No. 19-____

IN THE
Supreme Court of the United States

DAVID ZACHERY MORGAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a government official who would like to seize someone's personal property, and has both probable cause and the time to obtain a warrant, must bring his probable cause to a magistrate to obtain a warrant or may, under the plain-view exception, just send a fellow officer to go take it?

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David Zachery Morgan petitions for a writ of certiorari to review the Supreme Court of Washington's judgment in this case.

OPINIONS BELOW

The Supreme Court of Washington's opinion (Pet. App. 1a-17a) is published at 440 P.3d 136. The state court of appeals' opinion (Pet. App. 18a-54a) is unpublished, but available at 2018 WL 2418483. The trial court's oral ruling (Pet. App. 55a, 57a) is unpublished.

JURISDICTION

The Supreme Court of Washington entered judgment on May 16, 2019. On July 29, 2019, Justice Kagan granted a 60-day extension of time to file this petition, making it due on October 15, 2019. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the 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.

INTRODUCTION

The government frequently wants peoples' things. It may, for instance, have good reason to think those things would help it incriminate someone. But the Fourth Amendment tells the government it cannot just decide that it should have a person's things and then go take them. Absent a few carefully wrought exceptions, the government must bring its "probable cause" to a magistrate and get a warrant before it takes your stuff. U.S. Const. amend. IV.

In the decision below, a majority of the Washington Supreme Court interpreted the "plain-view" exception in a manner that guts this constitutional protection. Adopting the State's position, the court held that a government official who thinks he has probable cause to believe someone's property has evidentiary value and who encounters no exigent circumstance that makes it unrealistic to get a warrant, may lawfully skip the warrant and just send his fellow officer to "view" and then take the desired property.

It is undisputed that is what happened here. When investigating a fire, a supervising officer learned, third-hand, that someone smelled gasoline on Petitioner's clothing. Pet. App. 2a. The supervisor told his subordinate officer to go "collect [Petitioner's] clothing." *Id*. So, the officer did. After spending "hours" talking to Petitioner in his hospital room, the officer saw some opaque shopping bags that he believed to contain Petitioner's clothing. Pet. App. 2a-3a. Without knowing or perceiving *anything* incriminating about the bagged clothes, the officer took them. Pet. App. 7a-8a.

The decision upholding this seizure quite clearly violates this Court's plain-view caselaw, and it joins the wrong side of a split. This Court has recognized that, absent a warrant founded on probable cause or a recognized exception, the "seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment." *United States v. Place*, 462 U.S. 696, 701 (1983). The Court has, of course, recognized that in certain circumstances officers may seize property they discover in plain view; but, the Court has, for obvious reasons, restricted that exception to circumstances in which probable cause became "immediately apparent" from the officer's perceptions of the item. *Horton v. California*, 496 U.S. 128, 136 (1990). That's obvious because absent some perception about the property that sparks, or at least adds to, probable cause, the "exception" would swallow the rule: An officer who has the probable cause necessary to obtain a warrant would be able to just forgo the warrant, track down the property he wants, and seize it.

Accordingly, most lower courts hold "immediately apparent" means, at a minimum, that there must be a causal connection between the officer's perception of the item seized and probable cause: "The agents' 'immediate' sensory perception must produce probable cause of crime." *United States v. McLernon*, 746 F.2d 1098, 1125 (6th Cir. 1984) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 470 (1971)). In those jurisdictions, the "immediately apparent" requirement acts as a "vital constraint" against the government's circumvention of the warrant requirement. *United States v. Garcia*, 496 F.3d 495, 510 (6th Cir. 2007). In conflict, two state high courts interpret "immediately

apparent" to require no causal connection between the officer's "viewing" of the object and the probable cause justifying its seizure. That's clearest here, where it is undisputed the seizing officer did not perceive *anything* incriminating about Petitioner's (bagged) clothing when he seized it. In these jurisdictions, "immediately apparent" is equated with mere probable cause and "carries [no] independent meaning." *People v. Swietlicki*, 361 P.3d 411, 416 (Colo. 2015).

Resolution of this conflict is important. This Court has described its condition that probable cause be "immediately apparent" as central to ensuring the plain-view exception does not enable the sort of "general, exploratory rummaging in a person's belongings" that the Framers "abhorred." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality opinion). And, merits aside, when this Court says there are "conditions that must be satisfied" for a government seizure to be lawful under the Fourth Amendment, *Horton*, 496 U.S. at 136, lower courts have no place rendering one of those conditions meaningless.

This case is an unusually good vehicle: The plain-view exception—and, in particular, the "immediately apparent" requirement—was the sole basis for the decision below, which explicitly rejected the State's only other asserted justification. The State has never argued harmless error. And the factual predicate to resolve the conflict of authority is embedded in the seizure at issue: The State has conceded that the seizing officer did not and, in fact, could not have perceived any new information about Petitioner's opaquely bagged clothing and seized it based on his supervisor's instruction to do so.

This Court should grant certiorari.

STATEMENT OF THE CASE

1. On November 16, 2014, a neighbor saw Petitioner's house on fire and called 911. Pet. App. 19a. Firefighters arrived and found Petitioner lying in the driveway. *Id.* Petitioner had a wound on his head, blood on his hands and clothing, and hair singed by fire. *Id*. Firefighters asked Petitioner whether anyone was in the house. *Id.* Petitioner was able to mumble "garage" and handed them the garage door opener. *Id*. In the garage, firefighters found Petitioner's ex-wife, lying on her back with severe burns and in a pool of blood, and smelling of gasoline. *Id*. Paramedics transported both Petitioner and his ex-wife to hospitals for treatment, and smelled gasoline on each of their clothing. Pet. App. 2a.

Officer Christopher Breault was sent to Petitioner's hospital room to provide his supervising officer with "medical updates" and to confirm that Petitioner's daughter was somewhere safe. Pet. App. 2a-3a, 12a-13a. The supervising officer, who learned from a firefighter that paramedics thought they smelled gasoline on Petitioner's clothes, also instructed Officer Breault to "collect [Petitioner's] clothing." Pet. App. 2a, 12a-13a; CP 208.[1] Officer Breault was not told nor himself aware of anything incriminating about Petitioner's clothing. Pet. App. 14a-15a.

Officer Breault spoke with Petitioner in his hospital room, and Petitioner confirmed his daughter was safe at her grandmother's house and "spoke freely

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[1] "CP" refers to the Clerk's Papers on Appeal, lodged with the Washington Supreme Court. "RP" refers to the verbatim report of proceedings, *i.e.*, the consecutively paged transcript of the trial court proceedings.

with the officer regarding his memory of events." Pet. App. 2a, 20a. After speaking with Petitioner "for hours," Officer Breault saw several opaque plastic shopping bags on the back counter of Petitioner's hospital room, and believed them to contain Petitioner's clothing. Pet. App. 2a, 37a, 45a. Without consent, Officer Breault took the clothing from the bags. Pet. App. 37a.[2]

The State later analyzed the clothing, which tested negative for hydrocarbons. CP 350-51.

2. The State charged Petitioner with arson, assault, and attempted murder. Its theory at trial was that the cause of the fire could not be scientifically determined, but it could not be ruled out that Petitioner intentionally started it. RP 762, 890-91. The State sought to use the pattern of blood on Petitioner's clothing to argue that he must have attacked his ex-wife, and that one could therefore also infer he intentionally started the fire. RP 2747-50.

Petitioner moved to suppress the clothing under the Fourth Amendment and state constitution, CP 298, 302, and the State opposed. The State conceded that Officer Breault seized Petitioner's clothing "on the basis of somebody telling him to do so" and that he

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[2] While he was at it, Officer Breault seized Petitioner's cellphone, too. CP 327. At trial, Petitioner had no reason to challenge that seizure.

Sometime after seizing Petitioner's clothing and cellphone, officers observed Petitioner's utility knife on the counter, which had some blood on it. CP 327, 346-348; Pet. App. 3a, 14a n.7. It is undisputed that neither the fire nor the wounds of Petitioner's wife could have been caused by a utility knife. RP 678-79 (the State's medical expert testifying that a knife "could not have caused" any of the injuries).

could not see anything incriminating about the clothing through the opaque plastic bags. RP 146; Pet. App. 58a-59a. However, the State argued that the seizure was justified under the plain-view exception because Officer Breault's supervisor was aware that blood had been seen, and gasoline had been smelled, on Petitioner's clothing. CP 214-16; RP 145-46. The State argued, in the alternative, that the seizure was justified based on exigency. CP 213-14.

