Case No._____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*

v.

K.C., a child, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth District Court of Appeal improperly applied and grossly expanded this Court's decision in Riley v. California, 134 S. Ct. 2473 (2014), which held unconstitutional the warrantless search of a cell phone incident to arrest, in finding unconstitutional the warrantless search of a cell phone that had been abandoned in a stolen car, simply because the item abandoned is a password protected cell phone.

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Petitioner, the State of Florida, respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of the State of Florida in Case No. 4D15-3290.

OPINION BELOW

The opinion below can be found at State v. K.C., 207 So. 3d 951 (Fla. 4th DCA 2016) (Appendix A).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Lieutenant William Gordon with the City of Lauderhill Police Department was on duty during the evening shift from 5:00 p.m. to 4:30 a.m. on August 2, 2014, when he initiated a traffic stop on a 2000 black Ford Focus with Florida tag number 169BRN (T1 46). Lt. Gordon observed the vehicle coming towards him with no headlights and it appeared to be traveling at a high rate of speed (T1 47). The posted speed was 25 miles per hour (T1 47). Lt. Gordon observed two individuals in the vehicle (T1 47). Lt. Gordon made a U-turn and got behind the vehicle and activated his emergency lights (T1 47).

After Lt. Gordon activated his emergency lights, the vehicle turned into a shopping center parking lot and traveled toward another exit from

the lot, before abruptly stopping (T1 47). Lt. Gordon was about 20 feet behind the vehicle when it stopped (T1 51). Two individuals exited from the vehicle, one from the driver side and one from the passenger side, and looked briefly at Lt. Gordon before fleeing (T1 47, 51, 52). Lt. Gordon exited his vehicle and ordered the two individuals to stop, but neither complied with his command (T1 47). Neither of these individuals ever returned to the vehicle or called out to request return of their phone (T1 49). A search ensued with other law enforcement agencies but neither of the occupants was apprehended (T1 54).

Lt. Gordon looked in the vehicle and saw a cell phone "out and visible" in the front passenger and compartment area (T1 48, 52). A picture on the phone looked similar to one of the suspects (T1 52). The phone was locked and he did not attempt to unlock it (T1 53).

A search of the car's vehicle identification number ("VIN") revealed that it had been reported stolen in Sunrise, Florida (T1 55). The car's tag did not belong to that vehicle and the proper tag for the Ford Focus was found in the trunk (T1 55). Lt. Gordon turned the phone and the investigation over to the Sunrise Police Department (T1 53, 54). He did not get a warrant to search the phone (T1 53). Lt. Gordon considered the phone to be "abandoned" because the occupants fled from the vehicle and left it behind (T1 55).

Detective Jason Jolicoeur with the Sunrise Police Department was assigned to follow-up on the

stolen vehicle stopped by Lt. Gordon (T1 56-58). A forensic detective with the Sunrise Police Department was able to unlock the cell phone found in the vehicle (T1 60-61). A search of the phone revealed it belonged to Respondent (T1 60-61). The phone was not searched until some months after its recovery (T1 62, 64). Det. Jolicoeur did not obtain a search warrant prior to having the phone searched (T1 62).

Lt. Gordon told Det. Jolicoeur that he thought the picture on the phone's home screen was the suspect (T1 63). Det. Jolicoeur did not know who the phone belonged to (T1 64). According to Det. Jolicoeur, a person's picture on a phone's home screen does not mean that the phone belongs to the person in the picture (T1 63-64). Det. Jolicoeur testified that the police have seen many cases where someone will steal another person's phone and the thief will put their photo on the home screen of the phone (T1 63-64).

No one, including Respondent, ever contacted the police department about returning the phone (T1 58, 59, 64).

2. By Petition for Delinquency, Respondent was charged with one count of burglary of a conveyance (R 8-9).

3. Respondent filed a Motion to Suppress Statements, requesting that all of Respondent's statements to law enforcement be suppressed as "fruits of the poisonous tree" because his cell phone was searched in violation of the Fourth Amendment and the Florida Constitution (R 22-25). As grounds

for suppression, Respondent asserted: 1) police required a warrant before searching a "Samsung Galaxy" cell phone found in the front seat of a vehicle stopped by police; 2) police failed to obtain a warrant prior to unlocking the password on the cell phone and searching the cell phone; 3) there was no exception to the warrant requirement based on these particular facts (R 22-25). According to Respondent's motion, a search of the phone led the police to Appellee. Respondent was then interrogated by police and made incriminating statements. Id. The suppression motion contended that all statements made by Respondent were "fruits of the poisonous tree." (R 22-25).

