388; *see also*, *State v. Acrey*, 148 Wn.2d 738, 748-750, 64 P.3d 594 (2003) (emphasis added) (community caretaking exception to warrant requirement is cautiously applied.)

the phone in or on the console and unintentionally left it there, or the phone could have accidentally fallen out of his pocket and landed there.

Police perform a great variety of public services in addition to crime prevention and detection. In carrying out these broader responsibilities, sometimes officers must engage in a search for some purpose other than finding evidence of criminal activity. Police officers may inventory property which is lost or mislaid. *See*, Wayne R. LaFave, 3 Search and Seizure § 5.5(d) (5th Ed. 2015). Courts recognize a police *obligation* to try to find the owner of property they find or which a finder turns over to them, and on that basis, courts have found that a limited examination of contents of the item is permissible. *Id.* Courts from other jurisdictions have held, for differing purposes and on differing theories, that officers are justified in conducting a limited inspection of lost property to discover the property owner's identity.¹²

¹² *See, e.g., Gudema v. Nassau Cnty.*, 163 F.3d 717, 722 (2d Cir. 1998) (upholding police department's search of police officer's shield case in 42 U.S.C. § 1983 matter where, among other things, the government acted "in its capacity as employer rather than law enforcement"); *United States v. Sumlin*, 909 F.2d 1218, 1220 (8th Cir. 1990) (finding no violation of expectation of privacy where officers searched purse to determine whether it was the purse defendant reported stolen in robbery); *United States v. Michael*, 66 M.J. 78, 81 (C.A.A.F. 2008) (finding reasonable "in the military context" search to determine ownership of a computer discovered in a military barracks restroom); *People v. Juan*, 175 Cal.App.3d 1064, 221 Cal.Rptr. 338, 341 (1985) (finding no reasonable expectation of privacy in jacket left at empty table in public restaurant, on theory that owner likely "hopes" some "Good Samaritan" will search for identification to return garment); *State v. Ching*, 67 Haw. 107, 678 P.2d 1088, 1093 (1984) (upholding suppression of cocaine in closed cylinder found in lost leather pouch as exceeding limits of valid search of lost items for identification); *State v. Hamilton*, 314 Mont. 507, 67 P.3d 871, 876 (2003) (presuming that finder may examine contents of lost wallet to determine rightful owner in

In Washington, any governmental entity that acquires lost property “shall” attempt to notify the apparent owner of the property,¹³ and the procedure by which the return of such property is to be accomplished is statutorily prescribed. RCW 63.21.060. In *Kealey*, the court held this obligation to ascertain the rightful owner of lost or mislaid property is an exception to the warrant requirement. *Kealey*, 80 Wn. App. at 174-175; *see also*, *State v. Coyne*, 99 Wn. App. 566, 572, 995 P.2d 78 (2000) (discussing statutory duties of law enforcement to return lost or mislaid property and concluding that lost property statute does not allow officers to conduct a detention for a warrant check on the property owner). Further, in *Kealey*, the court held that the co-existence of investigatory and administrative motives does not invalidate a search of lost or mislaid property for identification. *Id.*

The *Kealey* court justified its holding in a number of ways: (1) the Fourth Amendment “does not metamorphose reasonable searches into unreasonable ones simply because the police officers have additional

holding under state constitution that expectation of privacy in lost property is diminished only to extent of permitting search by least intrusive means, as specified in written inventory policy); *State v. Pidcock*, 306 Or. 335, 759 P.2d 1092, 1095–96 (1988) (upholding search of briefcase where officers' motive was to assist private finders of lost property in discharging statutory duty to locate and return property to rightful owner.)

¹³ It is well settled that the word “shall” in a statute is presumptively imperative and operates to create a duty. *State v. Bryan*, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980). The word “shall” in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent. *Id.*

information of wrongdoing”; (2) the defendant’s privacy interest in the contents of the lost or mislaid property was already subject to the right of police to search for identification and the knowledge that she was probably involved in illegal activities did not increase her privacy interest; (3) the requirement of a search warrant could result in a paradox – if a warrant was required and granted, the police could search the property, but if the court did not find probable cause to search, then “the police would be back where they began and would presumably be entitled to search the [property] for identification” for the purpose of returning the property to its rightful owner; and (4) the presence of an investigatory motive does not invalidate a nonpretextual search to inventory the contents of property seized by police. *Id.*¹⁴

Ultimately, this Court must weigh a person’s privacy rights in the contents of his or her cell phone and the interest to be free from police interference against his or her interest in having potentially valuable lost