The trial court firmly rejected application of the plain-view exception. According to the court, the question of whether a direction to seize could be the basis for a plain-view seizure was an "easy" no. RP 145. The court chided the State for not "giving up" its plain-view argument, given that Officer Breault was simply "sent there to collect" the clothing and could not even "see through" the "opaque shopping bags." Pet. App. 58a. However, the court held the seizure of Petitioner's clothing could be justified by exigent circumstances. Pet. App. 56a, 60a-61a.[3]

The jury accepted the State's theory and found Petitioner guilty of the charges.

3. The court of appeals reversed, holding that the seizure of Petitioner's clothing was unlawful. First, the court held the State failed to show any exigency. Pet. App. 43a. According to the court, the record was "devoid of any evidence showing that it was impractical" to get a warrant before seizing the clothing. Pet.

[3] The trial court held that exigent circumstances could not justify the post-seizure analysis of the blood patterns on Petitioner's clothing; however, in light of its conclusion that the clothing had been properly seized, the court allowed the State to obtain a warrant to repeat its analysis.

App. 39a. On the contrary, "[t]he bagged clothing remained undisturbed for hours on a shelf in the hospital room, while [Petitioner] was almost constantly in the presence of police officers" and "not going anywhere." Pet. App. 41a.

Second, the court of appeals held that the seizure of Petitioner's clothing could not be justified under the plain-view exception. The court explained that, for the plain-view exception to apply, "the incriminating character must be immediately apparent." Pet. App. 45a. Here, however, Officer Breault did not "detect the scent of gasoline" or perceive anything else about the clothing's evidentiary value upon seeing it—indeed, the clothing "was inside apparently opaque hospital bags." *Id.*

Accordingly, the court of appeals held the seizure of Petitioner's clothing was unlawful. Pet. App. 45a-46a. The court noted that "[t]he State does not argue that this error was harmless" and held that "[o]n this record, it could not so argue." Pet. App. 43a, 46-47a.

4. The State petitioned for review, asking the Washington Supreme Court to decide whether the plain-view exception is satisfied "[w]hen police have probable cause that items have evidentiary value" or additionally requires the State to show that the items' incriminating nature was "immediately apparent." State's Pet. for Review 1.[4] The State acknowledged that, here, "the seizing officer had not smelled the

[4] In particular, the State posed the following question for review: "When police have probable cause that items have evidentiary value, is a 'plain view' seizure nonetheless invalid if the incriminating nature of the evidence is not 'immediately apparent'?" State's Pet. for Review 1.

scent of gasoline or observed blood or other relevant crime information." *Id.* at 11. It argued that under the plain-view exception, however, "[t]here is only a requirement that [officers] have probable cause based on the surrounding circumstances" and, here, "the previously-detected odor of gasoline[] provided that probable cause." *Id.* Petitioner disagreed and argued that the plain-view exception "requires the nature of the evidence be immediately apparent to the officer." Pet'r's Answer to Pet. for Review 8. Here, "the nature of the evidence was not immediately apparent to Officer Breault because the clothing was bagged in opaque shopping bags and Officer Breault had detected no odor of gasoline or other accelerant coming from the bags." *Id.*

The Washington Supreme Court granted review. The State's merits briefing argued that the "immediately apparent" requirement does not confine the plain-view exception to circumstances where seizing officers "observe something incriminating about the items" that causes them to have probable cause for seizure. State's Wash. Sup. Ct. Br. 9-10. Thus, the State contended, it was irrelevant that "neither blood nor other relevant crime information could be seen through the plastic bag." *Id.* According to the State, the plain-view exception allows officers to forgo a warrant whenever they have probable cause: "Because probable cause existed, the 'immediate knowledge' requirement was satisfied." *Id.* at 11-12. Petitioner urged that although this Court has held the plain-view exception does not turn on "inadvertence" or what officers subjectively "believe," it has always confined the exception to circumstances where "the

'incriminating character' of [evidence] was 'immediately apparent' to the officers." Pet'r's Wash. Sup. Ct. Br. 15 (quoting *Horton*, 496 U.S. at 131).[5]

In a 7-2 decision, the Washington Supreme Court reversed. All members of the court agreed "exigent circumstances did not exist." Pet. App. 4a-5a, 8a. However, they divided over whether the seizure of Petitioner's clothes could be justified based on the plain-view exception.

The majority held it could. According to the court, the dispositive issue was whether "it was immediately apparent that the clothing was associated with criminal activity." Pet. App. 7a.[6] The court stated that "[o]bjects are immediately apparent under the plain view doctrine 'when, considering the surrounding circumstances, the police can reasonably conclude' that the subject evidence is associated with a crime." *Id.* Applied here, it was sufficient that the supervising officer was "aware of the evidentiary value of [Petitioner's] clothing" and "instructed Officer Breault to collect it." *Id.* Officer Breault could have "reasonably concluded" the clothing would have evidentiary value

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[5] The State did not dispute the court of appeals' conclusion that the trial court's admission of the clothing, if erroneous, could not be considered harmless.

[6] The State also petitioned for review on the question of whether state constitutional law imposed an additional requirement of subjective "inadvertence." State's Pet. for Review 1. It argued that the court should interpret the state constitution consistent with this Court's decision in *Horton*, 496 U.S. 128 (rejecting a subjective inadvertence requirement). State's Wash. Sup. Ct. Br. 2-3, 9. The majority agreed, and held that under the state constitution and the Fourth Amendment alike, there is "no separate inadvertence requirement in the plain view doctrine." Pet. App. 6a-7a (adopting this Court's analysis in *Horton*, 496 U.S. 128).

"[w]ithout examining [it]," because the clothing "was expected to be in the hospital room and was detectable in the plastic hospital bags." *Id.*

Two justices dissented. In their view, "the chain of events here clearly support[ed] issuance of a warrant," but the decision to skip to the warrantless seizure of Petitioner's clothing did "not fit within any of the 'jealously and carefully drawn exceptions' to the warrant requirement." Pet. App. 10a. According to the dissent, the majority's opinion amounted to an "unprecedented application of the plain view doctrine." *Id.*

The dissent reasoned, first, that for the plain-view exception to apply, "it must be immediately apparent to the seizing officer that evidence he has discovered is associated with criminal activity." *Id.* That requirement could not be satisfied here because, even insofar as Officer Breault believed the opaque bags contained Petitioner's clothing, "he did not observe anything about the clothing that could be described as incriminating"—indeed, his "description of the plastic bags suggests the clothing was not observable through the bags at all." Pet. App. 10a, 13a, 14a. The majority's holding thus "divorces the observations of the seizing officer from the seizure." Pet. App. 10a.

In addition, the dissent reasoned, to uphold Officer Breault's seizure despite his lack of any personal knowledge of anything incriminating, the majority had to "import" into the plain-view exception the collective-knowledge or "fellow-officer" doctrine that this Court has applied in the context of arrests. Pet. App. 10a-11a, 15a-16a (citing *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971)). According to the dissent, the government could not rely on the knowledge of absent officers to show probable

cause was "immediately apparent" for "obvious reasons"—namely, "it cannot be plain to the seizing officer that he is viewing incriminating evidence unless he observes it and is himself aware of the surrounding facts and circumstances." Pet. App. 11a. In the dissent's view, it was dispositive that "Officer Breault saw nothing to justify a plain view seizure." Pet. App. 16a. That the supervising officer "had more than enough information to obtain a warrant" indicated only that he could have and should have done so before directing another officer to go seize Petitioner's property. *Id.*

REASONS FOR GRANTING THE PETITION

Absent a warrant founded on probable cause or a recognized exception, the government's "seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment." *United States v. Place*, 462 U.S. 696, 701 (1983). This Court has, of course, recognized that "under certain circumstances," a government official may "seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). The Court has cautioned, however, that if this exception is to remain "legitimate," it must be "limited," *id.*, and "scrupulously subjected to Fourth Amendment inquiry," *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 66 (1992).

The Court has thus adhered to three "conditions" for a valid plain-view seizure. *Horton v. California*, 496 U.S. 128, 136 (1990). Two go to the government's lawful presence and access: the officer must "be lawfully located in a place from which the object can be plainly seen"; and he must "have a lawful right of access to the object itself." *Id.* at 137. The third condition is that the officer's probable cause to seize the

item must have become "immediately apparent." *Id.* at 136; *Soldal*, 506 U.S. at 66, 69. This last requirement, the Court has said, is critical to ensuring that the plain-view exception does not enable the very evil that the Fourth Amendment is meant to proscribe: Confining the exception to circumstances where probable cause was "immediately apparent" prevents the government from using its mere access to desired property as an end-run around having a neutral magistrate determine whether the property can be seized and thereby safeguards citizens from the sort of "general, exploratory rummaging in a person's belongings" that the Framers "abhorred." *Coolidge*, 403 U.S. at 467.[7]

The scope of this Court's "immediately apparent" requirement is the subject of a split, and the court below joined the wrong side of it. Resolution of the split is important—central to ensuring the constitutional protection afforded to personal property and to providing clear rules to law enforcement. Satisfaction of the "immediately apparent" requirement was the sole basis for the decision below, and the State has conceded at every stage that any error was not harmless. The Court should grant certiorari.