The State filed a Motion to Strike the Defendant's Motion to Suppress (R 26-30). The State asserted that Respondent did not have standing to move for suppression because the cell phone in question was recovered from a stolen vehicle and abandoned for Fourth Amendment purposes when Respondent fled from the vehicle (R 26-30).

A hearing was conducted on Respondent's motion to suppress and the State's motion to strike on July 23, 2015 (T1 27-84). At the hearing, the State and the defense agreed that the motion to suppress was dispositive (T1 30). Lieutenant William Gordon and Detective Jason Jolicoeur testified at the hearing (T1 27-84). During the hearing, defense counsel acknowledged that Respondent was not challenging the seizure of the cell phone, but the search of the cell phone (T1 70). At the conclusion of the hearing, the trial court

reserved ruling on both motions (T1 80).

On August 18, 2015, the trial court orally pronounced that it was granting Respondent's motion to suppress "based on the [d]efense arguments." (T2 8). In a written order rendered on August 18, 2015, the trial court memorialized its oral pronouncement, stating only: "The motion to suppress filed by the child in the above-mentioned case number is hereby granted, for the reasons stated in open court." (R 32).

4. The State appealed the trial court's order granting Respondent's motion to suppress to the Fourth District Court of Appeal of Florida ("Fourth District"). The Fourth District affirmed in a written opinion in State v. K.C., 207 So. 3d 951 (Fla. 4th DCA 2016) (Appendix A), holding that as a matter of law the abandonment doctrine does not apply to cell phones whose contents are protected by a password. Petitioner now seek this Court's review of the Fourth District's decision.

REASONS FOR GRANTING THE WRIT

Relying solely on this Court's decision in Riley v. California, 134 S. Ct. 2473 (2014), the Fourth District Court of Appeals ("the Fourth District") has determined that as a matter of law, the abandonment doctrine does not apply to warrantless searches of password protected cell phones. Although the cell phone at issue in this case was not in possession of the defendant and instead was abandoned by him in a stolen vehicle, the Fourth District focused solely on the fact that the property at issue herein was a cell phone, and therefore Riley must apply. The decision of the Fourth District to apply Riley resulted in a creation of an unreasonable expectation of privacy where none previously existed.

In Riley, this Court determined that the search incident to an arrest exception to the warrant requirement does not apply when the warrantless search is of a cell phone. The cell phone at issue in Riley was found in the defendant's pocket at the time of his arrest. Ultimately, this Court found that the risk to officer safety or the risk of destruction of evidence, the two rationales underlying the search incident to arrest exception, did not apply when the item to be searched is digital data in a cell phone. Riley, at 2484-2485.

The appellate court's gross and unwarranted expansion of Riley is faulty because the rationale regarding the doctrine of abandonment is not

interchangeable with the rationale and policy associated with the search incident to an arrest exception. The court's decision to ignore the fact that the item seized and searched was abandoned is in direct conflict with long standing precedent from this Court regarding the abandonment doctrine. Specifically, since 1924, this Court has held that when a person abandons property a later claim of a privacy interest in that property is prohibited. See Hester v. United States, 265 U.S. 57 (1924); see also Abel v. United States, 362 U.S. 217, 241 (1960) (denying Fourth Amendment challenge to items left in waste basket of hotel room vacated by suspect as property no longer had an owner); California v. Greenwood, 486 U.S. 35, 40–41 (1988) (no reasonable expectation of privacy in items discarded in opaque garbage bags placed at curb as it "is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public"); California v. Hodari D., 499 U.S. 621, 629 (1991) (finding no reasonable expectation of privacy in containers or contraband dropped or abandoned by a suspect fleeing from law enforcement officials). The state appellate court's decision to apply Riley in this context is an unjustifiable expansion of its holding as it creates out of whole cloth an expectation of privacy, which is not something that has ever been found to exist in abandoned property and therefore protected under the Fourth Amendment.