¹⁴ Citing *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994) (“We have recently said that an inventory search is valid, even if the searching officer had an investigatory motive, as long as the officer would have conducted the search in question anyway pursuant to police inventory practices.”); *United States v. Agofsky*, 20 F.3d 866, 873 (8th Cir. 1994), *cert. denied*, 513 U.S. 909, 115 S.Ct. 280, 363, 130 L.Ed.2d 196 (1994) (“The presence of an investigatory motive, even if proven, does not invalidate an otherwise lawful inventory search.”); *United States v. Rodriguez-Morales*, 929 F.2d 780, 787 (1st Cir. 1991) (“[t]he coexistence of investigatory and caretaking motives will not invalidate the seizure.”), *cert. denied*, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992); *United States v. Frank*, 864 F.2d 992, 1001 (3rd Cir. 1988), *cert. denied*, 490 U.S. 1095, 109 S.Ct. 2442, 104 L.Ed.2d 998 (1989); *United States v. Orozco*, 715 F.2d 158, 161 (5th Cir. 1983) (*per curiam*); *People v. Hauseman*, 900 P.2d 74, 78 (Colo. 1995).

or mislaid property returned and the duty of law enforcement to ensure its return. *See, Acrey*, 148 Wn.2d at 750.¹⁵

In doing so, WAPA requests this Court take into consideration the justifications enumerated in *Kealey* which authorize limited searches of personal property to determine ownership under the community caretaking exception to the warrant requirement. Cellular phones are not easily identifiable to the owner of the phone without viewing the phone's contents; generally cell phones are nondescript, fungible items, only differing by color or type of carrying case. Yet, despite the commonplace appearance of most cell phones, they are invaluable to their owners.

Furthermore, in Mr. Samalia's case, it is especially true that, had the officer attempted to apply for a search warrant, a neutral and detached magistrate may not have found probable cause for the search; simply because the phone was located in a stolen vehicle did not necessarily mean

¹⁵ Not only does law enforcement have the statutory duty to locate the owner of mislaid or lost property and attempt to return it, but the owner of the property in which the lost or mislaid item is found also has this duty. The finder of lost or misplaced goods acts as bailee for the true owner, and has certain rights and obligations with respect to their care. *Kealey*, 80 Wn. App. at 172. One obligation of a bailee is the duty to deliver such property to its true owner. *Id.* Thus, even if Officer Yates did not have the ability to search the telephone to discover the identity of the owner, the owner of the vehicle would still have had the duty to search it and return it.

WAPA cites this bailor/bailee law involving private citizens' duties with respect to the found property of another not to argue that the identity of the cell phone's owner would be a matter of inevitable discovery, but rather to demonstrate Washington's significant emphasis on personal property rights and the importance of citizens attempting to effectuate such property's return when lost.

that evidence of the crime, or the identity of the suspect would likely be located on the phone, especially where, as here, a week had passed between the theft of the vehicle and the time it was located by law enforcement, and the phone could have belonged to a person other than the defendant or his passenger – it could have belonged to anyone who ever rode in that vehicle. If a judge declined to issue a search warrant for the phone, law enforcement would still be required to search the phone to identify the owner to return it.

The only thing worse than losing one's cell phone data, is losing the cell phone itself.¹⁶ This Court should recognize law enforcement's duty to return a lost cell phone to its owner, and the exception to the warrant requirement created by that statutory and common law duty. While the community caretaking function of law enforcement as an exception to the warrant requirement is generally disapproved, in this circumstance, the Court should hold that an individual's interest in the return of their lost or misplaced cell phone justifies law enforcement's limited search of that cell phone to effectuate its return.

¹⁶ "The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley*, 134 S.Ct. at 2489.

1. A search conducted to determine the owner of a lost or mislaid cell phone is not only permissible under the Fourth Amendment, but is also permissible under the Washington Constitution.

Kealey's analysis, discussed *supra*, was conducted solely under a Fourth Amendment rubric. WAPA submits that article 1, section 7 is coextensive with the Federal Constitution as to law enforcement's authority to search a lost or mislaid item to determine its owner.¹⁷

In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the Court set forth six nonexclusive criteria as relevant in determining whether the Washington State Constitution extends broader rights to its citizens than the United States Constitution: (1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern. *Id.* at 59.

Here, the same Federal and State constitutional provisions are at issue as were addressed in *Gunwall*; therefore, the analysis here tracks the analysis in *Gunwall*. First, "due to the explicit language of Const. art. 1,

¹⁷ WAPA does not request this Court find any independent state grounds that would restrict law enforcement's ability to carry out its statutory mandate and common law duties, but rather, only briefs the independent state constitutional grounds issue for the purpose of demonstrating that, in this particular area, the State Constitution is coextensive with the Federal Constitution.