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[7] Although early plain-view caselaw suggested an additional requirement of subjective "inadvertence," the Court has since rejected that requirement and articulated the three factors discussed. *See Horton*, 496 U.S. at 136-37.

I. Lower Courts Are In Conflict Over Whether "Immediately Apparent" Requires A Causal Connection Between An Officer's Perception Of The Seized Item And Probable Cause ("A Vital Constraint") Or It Just Means Probable Cause ("Carries No Independent Meaning").

Most jurisdictions interpret this Court's condition that probable cause be "immediately apparent" for plain-view seizures to require at least a causal, and sometimes even a temporal, nexus between the government's perception and its probable cause.

The Sixth Circuit, for instance, requires both. It understands "immediately apparent" to call for a two-part test: "[W]here the government attempts to excuse the warrantless seizure of evidence under the 'plain view' exception, a reviewing court must 'determine whether, under the circumstances of each case, probable cause was both "immediate" and "apparent" to the executing officers from the nature of the object viewed.'" *United States v. McLernon*, 746 F.2d 1098, 1124-25 (6th Cir. 1984); *see also United States v. Byrd*, 211 F.3d 1270 (6th Cir. 2000) (table) ("[W]e have said that probable cause to believe there is a nexus between the item and illegal activity must be both immediate and apparent to the officers from the object's nature."). For probable cause to be "immediate," it must have both a temporal and causal connection to the officer's perception: "The agents' 'immediate' sensory perception must produce probable cause of crime." *McLernon*, 746 F.2d at 1125 (citation omitted); *see also United States v. Garcia*, 496 F.3d 495, 511 (6th Cir. 2007) ("[T]he officer must recognize the incriminating nature of an object as a result of his 'immediate' or 'instantaneous sensory

perception.'"); *United States v. Beal*, 810 F.2d 574, 577 (6th Cir. 1987) ("[T]o be immediate, probable cause must be 'the direct result of the officer's instantaneous sensory perception of the object.'").[8]

Applying this test, the Sixth Circuit has expressly rejected the view that having probable cause is itself sufficient to satisfy the "immediately apparent" requirement. In *McLernon*, the district court had adopted that view, concluding that "immediately apparent" means "the police need only have probable cause to believe the seized item has criminal significance or evidentiary value." 746 F.2d at 1125. The Sixth Circuit reversed, concluding that "absolutely nothing" in this Court's or its own precedent supports that view and it "unequivocally adhered" to its two-part test requiring that probable cause be immediate and apparent. *Id.*; *see also id.* (stating that the court "do[es] not, and cannot, subscribe to" the view that probable cause alone is sufficient, which would allow "officers of the state to seize an item as evidence *merely* because it is in 'plain view'"). Upon finding that "probable cause was neither 'immediate' nor 'apparent' to [the seizing officers] from their 'plain view' of the objects," the Sixth Circuit rejected the government's plain-view justification and ordered suppression. *Id.* at 1126.

The First Circuit's foundational plain-view case, *United States v. Rutkowski*, 877 F.2d 139 (1989), described this causal and temporal limitation by refe-

[8] The second part of the test, whether probable cause was "apparent," requires that probable cause concerning an item's "evidentiary significance" arise from the officer's "perception of the items seized." *McLernon*, 746 F.2d at 1126.

rence to the proverbial "light bulb" that must illuminate in the officer's mind when he sees the item seized during a search. *Id.* at 142. "[I]f the light does not shine during the currency of the search, there is no 'immediate awareness' of the incriminating nature of the object." *Id.* "Put in more conventional terms, the officers' discovery of the object must so galvanize their knowledge that they can be said, at that very moment or soon thereafter, to have probable cause to believe the object to be contraband or evidence." *Id.*; *see also id.* at 143 (endorsing the Sixth Circuit's refusal to apply plain-view exception where "probable cause . . . was neither 'immediate' nor 'apparent'" and emphasizing that the plain-view exception requires a showing that the item seized was incriminating "*by virtue of its intrinsic nature*" or gave rise to probable cause "*at the time of the search*" (quoting *United States v. Szymkowiak*, 727 F.2d 95, 99 (6th Cir. 1984))).

Other jurisdictions have maintained the limitation of a causal connection between the officer's perception of the object seized and the probable cause to seize it, but have relaxed or disclaimed a temporal limitation. The D.C. Circuit, for instance, has held that although "taken literally" the "immediately apparent" requirement "sounds temporal" and would require officers to generate probable clause "*at the precise moment they first spotted*" the seized item, its "true meaning" is causal: "the incriminating nature of the item must have become apparent, in the course of the search." *United States v. Garces*, 133 F.3d 70, 75 (D.C. Cir. 1998) (emphasis in original). Still endorsing the First Circuit's light-bulb metaphor, the court added emphasis that the probable-cause light bulb must "shine

during the currency of the search." *Id*. at 76 (emphasis in original) (quoting *Rutkowski*, 877 F.2d at 142).

The Court of Criminal Appeals of Texas has similarly interpreted this Court's "immediately apparent" language to require a causal connection, though not a temporal limitation, with reference to historical and dictionary definitions of immediacy. In *State v. Dobbs*, 323 S.W.3d 184 (Tex. Ct. Crim. App. 2010), officers executing a search warrant for narcotics came across clothing and golf clubs that were not covered by their warrant and, when they discovered the items, "lacked probable cause to believe that these items were connected to any crime." *Id.* at 185. While still conducting their search, the officers received information that clothing and clubs, the appearance of which matched the ones the officers were looking at, had been stolen, which "gave the officers probable cause to believe that the items they had come across in plain view in the bedroom were those that had been stolen." *Id.* at 186. The Court of Criminal Appeals held that "immediately apparent" did not require officers to have probable cause "at the very instant they first see" the items. *Id.* at 186-87. It reasoned that this Court used the term "immediate" in its historical sense, which "denote[s] a causational rather than temporal relationship"—*i.e.*, that seeing the item be a "direct" or "proximate cause" of probable cause. *Id.* at 189 n.14. The critical inquiry is thus whether "probable cause . . . arises" during the time the police are present. *Id*. at 185. Because the officers in *Dobbs* "developed probable cause to believe [the items] were stolen" during their search, the causal requirement was satisfied. *Id*. at 188.

By requiring, at a minimum, a causal connection between the government's probable cause and perception of the item seized, these jurisdictions enforce this Court's "immediately apparent" condition as "a vital constraint" against circumvention of the warrant requirement. *Garcia*, 496 F.3d at 510; *see also Byrd*, 211 F.3d 1270 (describing "[t]he 'immediately incriminating' requirement of the plain view test" as "especially important" because it "limits the scope of searches" and "prevents them from becoming licenses for 'general rummaging'"); *Rutkowski*, 877 F.2d at 144 (recognizing that the requirement follows from "'the need for courts to delineate exceptions to the fourth amendment's warrant requirement 'jealously and carefully'" (quoting *Coolidge*, 403 U.S. at 455)).

In contrast to these jurisdictions, the Colorado and Washington high courts have interpreted the Fourth Amendment to permit plain-view seizures whenever officers have probable cause, irrespective of any causal connection to seeing the item. That is perhaps most clear here, where the officer was specifically sent to "collect" the property seized and did not perceive *anything* about the property, which was in opaque bags. *See* Pet. App. 7a (concluding that the seizure of Petitioner's clothing "[w]ithout examining the clothing" at all was lawful because all that is required is that police have probable cause, *i.e.*, "can reasonably conclude," that "the subject evidence is associated with a crime"). It was sufficient that the supervising officer (who had time to obtain a warrant) was "aware of the evidentiary value of [Petitioner's] clothing" and the clothing "was expected to be in the hospital room and was detectable in the plastic hospital bags." *Id.*

The Colorado Supreme Court has adopted the same interpretation of "immediately apparent." In *People v. Swietlicki*, 361 P.3d 411 (Colo. 2015), a detective learned that the defendant had sexually assaulted a minor and the detective had probable cause to believe the defendant had child porn on a laptop. *Id.* at 412-14. After an officer located and arrested the defendant, he returned to the house of the defendant's relative, who pointed out a laptop belonging to the defendant. *Id.* at 413. The officer, who could not perceive anything incriminating about the laptop, called the lead detective and "[a]t [the detective's] behest," seized the laptop without a warrant. *Id.* at 413.[9]

As here, the sole issue was the meaning of this Court's "immediately apparent" requirement. *Id.* at 415. The Colorado Supreme Court concluded that this Court's caselaw "conclusively forecloses" a causal or temporal restriction and has instead "equated this language to probable cause." *Id.* That is, "the 'immediately apparent' requirement of the plain view exception means nothing more than the police must possess probable cause without conducting a further search." *Id.* The court therefore concluded that this Court's "immediately apparent" requirement "carries [no] independent meaning." *Id.* at 416.[10]

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[9] As here, the officer decided to seize the defendant's cellphone, too, and admission of the cellphone did not become an issue. *Swietlicki*, 361 P.3d at 413 n.2.