In Hester, *supra*, this Court addressed for the first time abandoned property where revenue agents picked up containers dropped by moonshiners whom they were pursuing without a warrant. The containers were not excluded as the product of an unlawful seizure because "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the *contents* of each after they had been abandoned." Id. at 58 (emphasis added). Thus, from its earliest days, the abandonment doctrine addressed, and permitted, a search of the *contents* of the abandoned property, albeit such property was a moonshiner's jug and not a cell phone.

The illogical nature of the Fourth District's rationale is further exposed by the fact that the cell phone at issue here was abandoned in a stolen vehicle. This Court has held that there is no reasonable expectation of privacy in stolen property. See Rakas v. Illinois, 439 U.S. 128, 134 (1978) (precluding a defendant from raising a Fourth Amendment challenge to evidence that he does not own nor has a right to possess). In fact, this Court found the notion that there could be a privacy interest in stolen property "inexplicable." Id. at 141 n.9. Consequently, this opinion runs afoul of Rakas, *supra.* This Court should grant *certiorari* review as the decision below conflicts with Hester, *supra*, Rakas, *supra,* and their progeny and is an unwarranted and illogical expansion of Riley.

A. Settled Law Regarding Abandoned Property and the Fourth Amendment.

A warrantless search is per se unreasonable under the Fourth Amendment, unless an exception to the warrant requirement applies. Arizona v. Gant, 556 US 332, 338 (2009). When such an exception applies, as in the case of a search incident to lawful arrest, courts will then engage in the requisite weighing process between a citizen's reasonable expectation of privacy and a legitimate governmental interest. See Riley, *supra*.

However, when a reasonable expectation of privacy does *not* exist in the first instance because the property has been abandoned, the requisite balancing of competing interests does not apply. As noted above, it is well-settled principle of American jurisprudence since at least 1924, and one that should inform the outcome of this case, is that abandoned property is not subject to Fourth Amendment protection.

The Fourth District conflates these principles into a holding that does not comport with this Court's current precedent, nor does it comport with lower courts' application of that precedent. The abandonment doctrine is not comparable to exceptions to the Fourth Amendment's warrant requirement.

For instance, there are numerous examples of exceptions to the warrant requirement in addition to

the one discussed in Riley, *supra*, which include exigent circumstances[1], consent[2], automobile[3], and inventory[4]. Abandoned property is treated differently. As the Eleventh Circuit noted:

> The significance of abandoned property in the law of search and seizure lies in the maxim that the protection of the fourth amendment does not extend to it. Thus, where one abandons property, he is said to bring his right of privacy therein to an end, and may not later complain about its subsequent seizure and use in evidence against him. In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without probable cause. Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 399, 400–01 (1971); see, e.g., Abel v. United States, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960) ("There can be nothing unlawful in the Government's appropriation of [ ] abandoned property.").

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[1] Brigham City v. Stuart, 547 U.S. 398 (2006).
[2] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[3] California v. Carney, 4721 U.S. 386 (1985).
[4] Colorado v. Bertine, 479 U.S. 367 (1987).

United States v. Hammock, 860 F.2d 390, 392 (11th Cir. 1988).

Indeed, numerous Federal Courts of Appeals, when applying the abandonment doctrine, have held that a defendant has no expectation of privacy in a vehicle or its contents when the defendant abandons the vehicle to flee from police. See United States v. Smith, 648 F.3d 654, 660 (8th Cir. 2011) (defendant relinquished any legitimate expectation of privacy he might have had in vehicle and its contents when he left the car open, with the keys in the ignition, the motor running, in a public area and ran from police); United States v. Vasquez, 635 F.3d 889, 892, 894 (7th Cir. 2011) (concluding defendant had no expectation of privacy in his vehicle after fleeing from police and abandoning the vehicle in a Wal–Mart parking lot before continuing his flight on foot); United States v. Edwards, 441 F.2d 749, 751 (5th Cir. 1971) ("Defendant's right to Fourth Amendment protection came to an end when he abandoned his car to the police, on a public highway, with engine running, keys in the ignition, lights on, and fled on foot. At that point defendant could have no reasonable expectation of privacy with respect to his automobile."); United States v. D'Avanzo, 443 F.2d 1224, 1225–26 (2d Cir. 1971) (upholding a finding of abandonment where the defendant parked the car he was driving on a residential street and then fled from the police into a nearby wooded area); United States v. Falsey, 566 Fed. Appx. 864, 868 (11th Cir. 2014) (defendant who fled from car on foot leaving it in parking lot with the doors unlocked and keys

inside voluntarily relinquished his interest in the car and no longer had a reasonable expectation of privacy in it or its contents); United States v. Lee, 916 F.2d 814, 818 (2d Cir. 1990) (explaining that the fourth amendment protections….do not extend to abandoned property); Bond v. United States, 77 F.3d 1009, 1013) (7th Cir. 1996) (same); United States v. Tugwell, 125 F.3d 600, 602 (8th Cir. 1997) (same).

