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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Petitioner.

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

PETITIONER'S ANSWER TO AMICUS BRIEF
FILED BY WASHINGTON ASSOCIATION OF PROSECUTING
ATTORNEYS

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A. ARGUMENT

1. WAPA's proposal to expand the "exigent circumstances" exception allowing warrantless cell phone searches unacceptably and unnecessarily dilutes constitutional privacy protections

"[W]ithout question," the Washington Association of Prosecuting Attorneys (WAPA) agrees that a cell phone contains vast private information and "that information should not be accessed without a warrant." WAPA Amicus at 2. But it asks this Court to expand the exigent circumstances exception to the warrant requirement for cell phones even though this exception is jealously guarded and carefully drawn. *State v. Garvin*, 166 Wn.2d 242, 250-51, 207 P.3d 1266 (2009). WAPA proposes a new rule permitting warrantless cell phone searches: if the police assert the subjective need to know a suspect's identity and the suspect has fled from the scene of a felony offense, the police may search through a cell phone for the purpose of determining the identity of the suspect without a warrant. WAPA concedes that when the investigation only involves a possible misdemeanor, there would not be enough of an emergency to justify searching a cell phone, but its rule would apply to any potential felony

investigation regardless of the seriousness of the felony. WAPA Amicus at 8 n.7.

This expansion of the exigent circumstances exception is overbroad and unnecessary. A true emergency is addressed through the existing exigent circumstances exception, when an imminent danger requires access to a person's cell phone and there is no time to get judicial authorization, dependent on the case-specific circumstances, as the Supreme Court said in *Riley v. California*, _ U.S. _, 134 S.Ct. 2473, 2484, 2492-94, 189 L.Ed.2d 430 (2014).¹

In *Riley*, the government asked the United States Supreme Court for a rule allowing a limited warrantless cell phone search to obtain information about the suspect's identity, similar to what WAPA seeks. 134 S.Ct. at 2492-93. But the Supreme Court unanimously rejected this proposal as unreasonable under the Fourth Amendment. Allowing a limited search for information such as confirming a person's identity or

¹ WAPA cites *State v. Subiaz-Osorio*, 849 N.W.2d 748 (2014) as its only post-*Riley* decision authorizing a search of cell phone information due to exigent circumstances. WAPA Amicus at 5. But WAPA does not mention that the lead opinion conceded the justices were "deeply divided" on the issues, including the of existence of exigent circumstances. 849 N.W.2d at 752 & n.4. *Subiaz-Osorio* involved use of cell phone location tracking to locate a known, fleeing homicide suspect, which is a different type of information and a different kind of emergency than at issue here.

seeking information about the offense would “impose few meaningful constraints on officers”; it “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.” *Id.*

Riley recognized, while WAPA ignores, the impracticality of conducting a limited warrantless search of a cell phone to ascertain information about a cell phone’s owner. Identifying who owns a cell phone is not like finding a lost wallet and checking it for a driver’s license. There is no readily available ownership information on a cell phone’s first screen and officers cannot know in advance what information will be found in a certain location. 134 S.Ct. at 2492. WAPA’s rule authorizing warrantless searches contains no limits on what area would be searched, it is only limited by an individual officer’s purported desire to seek identifying information. It would permit the police to rummage through the contacts list, learning not only who the owner associates with, but also “call logs” that will “typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label ‘my house’ in Wurie’s case.” *Id.* at 2493. Police could also scroll through the phone’s pictures for a view of the owner, but would also

see the owner's friends and family, places visited, and "dates, locations, and descriptions" that can reconstruct "[t]he sum of an individual's private life" *Id.* at 2489. This purportedly limited search under the guise of "identifying the owner" gives police broad access to private information that could be used for many investigatory purposes.

As the Supreme Court held in *Riley*, warrantless cell phone searches have few meaningful constraints and should not be the default rule. True emergencies requiring immediate access to a person's cell phone may be found in case-specific contexts. But it is unreasonable under the Fourth Amendment and contrary to article I section 7 to create a blanket rule that a person who runs from a suspected nonviolent property offense poses a public emergency and his cell phone may be searched.