[10] As here, the defendant in *Swietlicki* sought suppression based on both the Fourth Amendment and the relevant state constitutional provision. The court acknowledged that its decision upholding the search necessarily served as an interpretation of both the federal and state constitutions. 361 P.3d at 414 n.3.

II. The Decision Below "Conflicts With Relevant Decisions Of This Court." Sup. Ct. R. 10(c).

When this Court interprets the Fourth Amendment and articulates "conditions that must be satisfied" for a search to be reasonable, *Horton*, 496 U.S. at 136, lower courts have no place rendering one of those conditions void of meaning. Yet that is precisely what Colorado and Washington have done. If all that is required to seize property is access and prior knowledge about the item that amounts to probable cause, then this Court's condition that "the object's incriminating character must also be 'immediately apparent'" does no work. *Id*.

For a similar reason, the decision below is obviously wrong. The very purpose of the warrant requirement is to have probable cause determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). If the government is permitted to bypass a magistrate's finding of probable cause by a court's post-hoc determination that probable cause existed, the warrant requirement is useless. *See Coolidge*, 403 U.S. at 466 (observing that the plain-view exception is "[o]f course . . . legitimate only where it is immediately apparent to the police that they have evidence before them").

Moreover, this Court has uniformly understood the plain-view exception not as some cumulative calculation of probable cause across absent officers, but as an exception that arises on an officer's "first-hand perception." *Texas v. Brown*, 460 U.S. 730, 739 (1983); *see also Horton*, 496 U.S. at 142 (applying the plain-view

exception because "it was immediately apparent *to the officer* that [the seized items] constituted incriminating evidence" (emphasis added)). This is not a hard concept: If the government wants to send an officer to seize a person's property regardless of what the officer knows or perceives, then it must send the officer on his way with a warrant authorizing the seizure. It cannot send him on that mission and then justify it as an "exception."

III. The Question Presented Is Important.

The conflict and error above go to the scope of one of the most frequently recurring Fourth Amendment exceptions. The plain-view doctrine surfaces virtually any time officers exceed the scope of a warrant or, as here, seize personal property without obtaining a warrant at all. Yet lower courts have "long deliberated what 'immediately apparent' means." *United States v. McLevain*, 310 F.3d 434, 441 (6th Cir. 2002).

The intrusion here is grounded not just in privacy, but in the deprivation of one's "dominion over his . . . property." *Horton*, 496 U.S. at 133. This Court's recent jurisprudence has recognized the importance of the proprietary interests underlying the Fourth Amendment. *See United States v. Jones*, 565 U.S. 400, 405 (2012) ("The text of the Fourth Amendment reflects its close connection to property[.]"); *Florida v. Jardines*, 569 U.S. 1, 11 (2013). The Framers afforded express and specific protection to a person's "effects," which "was connected to the law prohibiting interferences with another's possession of personal property, including dispossession . . . and unwanted manipulation." Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 951 (2016). "[H]istory demonstrates

that effects were specifically included in the constitutional text because of the harms to privacy and dignity that could be incurred by their inspection" as well as "the risk of mishandling or damage generally associated with interferences with personal property." *Id.* at 987.[11] Indeed, clothing, the particular effect here, was afforded "special status" in the law and was one of the specific categories of personal property that Madison sought to protect in the Bill of Rights. *Id.* at 978-88. Accordingly, in the lead up to passing the Bill of Rights, "orators gave impassioned speeches about" and "[a]uthors wrote about suffering searches of the clothing they carried on journeys." *Id.*

This Court, and lower courts that attribute meaning to the "immediately apparent" requirement, have emphasized its critical purpose in preventing circumvention of the warrant requirement and thereby ensuring the plain-view exception does not license the "general, exploratory rummaging in a person's belongings" that the Framers "abhorred." *Coolidge*, 403 U.S. at 467; *McLernon*, 746 F.2d at 1125. Relatedly, this Court's requirement "protects individuals against the possibility that officers acting without a warrant—without the authority of the rule of law—will

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[11] Patrick Henry, for instance, "argued that a Bill of Rights was necessary in part because the first Constitution failed to protect personal property from prying eyes; under it, '[e]very thing the most sacred [might] be searched and ransacked by the strong hand of power.'" Brady, *supra*, at 990. Indeed, the violence associated with "trespassing on personal property" was so significant that it "was often analogized to violence to real property, like the breaking of a door to a home." *Id.* at 991.

have time and scope to fabricate a plausible justification for an otherwise arbitrary and extensive search or seizure." *McLernon*, 746 F.2d at 1125.

IV. The Court Should Grant This Case.

The application of the plain-view exception was litigated and analyzed at all three levels in this case. The plain-view exception—and the "immediately apparent" requirement, in particular—was the sole, dispositive basis for the decision below. The State has never argued harmless error, nor disputed the court of appeals' conclusion that "[o]n this record, it could not so argue." Pet. App. 43a.

This record is uniquely good to resolve whether "immediately apparent" requires an officer to perceive *at least something* about the seized object because, here, it is undisputed that Officer Breault did not and *could not*. The State affirmatively conceded that when Officer Breault seized the clothing it was in opaque shopping bags and he could not have perceived anything additional. Pet. App. 58a-59a; *see also* Pet. App. 14a (Madsen, J., dissenting) (noting "Officer Breault never testified to smelling any gasoline in the room or near the plastic bags, nor did he state he observed any blood on [Petitioner's] clothing"; rather "the clothing was not observable through the bags at all"); RP 146 (conceding Officer Breault seized Petitioner's clothing based on his supervising officer's instruction, not his own analysis).

CONCLUSION

The Court should grant certiorari in this case.

Respectfully submitted,

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OCTOBER 2019

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	
	)	No. 96017-8
v.	)	
	)	En Banc
DAVID ZACHERY MORGAN,	)	
	)	Filed May 16, 2019
Respondent.	)	

GONZÁLEZ, J.—David Morgan was convicted by a jury of first degree assault, attempted murder, and arson. A bloodstain pattern analysis performed on his clothing suggested he was in close proximity to the victim when she suffered her injuries. We must decide if the warrantless seizure of his clothing, which officers reasonably concluded contained evidence, was justified by an exception to the warrant requirement.

Based on our inconsistent articulation of the plain view doctrine, the Court of Appeals found that the State was required to establish inadvertence as a separate element and reversed Morgan's convictions. We hold inadvertence is not a separate element required under the plain view doctrine, reinstate Morgan's convictions, and remand to the Court of Appeals for further proceedings in that court.

FACTS

Morgan and his ex-wife, Brenda,[1] shared custody of their daughter. About the time Brenda came to pick up their daughter from Morgan's house, Morgan's house was in flames. Firefighters found Morgan kneeling in his driveway, hair singed and barely able to speak. A firefighter repeatedly asked Morgan if anyone was in the burning house. After a period of silence, Morgan directed firefighters to the garage, where Brenda was lying in a pool of blood. Brenda was nonresponsive and badly injured, with multiple lacerations on her head, fractures, and severe burns on her upper body. Morgan and Brenda's clothing smelled of gasoline. Medics transported them to separate hospitals, observing blood on Morgan's clothing.

A supervising officer promptly told Officer Christopher Breault to "collect Morgan's clothing [from the hospital] and try to get an initial statement." Clerk's Papers (CP) at 208. A crime scene technician was also dispatched to collect Brenda's clothing.