Consequently, the analysis applicable to the abandonment doctrine is fundamentally different than that which applies to the Fourth Amendment warrant exceptions, such as the search incident to arrest exception addressed in Riley. As noted in Riley, when determining whether to exempt a given type of search from the warrant requirement, courts assess, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of a legitimate governmental interest. Riley, at 25484.

With abandoned property, this analysis does not occur because there is no intrusion of privacy to begin with because a person does not retain a reasonable expectation of privacy in abandoned property. See Tugwell, *supra*; United States v. Basinski, 226 F.3d 829, 836 (7th Cir. 2000) (ruling that "no person can have a reasonable expectation of privacy in an item that has been abandoned"); United States v. Cofield, 272 F.3d 1303, 1306 (11th Cir. 2001) (explaining that if a defendant has abandoned property-meaning that he "voluntarily

discarded, left behind, or otherwise relinquished this interest" in it - he has no Fourth Amendment basis for objecting to its later acquisition by the police).

Notwithstanding the fundamental differences between the abandonment doctrine and Fourth Amendment warrant exceptions, the Fourth District took Riley, a case specifically addressing the search incident to arrest exception, and used it to eviscerate the long-standing abandonment doctrine because a cell phone was involved. It did this even though Riley makes no mention of abandoned property. The State maintains that abandoned property is outside the scope of the Fourth Amendment and thus, as discussed above, the analysis is different than for established Fourth Amendment exceptions. Riley's explicit limitation, though, is further authority that it should not have been extended as it was by the Fourth District.

Moreover, the Fourth District's error is compounded by the fact that the abandoned phone herein was left in a stolen car following police pursuit and therefore runs afoul of Rakas, *supra*, wherein this Court precluded a defendant from raising a Fourth Amendment challenge to evidence to which he has no right to possess.

Based on Rakas, several Federal Courts of Appeals have held that the possessor of a stolen vehicle does not have a protected privacy interest in it. See, e.g., United States v. Tropiano, 50 F.3d 157, 161 (2d Cir. 1995) (finding it "obvious that a

defendant who knowingly possesses a stolen car has no legitimate expectation of privacy in the car"); United States v. Lanford, 838 F.2d 1351, 1353 (5th Cir. 1988) (the possessor of a stolen vehicle has no standing to object to its search); United States v. Hensel, 672 F.2d 578, 579 (6th Cir. 1982) ("the defendant had no legitimate expectation of privacy in the stolen truck or its contents," thus, he "had no standing to challenge the search of the truck"); United States v. Sanchez, 635 F.2d 47, 64 (2d Cir. 1980) (defendant who did not show either that he owned the car or possessed it with permission of the owner lacked constitutionally protected interest in car); United States v. Wilfong, 528 Fed. Appx. 814, 817 (10th Cir. 2013) (as defendant had no privacy interest in stolen vehicle, he lacked standing to challenge search of vehicle).

Consistent with the rationale of those cases, several Federal Courts of Appeals have found that a defendant arrested while driving a stolen car not only has no legitimate expectation of privacy in the stolen car, but also no expectation of privacy in any containers in the stolen car. See Hensel, *supra*; United States v. Hargrove, 647 F.2d 411, 412 (4th Cir. 1981) ("One who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile"); United States v. Worthon, 520 F.3d 1173, 1183 (10th Cir. 2008) (unauthorized driver of rental van lacked standing to challenge search of duffel bags in van); United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (unauthorized driver of car

lacked standing to challenge search of luggage he had placed in car). The Fourth District Court of Appeal's decision to create a reasonable expectation of right of privacy in an abandoned cell phone left in a stolen vehicle conflicts with these principles outlined above.

B. The Fourth District Improperly Extends Riley to Find Law Enforcement Cannot Search an Abandoned Password Protected Cell Phone Without a Warrant.