§ 7, ... the relevant inquiry for determining when a search has occurred is whether the State unreasonably intruded into the defendant's 'private affairs.'"¹⁸ *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Second, the language of article 1, section 7 substantially differs from the parallel provision of the Federal Constitution. Third, the State Constitutional Convention specifically rejected a proposal to adopt identical language to that of the Fourth Amendment. *Gunwall*, 106 Wn.2d at 66.

The Court next examines preexisting state law to determine if the Federal analysis, discussed above, is consistent with previously developed state law. *State v. Brooks*, 43 Wn. App. 560, 567, 718 P.2d 837 (1986). Even though Washington has typically been more protective of telephonic communications than the Federal system, *Gunwall*, 106 Wn.2d at 66, Washington's historical emphasis on personal property rights weighs against determining this issue on independent state constitutional grounds. The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the State of Washington, is the rule of law in Washington. RCW 4.04.010. 'Finders keepers, losers weepers' is a

¹⁸ The limited search of an item of property to determine its owner is not an unreasonable intrusion into private affairs, as any property owner (especially the owner of a cellular phone that contains contacts, calendars, bank access, social media access, etc.,) would want their lost or mislaid property to be returned to them, rather than being destroyed, sold, or traded as is allowed by RCW 63.32 or 63.40.

time-worn old saying, but not true. *Kealey*, 80 Wn. App. at 172. At common law, the finder of lost property had a duty to look for the owner and was absolutely liable if he delivered it to anyone other than the true owner. Wanda J. Wakefield, Annotation, *Validity, Construction, and Application of Lost or Abandoned Goods Statutes*, 23 A.L.R.4th 1025 (1983).

The statutory duties for non-law enforcement finders of lost property are codified in Washington under RCW 63.21.010. A finder's right to any claim of the lost property is extinguished if, within sixty days of the time the finding was reported, the true owner satisfactorily establishes his or her rights to the property. RCW 63.21.020. A finder who fails to comply with the statutory duties forfeits all rights to the property and is liable for the full value of the property to the true owner. RCW 63.21.040. It is clear that Washington's statutory scheme values an owner's right to recover lost property just as much as the common law did.

As to the fifth *Gunwall* criterion, the Federal Constitution is a grant of enumerated powers to the Federal government, and the state constitution serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. "Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guarantee of those rights rather than as a restriction on them."

Gunwall, 106 Wn.2d at 62. The sixth criterion inquires whether the issue is one of state or local concern or if there is a need for national unanimity. There are no additional local, state or national concerns that were not addressed by the discussion regarding the fourth criterion, above.

While Washington's constitution is generally more protective of a person's private affairs than the Federal constitution, Washington's law on personal property rights is equally as protective. These competing interests must be weighed against each other in determining this issue at hand, but this determination does not require the Court to engage in a separate article 1, section 7 analysis or decide the issue on independent state constitutional grounds.

Should the Court determine that law enforcement is *never* justified in conducting a warrantless limited search of lost personal property for the sole purpose of determining ownership, it is likely that a significant amount of lost or mislaid personal property will go unreturned to its true owner, and will ultimately be destroyed by the State.¹⁹ This result is clearly contrary to common law and Washington's emphasis on personal property rights.

¹⁹ Or, potentially, state and local governments could become liable for the full value of the item if sold or destroyed under RCW 63.20.040 or RCW 63.40.040, where ownership remained undetermined because law enforcement was prohibited from conducting a search of the property to determine the identity of the owner.

V. CONCLUSION

Warrantless searches of personal property, including cell phones, are permissible when necessary and reasonable to prevent a fleeing felon from escaping capture. Furthermore, while the community caretaking function of law enforcement as an exception to the warrant requirement has typically been disapproved in many circumstances, the circumstance where law enforcement searches a found article of personal property to solely determine its owner is grounded both in common law and statutory mandate, and should be deemed reasonable under both Fourth Amendment and article 1, section 7 jurisprudence. WAPA respectfully requests the Court to be mindful of these considerations when deciding this case.

Dated this 25 day of November, 2015.

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Attached for filing in the above case, please find the following documents:

1. Motion for Leave to File Amicus Curiae Brief
2. Brief of Amicus Curiae Washington Association of Prosecuting Attorneys
3. Certificate of Service

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 91532-6

RECEIVED BY E-MAIL

Respondent

CERTIFICATE OF SERVICE

v.

ADRIAN SAMALIA,

Petitioner

I certify that on the 25th day of November, 2015, I caused a true and correct copy of the Washington Association of Prosecuting Attorneys' Brief of Amicus Curiae Brief to be served on the following in the manner indicated below:

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