Officer Breault spoke with Morgan in his hospital room for hours. Morgan disclosed that his daughter was safe at Morgan's mother's home during the fire. Morgan said he woke up to find his house on fire. He said he then found Brenda in his house with her sweater burning and tried to help her remove it. At some point during their conversation, Officer Breault noticed that hospital staff had put Morgan's clothing

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[1] We use only her first name to avoid subjecting her to unwanted publicity. No disrespect is intended.

in "several plastic shopping like bags" and left his clothing on the counter in Morgan's hospital room. 1 Verbatim Report of Proceedings (Feb. 4, 2016) at 151, 154-55. The officer later testified that it "was almost like [the clothing was] in like some sort of gift bag; it looked like it had a hospital logo on it. And they were just regular plastic bags that you could get at a store." *Id.* at 158. When the crime scene technician arrived with arson bags designed to preserve evidence, he and Officer Breault secured Morgan's clothing. Officer Breault also secured a utility knife with dried blood on the handle from a counter near the clothing. Hospital staff told Officer Breault they found the knife in Morgan's clothing.

Morgan was charged with attempted first degree murder, first degree arson, and first degree assault. He unsuccessfully moved to suppress the seized clothing.[2] The trial court rejected the State's plain view argument because Officer Breault did not find it inadvertently and he could not examine the clothing without removing it from the plastic hospital bags. Nonetheless, the trial court found that the removal of Morgan's clothing was justified by exigent circumstances because "there are special bags that have been designed and are available to put clothing and other items into so as to preserve that particular evidence." *Id.* at 182.

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[2] The record contains no written findings or conclusions for the CrR 3.6 hearing, but the trial court's oral findings adequately present the issues for appellate review. The trial court's written CrR 3.5 findings concern some of Officer Breault's observations.

The Court of Appeals found the State had not met its burden of establishing exigent circumstances because it had not shown applying for a warrant would have resulted in a loss of evidence. It also rejected the State's claim that the plain view doctrine applied because Officer Breault did not smell gasoline or see blood through the plastic hospital bags or come across it inadvertently. The State sought, and we granted, review. *State v. Morgan*, 191 Wn.2d 1026, 428 P.3d 1170 (2018).

ANALYSIS

We are faced with a warrantless seizure of clothing associated with criminal activity. Under the robust privacy protections of our constitution, any state intrusion into private affairs must be done under "authority of law." WASH. CONST. art. I, § 7. "Authority of law" generally means a warrant or a well-established exception to the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *City of Seattle v. McCready*, 123 Wn.2d 260, 273, 868 P.2d 134 (1994)). The plain view doctrine and exigent circumstances are well-established exceptions. We hold the State failed to establish that exigent circumstances justified the intrusion, but it did justify the intrusion under the plain view doctrine.

We agree with the Court of Appeals' conclusion that the State did not meet its burden to show that exigent circumstances existed when Officer Breault seized Morgan's clothing. The State "must establish the exception to the warrant requirement by clear and convincing evidence." *State v. Garvin*, 166 Wn.2d 242,

250, 207 P.3d 1266 (2009) (citing *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990)). Critically, the exigent circumstance "exception requires a compelling need for officer action and circumstances that make the time necessary to secure a warrant impractical." *State v. Baird*, 187 Wn.2d 210, 221, 386 P.3d 239 (2016) (plurality opinion) (citing *Missouri v. McNeely*, 569 U.S. 141, 149-50, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013)). While the State had a legitimate concern that trace evidence on Morgan's clothing could be contaminated by Morgan or hospital staff, the officers exhibited no urgency in collecting the clothing, which sat undisturbed on the counter for hours, including when Morgan was alone with hospital staff.

We disagree, however, with the Court of Appeals' application of the plain view doctrine. We have been inconsistent in articulating the elements the State must establish to justify a warrantless intrusion under the plain view doctrine. We have said the plain view doctrine applies "when the police (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity." *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007) (citing *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991)). But in some cases, we have also articulated a third element, inadvertence. *See, e.g.*, *State v. Kull*, 155 Wn.2d 80, 85, & n.4, 118 P.3d 307 (2005).[3]

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[3] "The requirements for plain view are (1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the officer that [they] had

We take this opportunity to clarify the law. Properly understood, there is no separate inadvertence requirement in the plain view doctrine. Officers are not restricted to seizing evidence solely when they come across the evidence unintentionally and inadvertently. As the United States Supreme Court held, "[I]nadvertence is a characteristic of most legitimate 'plain-view' seizures" but "it is not a necessary condition." *Horton v. California*, 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

Officers are "entitled to keep [their] senses open to the possibility of contraband, weapons, or evidence of a crime." *State v. Lair*, 95 Wn.2d 706, 719, 630 P.2d 427 (1981).[4] There is, however, an article I, section 7 requirement that a seizure not be based on pretext. *See, e.g.*, *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). "Put simply, the law does not vest in police the discretion to seize first and decipher a piece of evidence's incriminating nature later." Katie Farden, *Recording a New Frontier in Evidence-Gathering: Police Body-Worn Cameras and Privacy Doctrines in Washington State*, 40 SEATTLE U. L. REV. 271, 284-85 (2016). Thus, a plain view seizure is legal when the police (1) have a valid justification to be in

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evidence before [them]." *Kull*, 155 Wn.2d at 85 (citing *State v. Chrisman*, 94 Wn.2d 711, 715, 619 P.2d 971 (1980), *rev'd*, 455 U.S. 1, 102 S. Ct. 812, 70 L. Ed. 2d 778 (1982)). The intrusion is often the detention of a person or entry into a place, not the seizure of the evidence itself.

[4] The fact that the evidence in plain view is not contraband is of no relevance. *See, e.g.*, *State v. Weller*, 185 Wn. App. 913, 926, 344 P.3d 695 (2015) (seizing a board associated with an assault); *State v. Alger*, 31 Wn. App. 244, 248, 640 P.2d 44 (1982) (seizing a sleeping bag associated with a rape).

an otherwise protected area, provided that they are not there on a pretext, and (2) are immediately able to realize the evidence they see is associated with criminal activity.

Here, Morgan challenged the seizure of his clothing. Morgan does not dispute that "the officers had a lawful reason to be in the hospital room." CP at 306-07. The State need show only that it was immediately apparent that the clothing was associated with criminal activity, which it aptly does.

Objects are immediately apparent under the plain view doctrine "when, considering the surrounding circumstances, the police can reasonably conclude" that the subject evidence is associated with a crime. *State v. Hudson*, 124 Wn.2d 107, 118, 874 P.2d 160 (1994) (citing *Lair*, 95 Wn.2d at 716). Certainty is not necessary.[5]

Morgan's clothing was expected to be in the hospital room and was detectable in the plastic hospital bags on the counter. Officer Breault's supervising officer, having become aware of the evidentiary value of Morgan's clothing—including that it smelled like gasoline—instructed Officer Breault to collect it. Without examining the clothing, Officer Breault reasonably concluded that Morgan's

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[5] As the United States Supreme Court has noted, "[T]he use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for application of the 'plain view' doctrine." *Texas v. Brown*, 460 U.S. 730, 741, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

clothing would have evidentiary value given the conversation he had had with Morgan and observations he made during that time, including a knife with dried blood on the handle.

In light of the fire, Brenda and Morgan's respective injuries, the supervising officer's knowledge, and observations by Officer Breault and others, there were more surrounding circumstances than necessary. Officer Breault did not have to manipulate the bags to know what they contained.[6] He reasonably concluded that the clothing contained evidence associated with suspected criminal activity. Nothing in this record suggests any ambiguity; it is clear from context that the plastic hospital bags contained the clothing hospital staff removed in treating Morgan. Thus, the State met its burden to show that Officer Breault lawfully seized Morgan's clothing under the plain view doctrine.

CONCLUSION

While exigent circumstances did not exist, the plain view doctrine permitted the seizure of Morgan's clothing. We reverse and remand to the Court of Appeals for further proceedings in that court.

/s/ Gonzales, J.

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[6] Conversely, an officer's suspicion that an expensive stereo in a rundown house was stolen would not allow the officer to manipulate it. *Arizona v. Hicks*, 480 U.S. 321, 326-27, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); *accord State v. Murray*, 84 Wn.2d 527, 536, 527 P.2d 1303 (1974). This case is different because Officer Breault could reasonably conclude the clothing was associated with a crime without having to *see* blood or *smell* gasoline on the clothing through the plastic hospital bags.

WE CONCUR:

/s/ Fairhurst, C.J.

/s/ Johnson, J.

/s/ Owens, J.

/s/ Stephens, J.

/s/ Wiggins, J.

/s/ Yu, J.