In Riley, this Court held that, in general, law enforcement must obtain a search warrant to search a cell phone seized incident to arrest. While Riley specifically discussed the availability of the exigent circumstances exception, Riley in no way indicated or even suggested that it is per se unconstitutional to conduct a warrantless search of a cell phone. Rather, this Court indicated that other "exceptions" (plural) may be available. Riley at 2494.

Yet, the Fourth District, while recognizing that Riley "conceded that some 'case-specific' exceptions may apply to justify a warrantless search of a cell phone," noted that the only example given was a search based upon exigent circumstances. State v. K.C., at 955. Instead of recognizing established precedent that it is unreasonable to find an expectation of privacy in property that has been abandoned, the Fourth District focused instead exclusively on the nature of the item abandoned and subsequently searched. The Court opined that due to the extensive storage capacity of the "smart

phone," which is so ubiquitous in today's culture, any initial expectation of privacy attached therein can never be lost or destroyed, regardless of unambiguous and unrebutted evidence to the contrary. Id. In this case, the evidence was clear that the cell phone was left in plain view, in a stolen car, immediately following a police officer's command to the car's occupants to stop.

The fact that a cell phone was the item abandoned should not alter the analysis. The rationale for allowing the search of abandoned property applies, whether the abandoned item is a purse, wallet, briefcase, file, planner, diary, and most telling, a computer. Indeed, lower courts did not alter the analysis when the item left behind was a computer, as courts continued to apply the abandonment doctrine to computers, which, according to the Fourth District was the precursor to today's modern smart phone. See State v. Gould, 963 N.E.2d 136 (Ohio 2012) (warrantless search of computer hard drive contents did not violate Fourth Amendment where defendant left hard drive in his apartment when he stole his brother's truck, left town, and never inquired about hard drive or attempted to assert control over it), cert. denied, 133 S.Ct. 444 (2012); Gerbert v. State, 793 S.E.2d 131, 145 (Ga. Ct. App. 2016) (counsel not ineffective for failing to file motion to suppress images recovered from computer because motion would not have been successful in that defendant abandoned computer when he left it with a coworker and never attempted to recover it); Commonwealth v. Sodomsky, 939 A.2d

363, 369 (Pa.Super.Ct. 2007) (finding that when defendant submitted his computer to technicians for repair, he abandoned his privacy interest in the child pornography stored on his hard drive), review denied, 962 A.2d 1196 (2008), cert. denied, 556 U.S. 1282 (2009).

Despite the well settled principle that a person who abandons property forfeits any later claim to a reasonable expectation of privacy, and despite Respondent's abandonment of his cell phone in a place in which he clearly did not have any expectation of privacy, i.e., a stolen vehicle, the Fourth District held that a warrantless search of a password protected abandoned cell phone is unconstitutional based on Riley. In relying on Riley *supra,* the Court explained:

> Thus, the quantitative and qualitative nature of the information contained on a cell phone sets it apart from other physical objects, even locked containers.
>
> Because both the United States Supreme Court and the Florida Supreme Court have recognized the qualitative and quantitative difference between cell phones (and their capacity to store private information) and that of other physical objects and the right of privacy in that information, we conclude that the abandonment exception does not apply to cell phones

> whose contents are protected by a password. Paraphrasing Chief Justice Roberts, "[o]ur answer to the question of what police must do before searching [an abandoned, password protected] cell phone ... is accordingly simple—get a warrant." Id. at 2495.

See A-18, 19.

Although Riley discusses in detail the characteristics of today's cell phone and its capacity to hold enormous amounts of information about every aspect of a person's life, that dispositive observation was made in the context of how to balance a recognized and present privacy interest in an item against an exigent circumstance/ governmental interest. The Fourth District clearly recognized this context when it found as follows:

> In light of Riley, the United States Supreme Court treats cell phones differently, for the purposes of privacy protection, than other physical objects. Although Riley conceded that some "case-specific" exceptions may apply to justify a warrantless search of a cell phone, the example given was a search based upon exigent circumstances. Riley, 134 S.Ct. at 2494. "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." Id. The abandonment exception does not compel a similar conclusion that a warrantless search is authorized. There is no danger to individuals, property, or the need to immediately capture a criminal suspect where the cell phone is out of the custody of the suspect for substantial amounts of time. And there is an abundant amount of time for the police to obtain a warrant, which could then limit, if necessary, the scope of the search of the phone.