WAPA does not explain why the police lacked time to obtain a warrant here or why it is not practical to obtain a warrant in other cases when a suspect has fled and left a phone behind. The only crime at issue was the possession of a stolen vehicle and that offense had been completed. The digital data on the phone poses no danger to officers. 134 S.Ct. at 2485. It is not a weapon itself. *Id.* When the police have the suspect's phone, he or she can no longer use it to facilitate escape. *Id.*

Nothing suggests that obtaining a warrant would have hindered law enforcement efforts.

The only reason WAPA proffers for searching the phone is the need to learn the identity of its owner. Yet even with a warrant, it is time-consuming to search through a phone's contents to learn the owner's identity. The police would need to piece together this information from available contacts, photographs, emails, or social media postings. This type of intrusive investigation would yield little emergency benefit to the police while substantially intruding upon individual privacy and should not be the default rule when the police come across a cell phone in the course of a criminal investigation.

In any event, WAPA concedes that the State did not prove to the court the essential requirements of this exception in Mr. Samalia's case. WAPA Amicus at 3-4 n.3. Having failed to meet its heavy burden justifying a warrantless search, this exception does not authorize the search conducted.

2. WAPA’s proposal for police to search through a cell phone looking for the identity of the owner would unacceptably diminish cell phone owners’ privacy interests in the contents of their phones

a. The authority to return lost or mislaid property does not permit an investigatory search for information about the suspected perpetrator of a crime.

Community caretaking functions performed by police are “noncriminal” and “noninvestigative.” *State v. Acrey*, 148 Wn.2d 738, 748-49, 64 P.3d 594 (2003). These functions are “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Id.* Based on the general authority accorded police to protect the public, police may render emergency aid or perform routine checks on health and safety. *Id.*

Raised for the first time in an amicus brief, WAPA’s lengthy discussion about lost or mislaid property would not supply authority of law to search Mr. Samalia’s cell phone. The officers did not search Mr. Samalia’s phone based on a statutory obligation to return lost property to its rightful owner or based on a noncriminal, noninvestigatory desire to provide a public service. Had the police simply wanted to return the phone to its owner, they would not have tricked Daylene Telles into meeting them on a street corner where they arrested her for trespassing

and grabbed her phone to see whose name appeared when they dialed her number with the phone seized from the car. RP 48-50, 56, 61-63. Mr. Samalia's phone was used as a tool for investigating a crime not premised on a ministerial concern about returning mislaid property.

b. The police do not need to rummage through a cell phone for incriminating information for the non-investigatory purpose of returning lost property.

The ACLU's recently filed amicus brief appropriately addresses the role police may play when acting in a purely ministerial role of returning a lost or mislaid cell phone to its owner and demonstrates a better grasp of the technology at issue than WAPA. It explains that the quantity and quality of private information readily available on a cell phone requires a warrant before an investigatory search. In the purely noninvestigatory context, when police attempt to return a lost or mislaid phone to its rightful owner, the ACLU explains a non-invasive mechanism for tracing the owner through identifying information from the outside of the phone, by obtaining subscriber numbers. ACLU Amicus at 14.

There are methods of identifying a phone's owner for purpose of returning it to her that do not involve accessing the contents of data stored on the phone. When acting solely based on the statutory

obligation to return lost property, the police may try to obtain this bare information without manipulating the phone's stored information.

ACLU Amicus at 14.

If the police view information on a phone without a warrant in this ministerial capacity of returning the phone to its owner, the information obtained should not be authorized for use in a criminal investigation. Under the independent source doctrine, the criminal investigation must be premised on information gained from other sources. *See State v. Gaines*, 154 Wn.2d 711, 722, 116 P.3d 993 (2005); *State v. Miles*, 159 Wn.App. 282, 291, 244 P.3d 1030, *rev. denied*, 171 Wn.2d 1022 (2011).

c. Article I, section 7 does not authorize police to search through private affairs by diminishing a cell phone owner's expectation of privacy whenever a phone is lost or mislaid and this belatedly raised argument should be disregarded.