No. 96017-8

MADSEN, J. (dissenting)—I disagree with the majority that the seizure of David Morgan's clothes falls under the plain view exception to the search warrant requirement. Under the plain view doctrine, it must be immediately apparent to the seizing officer that evidence he has discovered is associated with criminal activity. The majority's holding here divorces the observations of the seizing officer from the seizure. Instead, the majority says that if an officer has information from a civilian witness who has observed evidence that may indicate criminal activity when that evidence was at a different location, a different officer, who was not informed that evidence was incriminating and who did not himself observe anything incriminating, may seize that evidence in a different location under the plain view doctrine—a doctrine meant solely to allow law enforcement an exception to obtain evidence without a warrant when it is obvious to the seizing officer that the evidence is associated with a crime. While the chain of events here clearly supports issuance of a warrant, it certainly does not fit within any of the "jealously and carefully drawn exceptions" to the warrant requirement.

In reaching this unprecedented application of the plain view doctrine, the majority, sub silentio, imports the "fellow officer" rule, which allows officers to make *warrantless arrests* on the strength of collective information. *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971). This rule has never been imported into

the "plain view" exception for obvious reasons—it cannot be plain to the seizing officer that he is viewing incriminating evidence unless he observes it and is himself aware of the surrounding facts and circumstances. Because the majority severely undermines the search warrant requirement under article I, section 7 of our constitution, which has long been held to provide greater protections than the Fourth Amendment, I respectfully dissent. WASH. CONST. art. I, § 7; U.S. CONST. amend. IV.

Discussion

Our constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. Generally, an officer acts under authority of law when executing a search and seizure under a valid warrant. *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007). Warrants must be supported by probable cause and describe the places to be searched or persons or things to be seized with particularity. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). This is, of course, to prevent a "'general, exploratory rummaging in a person's belongings.'" *Id.* (internal quotations omitted) (quoting *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). It is well settled that a warrantless search is per se unreasonable unless it falls under one of the "'jealously and carefully drawn exceptions.'" *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007) (internal quotation marks omitted) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). The plain view doctrine is one of those exceptions.

A plain view search is legal when officers (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to recognize the evidence they see is associated with criminal activity. *Id*. (citing *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991)). An object is immediately apparent under the second prong of a plain view search when, "considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them." *State v. Lair*, 95 Wn.2d 706, 716, 630 P.2d 427 (1981). "In other words, police have immediate knowledge if the *officers* have a reasonable belief that evidence is present." *State v. Munoz Garcia*, 140 Wn. App. 609, 625, 166 P.3d 848 (2007) (emphasis added); *see also State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986) (it is not an unlawful search and seizure when an officer, observing from a vantage point where he can legally be present, immediately recognizes an object as incriminating evidence). Probable cause is required to satisfy the immediate recognition prong of the plain view doctrine. *State v. Hudson*, 124 Wn.2d 107, 118, 874 P.2d 160 (1994) (citing *Arizona v. Hicks*, 480 U.S. 321, 326, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)).

In this case, the officer who seized the clothing, Officer Christopher Breault, was initially dispatched to Morgan's hospital room to "give medical updates to Sergeant [Curtis] Zatylny" and to find more information about a possible missing child. 1 Verbatim Report of Proceedings (Feb. 4, 2016) at 115. At some point, Sergeant Zatylny ordered Officer Breault to seize Morgan's clothes as evidence. After going in and out of Morgan's hospital room, Officer

Breault noticed Morgan's clothing had been placed "in several plastic bags that the hospital had provided and then placed on the back counter of the … hospital room." *Id*. at 151. The bags had a hospital logo on it but otherwise "were just regular plastic bags that you could get at a store." *Id*. at 158.

The first step in our analysis must be a recognition that Morgan's clothing is a private affair and that he has an expectation that his privacy in the clothing is not disturbed without a warrant. Next, it is important to recognize that clothing is not inherently incriminating. Here, Officer Breault believed the bags he seized contained Morgan's clothing, but he did not observe anything about the clothing that could be described as incriminating. To justify the seizure, the State cites two cases it argues support the position that "surrounding facts and circumstances" in the context of plain view means any and all information that any police officer may know related to the investigation. *See* Suppl. Br. of Pet'r at 10-11. While the majority agrees with this broad reading of a "jealously and carefully drawn exception," those cases do not actually broaden the narrowly drawn plain view exception in the way the majority attempts to do here. In *State v. Alger*, a sleeping bag was seized under the plain view doctrine as evidence of statutory rape. 31 Wn. App. 244, 640 P.2d 44 (1982). But the officers who seized the evidence were themselves "acquainted with the details of the crime." *Id*. at 247. They were informed that sexual relations between the defendant and the victim occurred on a sleeping bag while she was on her menstrual cycle. *Id*. at 246. The sleeping bag was seized after it was clearly

visible from their vantage point near the front door, based on the surrounding facts and circumstances known to the officers at the time *those officers* seized the evidence. Similarly, in *State v. Weller*, officers were called in to assist on a wellness check after a Child Protective Services investigator interviewed the defendant's children for possible abuse. 185 Wn. App. 913, 344 P.3d 695 (2015). The officers there interviewed two of the children who described being beaten with a board. *Id*. at 919. When the officers moved to the garage for greater privacy, the officers discovered a board that the children later indicated was used for their beatings. *Id*. The board—which the officers observed had a long groove in it and had discoloration that appeared to be dried blood—was seized by the officers. In both *Alger* and *Weller*, *the seizing officer* was aware of the "surrounding facts and circumstances" that justified the warrantless seizure of evidence.

Here, that is not the case. Officer Breault never testified to smelling any gasoline in the room or near the plastic bags, nor did he state he observed any blood on Morgan's clothing through the plastic bags.[7] Indeed, the officer's description of the plastic bags suggests the clothing was not observable through the bags at all. Moreover, Officer Breault was not there to investigate any possible crime committed by Morgan. His only purpose for being there was to observe Morgan and to determine the location of the child who

[7] At most, Officer Breault noticed and later seized a utility knife with some dried blood near the bag of clothing. But Morgan does not dispute the seizure of the utility knife.

may have had a connection to the events. While firefighters and paramedics observed that the clothes belonging to Morgan's ex-wife, Brenda, smelled like gasoline in the ambulance, as did Morgan's clothing, all of that information was from a non-law-enforcement source and was relayed only to Sergeant Zatylny. Sergeant Zatylny himself did not notice any evidence of gasoline or other incriminating evidence when he responded to the residential fire. Crucially, none of the information regarding Morgan's or Brenda's clothing was relayed to Officer Breault. To discover that evidence, Officer Breault would have had to manipulate the bag's contents to determine whether the clothing actually contained incriminating evidence. But doing so would undoubtedly be an unlawful seizure. *See State v. Johnson*, 104 Wn. App. 489, 501-02, 17 P.3d 3 (2001) (discussing *Hicks*, 480 U.S. at 328-29 (manipulating stereo equipment that an officer reasonably suspects may be incriminating evidence to determine the serial number, which would give the officer probable cause, constitutes an unlawful search under the plain view doctrine)).

While we have generally recognized that "a policeman in the course of a valid search is entitled to keep his senses open to the possibility of … evidence of a crime," *Lair*, 95 Wn.2d at 719, we have never suggested knowledge obtained by one officer may be imputed to the seizing officer, *who is completely unaware* of the facts and circumstances leading up to the seizure based on "plain view." Indeed, we have recognized only that a warrantless arrest, not a warrantless search and seizure, may be executed based on the cumulative knowledge possessed by a

team of officers under the "fellow officer" rule. *See State v. Bravo Ortega*, 177 Wn.2d 116, 297 P.3d 57 (2013). But to fall under the "fellow officer" rule, the information supplied must be from a law enforcement agency. *See State v. Gaddy*, 152 Wn.2d 64, 70-71, 93 P.3d 872 (2004). Here, the information obtained by the police came from first responders on the scene who were non-law-enforcement sources. Consequently, the officer's warrantless seizure could not fall under the fellow officer rule even if it were applied here.

In essence, the majority's holding that Sergeant Zatylny directing Officer Breault to collect Morgan's clothing falls under the plain view exception is really an "ends justify the means" argument since Officer Breault saw nothing to justify a plain view seizure. Importantly, Sergeant Zatylny was not present at Morgan's hospital room to perform a plain view seizure of the clothing. Sergeant Zatylny had more than enough information to obtain a warrant to collect Morgan's clothing. There was no concern that obtaining a warrant here would "be a needless inconvenience [or] dangerous—to the evidence or to the police themselves." *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (plurality portion). Given the facts and circumstances of the investigation, a telephonic warrant would have been easily obtainable, should have been obtained by police here, and, more importantly, is what our constitution required.