See A-10, 11.

However, because Respondent abandoned his cell phone in a stolen car, there was no longer a present expectation of privacy to be weighed against a governmental interest recognized by the Courts. The pith of Riley, *supra,* is that the nature of today's modern cell phone places the proverbial thumb on the privacy side of the scale to be weighed against a governmental interest/exigent circumstance on the other side of that same scale. That holding does not apply herein as precedent from this Court makes clear, a person who abandons property cannot revive a privacy interest under the Fourth Amendment in that abandoned property at a later date.

Consequently, the assessment undertaken to balance privacy rights with governmental interests, as examined in Riley*, supra* at 134 S.Ct. at 2484,

does not apply here because there is no privacy interest to consider as K.C. abandoned that interest when he left his phone, in plain view, in a stolen car. The Fourth District erred when it applied Riley to the facts of this case.

C. The Fourth District's Decision Conflicts With Decisions of Other State and Federal Courts.

Consistent with application of the abandonment doctrine to other items including computers, courts across the country applying Fourth Amendment law to modern cell phones have not altered the analysis regarding abandonment simply because the property left behind is a cell phone. In numerous cases, courts have determined that cell phones, and consequently their content, can be abandoned and thus there is no Fourth Amendment violation in searching such a phone without a warrant. See State v. Samalia, 375 P.3d 1082, 1087 (Wash. 2016) (cell phone was voluntarily abandoned, such that police were not required to obtain search warrant prior to searching phone, where defendant left phone in unattended vehicle and fled on foot after being stopped by police); State v. Brown, 776 S.E.2d 917 (S.C. Ct. App. 2015) (defendant abandoned any expectation of privacy in his code-locked cell phone, which was found in private residence shortly after burglary, and in phone's data, and therefore, officer was not required to obtain a warrant before searching the phone as phone did not belong to anyone who lived at or frequented the residence, there was no indication of

any attempts to reclaim the phone after it was confiscated by the police, and officer did not search phone until six days after phone had been found in private residence); United States v. Powell, 732 F.3d 361, 374–75 (5th Cir. 2013) (as a consequence of her statements abandoning cell phone, defendant-passenger lacked standing to contest its warrantless search by police officer); United States v. Foster, 65 Fed. Appx. 41, 46 (6th Cir. 2003) (defendant's abandonment of vehicle after state troopers discovered bag of drugs in trunk extinguished any reasonable expectation of privacy that he might once have had in property in vehicle, and thus troopers' search and seizure of cellular telephone plugged into vehicle's cigarette lighter did not violate defendant's Fourth Amendment rights); United States v. Quashie, 162 F. Supp. 3d 135, 141–42 (E.D.N.Y. 2016) ("[Riley]" outlines the standard to be applied to a search of a cellphone incident to arrest. It has nothing to do with an abandoned cellphone or even a stolen cellphone. Although Riley includes language about the vast amount of information contained on cellphones and how the expectations of privacy in the contents of a phone have shifted, any objective expectation of privacy in a cellphone must go hand-in-hand with an individual's demonstration of a subjective expectation of privacy. Whether it was defendant or the robbers who left the phone in the victim's apartment, they gave up that subjective expectation of privacy."); Edwards v. State, 497 S.W.3d 147, 161 (Tex. App. 2016) (defendant had no reasonable expectation of privacy in cell phone that was abandoned and left on top of vehicle from which

defendant fled); Commonwealth v. Martin, 4 N.E.3d 1236, 1248 (Mass. 2014) (search of defendant's cell phone was constitutionally permissible because defendant had abandoned phone, and, as such, had no expectation of privacy in it in that defendant placed phone on window sill and then told officers that phone was not his, that he did not want it anymore, and he never retrieved phone); State v. Dailey, 2010 WL 3836204 (Ohio Ct.App. Oct. 4, 2010) (search of cell phone permissible where defendant abandoned phone when he slipped out of his coat and left it and its contents behind in order to escape being detained by a store loss prevention employee, and defendant never made a request to have the items returned); Royston v. State, 2015 WL 3799698 (Tex.App.–Houston [14th Dist.] June 18, 2015, pet. ref'd) (mem. op., not designated for publication) (defendant abandoned cellular telephone when he left it in public dressing room on "record" mode and walked away); United States v. Hanner, 2007 WL 1437436 (W.D. Pa. May 14, 2007) (defendant had no reasonable expectation of privacy in cell phone found in an alley near scene of murder).