WAPA draws its lost and mislaid property analysis from a Court of Appeals case involving a purse left by a customer in the shoe department of the Bon Marche. WAPA Amicus at 10-19, citing *State v. Kealey*, 80 Wn.App. 162, 907 P.3d 319 (1995), *rev. denied*, 129 Wn.2d 1021 (1996). In *Kealey*, the customer quickly returned, looking for her purse, but a store clerk had already searched through it, found a bag

containing what looked like marijuana, and hid both the purse and the bag with drugs from the customer. *Kealey*, 80 Wn.App. at 165-66. The next day, a store manager called the police, who searched the purse without a warrant to find out who owned it. *Id.* The *Kealey* Court ruled that the purse's owner retained her expectation of privacy in her purse, but it was reduced when she left it behind and the police did not need a warrant to search it. *Id.* at 175.

The legal analysis in *Kealey* rested solely on the Fourth Amendment. The parties did not adequately brief the greater protections of article I, section 7 and the court refused to address it without briefing. *Id.* at 176-77. *Kealey*'s failure to address article I, section 7 makes it inapposite due to the differences in these constitutional provisions.

For example, the store clerk in *Kealey* conducted a private search finding contraband before calling the police. *Kealey* did not differentiate between the Fourth Amendment's private search doctrine, under which a person loses her reasonable expectation of privacy if a private citizen searches her property before the police, and article I, section 7's rejection of that doctrine. *State v. Eisfeldt*, 163 Wn.2d 628, 636, 185 P.3d 580 (2008). This state's courts "have repeatedly held the

privacy protected by article I, section 7 survived where the reasonable expectation of privacy under the Fourth Amendment was destroyed.”
Id. at 637.

To analyze a person’s privacy expectation in lost property, *Kealey* relied on a Fourth Amendment case holding telephone owners lack an expectation in the telephone numbers they dial because this information is publicly exposed. 80 Wn.App. at 168. Yet *Kealey* did not mention that this reduced privacy expectation applies only under the Fourth Amendment; it was renounced as incompatible with article I, section 7 in *State v. Gunwall*, 106 Wn.2d 54, 65-68, 720 P.2d 808 (1986). Unlike the Fourth Amendment’s reduced expectation of privacy analysis, a person’s cloak of privacy is not shed because members of the public are aware of private information on a phone. *Id.* at 68.

Another tenet of article I, section 7 absent from the Fourth Amendment analysis in *Kealey* is the difference between an expectation that another citizen might scroll through a person’s mislaid purse or phone, or rifle through his garbage, and article I, section 7’s strict requirement of a warrant for the government to access that same information. *See State v. Hinton*, 179 Wn.2d 862, 873-75, 319 P.3d 9 (2014); *State v. Boland*, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990).

In short, the truncated *Gunwall* analysis posited by WAPA in its amicus brief should be rejected. Not only is it too late in the appellate process to introduce this new issue, the *Gunwall* analysis is wrong. It adopts a ratcheting down of the reasonable expectation of privacy that is not the touchstone under article I, section 7. It disregards the strong privacy interest a person possesses in the vast quantity of information readily available on a person's phone. Losing a cell phone is a hardship and expense, but much of its data is stored elsewhere and may be recovered by the owner with a replacement phone. *See Riley*, 134 S.Ct. at 2491 (with "increasing frequency" of cloud computing, remote servers store cell phone data). It is unreasonable and contrary to the strict protections of article I, section 7 to subjugate a person's privacy interest in the contents of her phone to make it easier for the police to identify the phone's owner.

As the Supreme Court concluded in *Riley*, the simple requirement of obtaining a warrant prior to searching a cell phone provides a definitive rule that protects individual privacy and clearly dictates the scope of an authorized search. 130 S.Ct. at 2495. That rule should not be abandoned by this Court for purposes of convenience. If police obtain data from a phone while acting in the purely

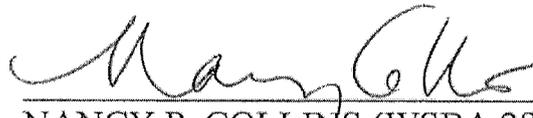
administrative capacity of returning lost property, such information should be precluded from use in any criminal prosecution.

B. CONCLUSION

This Court should reverse the Court of Appeals, reject the proposals expanding police authority to search cell phones proffered by WAPA, and hold that the police violated Mr. Samalia's rights under the Fourth Amendment and article I, section 7 by searching the data in his cell phone without a warrant or valid exception to the warrant requirement.

DATED this 30th day of December 2015.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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)	NO. 91532-6
v.)	
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Petitioner.)	

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