Conclusion

Clothing, without more, is not inherently incriminating evidence. The officer observing and

seizing evidence under plain view, must be aware of the surrounding facts and circumstances to have probable cause justifying the warrantless seizure. Because the officer here was directed only to observe, gain information about a missing child, and, later, collect Morgan's clothing as evidence without knowing anything about a criminal investigation, the plain view exception to a warrant is not met. The majority's holding unnecessarily broadens our plain view doctrine and undermines the search warrant requirement under article I, section 7 of the Washington State Constitution. Probable cause to justify the warrantless seizure by the seizing officer was not met, and as such, I respectfully dissent.

/s/ Madsen, J.

/s/ Gordon McCloud, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 75072-1-I
	)	DIVISION ONE
v.	)	
	)	
DAVID ZACHERY MORGAN,	)	UNPUBLISHED
	)	Filed May 29, 2018
Appellant.	)	

Cox, J.—David Morgan appeals his convictions for one count of first degree attempted murder, first degree arson, and first degree assault, all crimes of domestic violence. The trial court did not abuse its discretion in declining to dismiss these charges following Morgan's mistrial motion. And double jeopardy did not bar retrial of these charges. But police authorities seized Morgan's clothing from bags inside his hospital room without authority of law. The State failed to prove by clear and convincing evidence that exigent circumstances existed. That clothing was later admitted into evidence at trial. Accordingly, we reverse and remand for a new trial.

David Morgan and Brenda Welch were divorced and shared custody of their eight-year old daughter, K. Morgan spent three weekends per month with K. Welch would pick her up at Morgan's house on Sunday evenings.

On Saturday night, November 15, 2014, Morgan left K. with his mother. Morgan claims to have been sick. He was supposed to pick up K. before Welch arrived at his home on Sunday evening. But he told officers who interviewed him that he fell asleep.

Welch left her house around 6:25 p.m. on Sunday, November 16, 2014, to pick up K. from Morgan's. Around 7:00 p.m., a neighbor saw that Morgan's house was on fire. Firefighters arrived within minutes and found Morgan on the ground, in the driveway. A lieutenant, the first firefighter to arrive, repeatedly asked Morgan if anyone else was in the house. Morgan mumbled the word "garage," and handed the garage door opener to the lieutenant.

The door opener did not work because a bin was blocking the door. After getting inside, firefighters found Welch on her back, in a pool of blood. She had severe burns on her upper body. She also smelled strongly of gasoline. She was taken to Harborview Medical Center for observation and treatment.

Welch had a skull fracture with a pattern of head lacerations that resembled a garden tool found by the front door of Morgan's home. She suffered permanent injuries. She did not remember how she got hurt.

Morgan had blood on his hands and clothing but no lacerations. He had a small wound on his forehead and his hair was singed. He was taken to Swedish Edmonds Hospital for observation and treatment.

Officer Christopher Breault of the Lynnwood Police Department went to the hospital, where Morgan was in a room being treated for smoke inhalation. He asked Morgan what had occurred that

evening. Morgan spoke freely with the officer regarding his memory of events.

Later that same evening, two other police officials arrived at the hospital room to interview Morgan. During this interview, Morgan declined to give a recorded statement. Sometime during this interview, police seized his clothing, which was stored in several plastic bags located on the back counter of his hospital room.

Police arrested Morgan the next day, upon his release from the hospital.

The State charged him with attempted first degree murder, first degree assault, and first degree arson. Each charge included an allegation that it constituted a crime of domestic violence.

On the fourth day of Morgan's first jury trial, the trial court granted a mistrial due to prosecutorial misconduct. At the second trial that followed a short time later, the jury convicted Morgan on all counts. The trial court sentenced him accordingly.

Morgan appeals.

DISMISSAL UNDER CrR 8.3(b) AND CrR 4.7(h)(7)(i)

Morgan first claims that he was entitled to dismissal of the charges with prejudice under CrR 8.3(b) and CrR 4.7(h)(7)(i) due to the prosecution's allegedly outrageous and prejudicial conduct. The court did not abuse its discretion in declining to dismiss the charges with prejudice on these grounds.

CrR 8.3(b) authorizes dismissal "due to arbitrary action or governmental misconduct when there has

been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 4.7(h)(7)(i) authorizes the trial court to impose sanctions, including dismissal for discovery violations.

A trial court will only order dismissal of charges under CrR 8.3(b) if the defendant shows by a preponderance of evidence, arbitrary action or government misconduct and prejudice affecting the defendant's right to a fair trial.[1] Likewise, dismissal pursuant to CrR 4.7(h)(7)(i) is an extraordinary remedy that is only available if a defendant can show actual prejudice.[2]

This court reviews the trial court's decision for manifest abuse of discretion.[3] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.[4]

Here the prosecutor elicited an opinion from an expert witness that had not been disclosed in pretrial discovery. The State properly concedes that this constitutes "government misconduct."[5] However, Morgan still bears the burden to show that his right to a fair trial was prejudiced in a manner that could not be remedied by a new trial.[6] But the trial court specifically determined that Morgan could be given a

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[1] *State v. Puapuaga*, 164 Wn.2d 515, 520, 192 P.3d 360 (2008).

[2] *See State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010).

[3] *Puapuaga*, 164 Wn.2d at 520-21; *Krenik*, 156 Wn. App. at 320.

[4] *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

[5] *See id*. at 239-40.

[6] *State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981).

fair trial. And he fails to point to anything in the record of the second trial to show he did not get a fair trial.

Instead, he argues that he was prejudiced by the loss of the jury selected in his first trial, especially since the media coverage of his case made it particularly difficult for him to obtain a second unbiased jury. But he fails to point to anything in this record to show why the original jury selected would have been any fairer than the jury selected at his second trial.

Moreover, while Morgan claims that he was subject to adverse pretrial publicity, the trial court disagreed. Morgan fails to present anything other than speculation to show that the trial court was wrong in its assessment of this issue.

Morgan also argues that the mistrial, followed by retrial, worked to the State's benefit. We see no persuasive explanation why, given the eleven-day delay between termination of his first trial and commencement of his second trial.

Morgan relies on *State v. Martinez*, as support for his contention that dismissal was appropriate due to the prosecution's allegedly "outrageous" conduct.[7] His reliance is misplaced.

In *Martinez*, the prosecution kept *exculpatory* evidence from Alexander Martinez until the middle of trial.[8] The exculpatory evidence was revealed

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[7] 121 Wn. App. 21, 86 P.3d 1210 (2004).

[8] *Id*. at 32-35.

right before the State rested.[9] The jury voted 10 to 2 to acquit, and the trial court declared a mistrial.[10]

When the State moved to refile the charges, Martinez moved to dismiss based on double jeopardy and CrR 8.3(b).[11] The trial court agreed with Martinez, dismissed the charges, and the State appealed. [12]

This court affirmed. We noted that "dismissal under CrR 8.3(b) is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused."[13] We then held that the prosecutor's withholding of exculpatory evidence until the middle of trial was "so repugnant to principles of fundamental fairness" that the trial court did not abuse its discretion in dismissing the charges.[14]

Here, the undisclosed evidence was not exculpatory. Rather, it supported the State's theory that Morgan was guilty of arson. It is true that the trial court found that the prosecution intentionally elicited an opinion that should have been disclosed earlier, but Morgan has failed to cite to any authority equating such conduct with a failure to produce exculpatory material or with other outrageous behavior. Moreover, dismissal pursuant to CrR 8.3(b)

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[9] *Id*. at 32-33.

[10] *Id*. at 24, 29.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 30.

[14] *Id*. at 35-36

is a discretionary decision. Thus, affirming in this case is consistent with this court's decision to affirm in *Martinez*. In both cases, this court defers to the trial court's exercise of discretion.

Finally, Morgan argues in his opening brief that he was prejudiced because the mistrial forced him to waive his speedy trial rights. But he concedes in his reply brief that this argument was in error. Specifically, the last day for trial pursuant to CrR 3.3 was Monday, March 21 and trial began on that day. We need not further address this argument.

Morgan fails to show that he either could not receive a fair trial, or that he suffered actual prejudice that could not be remedied by retrial. Accordingly, the trial court did not abuse it discretion by refusing to dismiss the charges with prejudice.

DOUBLE JEOPARDY

Morgan next argues that double jeopardy precluded a second trial, notwithstanding that he sought the mistrial that the court granted. He further claims that the prosecutor acted in bad faith by intentionally and repeatedly eliciting highly prejudicial testimony from the State's expert in violation of the trial court's discovery order. We disagree.

Both the federal and Washington constitutions protect persons from being put into jeopardy twice for the same offense. [15] Jeopardy attaches once a jury is sworn in.[16] In general, double jeopardy principles

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[15] *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010).