The Fourth District held otherwise primarily relying on language in Riley.

D. The Importance of Resolving Whether Riley Prohibits the Search of an Abandoned Cell Phone Without a Warrant.

Criminal appellate courts are grappling with applying settled Fourth Amendment law to modern

technology. Despite the well-established principles that a defendant has no reasonable expectation of privacy in abandoned property (as discussed above in Section A), the Fourth District has deemed that Riley undercuts almost 100 years of abandonment doctrine without even a mention.

However, while Riley involved a cell phone, it did not involve an *abandoned* cell phone – nor a cell phone abandoned in a stolen car. Guidance is needed as to whether Riley can be used to impose a "categorical rule" to eviscerate applying the long-standing abandonment doctrine to cell phones, whether password protected or not. Petitioner submits that a cell phone, including a password protected cell phone, can be abandoned. The rationale of Riley simply does not apply to abandoned property. The Fourth District's opinion is an outlier transforming the landscape in an area of the law that has been well settled for decades. The expansive nature of its holding with the creation of an illogical expectation of privacy that does nothing to protect legitimate privacy rights requires review by this Court.

Continuing confusion and expansion by the courts in this area further supports review now. Very recently another panel of the Fourth District relied on Riley, and United States v. Jones, 132 S.Ct. 945 (2012) in its prediction of "an emerging trend" in Fourth Amendment cases to create an expectation of privacy where none previously existed when the item at issue involves electronic storage devices. See

State v. Worsham, 2017 WL 1175880 (Fla. 4th DCA March 29, 2017) (extending Jones to recognize an expectation of privacy in an "event data recorder" located in an impounded car that was driven by a defendant charged with DUI manslaughter).

In addition to the courts, law enforcement needs clear guidance on this issue. Law enforcement encounters abandoned cell phones in a myriad of ways. For example, law enforcement may observe a fleeing suspect actually discard a phone. See In re Application of the U.S. of Am. for a Search Warrant for a Black Kyocera Corp. Model C5170 Cellular Tel. with FCCC ID: V65V5170, No. 14-231 (JMF), 2014 WL 1089442, at *2 (D.D.C. Mar. 7, 2014) (denying the government's warrant application to search a cell phone the defendant dropped while the police pursued him because no warrant is required to search abandoned property). Law enforcement may recover a cell phone at the scene of a crime, including finding a cell phone in a stolen car like in the instant case. See also Brown, *supra*; Quashie, *supra*; Foster, *supra*; Edwards, *supra*; Samalia, *supra*; Dailey, supra.

Along with assisting the courts and impacting law enforcement's daily activities, the instant issue is of great interest and importance to the public, and not just the parties involved. Cell phones are ubiquitous in today's society. As of January 12,

2017, 95% of Americans own a cell phone of some kind, with 77% owning a "smartphone."[5]

The facts of this case are straight-forward and well-developed for review. Here, there was a lawful stop of the vehicle in question. While law enforcement was in the process of effectuating the stop, the vehicle came to an abrupt halt and two individuals bailed from the vehicle. The vehicle turned out to be stolen and the cell phone was found "out and visible" in the front passenger area. The phone was password protected. Law enforcement, with the aid of a forensic technician, searched the phone some months later without a warrant. During that time, no one had claimed the phone or attempted to exert control over it. The search of the phone led to Respondent, who, when questioned by police, made incriminating statements regarding the theft of the vehicle. Thus, the record is uncomplicated but developed enough for review on this important issue, and gives the Court an opportunity to address whether a password on a cell phone alters the analysis.

In light of the proliferation of cell phones in today's society and law enforcement's need for clear rules, this issue is timely and significant. In Riley, this Court noted its "general preference to provide clear guidance to law enforcement through categorical rules" and not provide guidance on "an ad hoc, case-by-case fashion by individual police

[5] Mobile Fact Sheet, Pew Research Center, available at http://pewinternet.org/fact-sheet/mobile/.

officers.'" Riley at 2491-92, citing Michigan v. Summers, 452 U.S. 692, 705, n. 19, (1981). Accordingly, this Court should use this case to clarify and hold that Riley does not preclude application of the abandonment doctrine to a password protected cell phone.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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