[16] *State v. Corrado*, 81 Wn. App. 640, 646, 915 P.2d 1121 (1996).

do not preclude retrial if the mistrial was granted upon the defendant's motion.[17] This is true even if the defendant sought a mistrial due to prosecutorial error.[18]

Federal cases recognize one exception to the usual rule. If the prosecutor intended to goad the defense into seeking a mistrial, re-trial is precluded.[19] Other bad faith actions by the prosecutor are not enough.[20]

Washington courts have recognized the possibility of a slightly broader exception based on the Oregon Supreme Court's interpretation of its state constitution.[21] Under the "Oregon standard," double jeopardy precludes retrial if the prosecutor "knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal."[22] The difference between the federal and Oregon standards is quite narrow with the latter including cases where the prosecutor "harass(es] the defendant with what the prosecutor knows to be prejudicial error."[23] Washington courts

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[17] *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S. Ct. 2083, 72 L. Ed. 2d 416(1982); *State v. Hopson*, 113 Wn.2d 273, 280, 778 P.2d 1014 (1989).

[18] *Hopson*, 113 Wn.2d at 280.

[19] *Kennedy*, 456 U.S. at 676.

[20] *Id*. at 675-76.

[21] *Hopson*, 113 Wn.2d at 280 (citing *State v. Kennedy*, 295 Or. 260, 276, 666 P.2d 1316, 1326 (1983)).

[22] *Id*. (quoting *Kennedy*, 295 Or. at 276).

[23] *Id*. (quoting *Kennedy*, 295 Or. at 272).

have not yet decided whether this broader rule applies under the Washington constitution.[24]

Whether the prosecutor intended to goad the defendant into seeking a mistrial is an issue of fact for the trial court.[25] Likewise, a finding whether the prosecutor intended or was indifferent to the possibility of a mistrial is factual, and "[t]he trial court may infer its finding from objective facts and circumstances."[26]

We will not disturb the trial court's factual findings that are "supported by substantial evidence."[27] We review de novo any questions of law.[28]

Snohomish County Deputy Fire Marshall Edwin Hardesty investigated to determine the cause of the fire. He submitted a report characterizing the cause as "undetermined," and stating that he "could not rule out it was an incendiary fire" and he could rule out all natural and accidental causes. The report was provided to the defense.

Morgan moved to compel pursuant to CrR 4.7(a), asking the State to provide a summary of the opinions of its expert witnesses. The trial court granted the motion, and the State produced a memorandum summarizing Hardesty's opinion and stating that he was expected to testify that the exact

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[24] *Id*. at 277-78; *State v. Lewis*, 78 Wn. App. 739, 743, 898 P.2d 874 (1995).

[25] *Lewis*, 78 Wn. App. at 744.

[26] *Id*.

[27] *Id*.

[28] *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

cause of the fire was undetermined. In the same memorandum, the State provided that Mikael Makela, the fire investigator assisting Hardesty, signed off on Hardesty's report, and "it is expected that he would join in the ultimate conclusions listed above if called to testify."

At the first trial, Hardesty testified that, from the nature of the fire, he concluded that some type of fuel or accelerant had been added to the room to sustain the fire. Based on Welch's condition and the gasoline on her clothing, Hardesty testified that he could not rule out that the fire was intentionally set. He could eliminate all accidental causes in the room of fire origin and could not rule out an intentionally set fire. He again classified the cause of the fire as "undetermined."

On cross-examination, Morgan's counsel questioned Hardesty about NFPA 921, a peer-reviewed manual that rejects a procedure called "negative corpus" in which the investigator uses a process of elimination to conclude the fire was intentionally set. Hardesty denied using that procedure.

The State later called Makela who testified that he agreed with Hardesty's conclusions. Towards the end of his testimony, the following exchange occurred:

> Makela: [Reading from the NFPA that] "An incendiary fire is a fire that is deliberately set with the intent to cause the fire to occur in an area where the fire should not be.

Prosecutor: And do you believe that's what occurred in this case?

M: Yes, Ido.

P: (Does the NFPA] reiterate anything about ignitable liquid?

M. It does.

P. What does it say?

M: The presence of ignitable liquids may indicate that a fire was incendiary, especially when [they] are found in areas in which they are not normally expected.

P: Did you find that in this particular case?

M. Yes.

P: And the last paragraph?

M: Absence of personal items prior to the fire, the absence of items that are personal, irreplaceable, or difficult items to replace should be investigated." Examples include . . . photographs, awards, . . . art, pets [and] the removal of important documents, e.g., fire insurance policies, business records, tax records, prior to the fire, should be investigated and explained.

P: In consideration of all of that, of the standards of what you both eliminated and what you found, do you have an opinion as to whether this is an intentionally set fire?

M: Yes, I do. P: Which is?

M: Yes. It is an incendiary fire. [29]

On cross-examination, Makela testified that he had told the State of his opinion a few months before trial and had spoken with the prosecutor about his conclusion "[m]aybe three of four times."[30] He did not provide the State with a written report of his conclusions.

Morgan moved for a mistrial because the prosecution had failed to disclose in discovery Makela's opinion that the fire was intentionally set. The prosecutor initially claimed that Makela's testimony was consistent with Hardesty's. The trial court disagreed, noting that Makela had testified that his professional opinion was that it was an intentionally set fire.

The prosecutor then claimed that he believed he had provided materials to the defense about Makela's opinions but would have to check. After a recess, the prosecutor corrected his earlier statement and informed the court that he had not intended to elicit this information on direct examination. The trial court determined that failure to disclose Makela's opinion was a violation of the court's discovery order and declared a mistrial.

Morgan then moved to dismiss the charges. The prosecutor responded that he had elicited far more than he intended and acknowledged that his questioning was "sloppy, inartful [sic], and unfocused."

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[29] Report of Proceedings Vol. 5 (February 29, 2016) at 950-51.

[30] *Id*. at 951-52.

The trial court disagreed with the prosecutor's version of the facts in its response. The trial court determined that the prosecutor had asked questions designed to elicit Makela's opinion that the fire was incendiary and that the "five minutes or so of testimony that was elicited cannot be attributed to a mistake." Nonetheless, it did not believe that the prosecutor's misconduct warranted dismissal but reserved the right to impose sanctions at the conclusion of the case. At the end of the second trial, the court determined that the mistrial was an appropriate and sufficient sanction and imposed no others.

Morgan argues that the second trial violated his double jeopardy rights because his motion for mistrial should not be considered as consent. He is wrong.

Morgan relies on *State v. Rich*, as support for this argument that he did not consent because he was presented with two equally unacceptable choices—to allow a mistrial or to proceed with a jury that was tainted by the prosecutor's misconduct. [31]He is wrong because John Rich objected to the trial court's decision to grant a mistrial.[32] If Morgan was correct, no defendant seeking a mistrial due to prosecutorial error could ever be seen as consenting because he or she always faces a choice between giving up the first jury or continuing with a trial tainted by prosecutorial error.[33]

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[31] 63 Wn. App. 743, 821 P.2d 1269 (1992).

[32] *Id*. at 745-46, 747.

[33] See *U.S. v. Dinitz*, 424 U.S. 600, 609, 96 S. Ct. 1075, 47 L. Ed.

Morgan also argues that retrial should have been barred because the prosecutor acted in bad faith to goad him into requesting a mistrial or to prejudice his prospects for acquittal. He also argues the opposite—that the prosecutor "took a risk by eliciting testimony he knew he had not provided in discovery, presuming that the evidence would simply be stricken if defense counsel objected." He argues that the prosecutor's improper questioning, coupled with his subsequent false assertions, first that he had provided the information in discovery and then that he had asked the questions by accident, shows bad faith and thus the trial court erred in refusing to dismiss the charges. We disagree.

Under either double jeopardy standard, the more narrow one articulated by the United States Supreme Court in *Kennedy* or the broader Oregon standard recognized in *Hopson*, Morgan was not entitled to dismissal. Both require a "rare and compelling" set of facts before dismissal is warranted.[34]

The double jeopardy concerns presented in this case are very similar to those addressed by this court in *State v. Lewis*.[35] Andre Lewis was charged with second degree murder, and at his first trial the prosecutor repeatedly asked a witness about whether someone working for the defense had tried to get him to change his story.[36] Lewis objected three times and

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2d 267 (1976).

[34] *Hopson*, 113 Wn.2d at 283.

[35] 78 Wn. App. 739, 898 P.2d 874 (1995).

[36] *Id*. at 741-42.

each time the trial court sustained the objection.[37] The trial court granted a mistrial concluding that the prosecution "had introduced irrelevant, prejudicial evidence that denied Lewis a fair trial."[38]

This court affirmed the trial court's refusal to dismiss the charges based on double jeopardy.[39] Turning first to the federal standard, the court observed that "the critical factor is the trial court's perception that the State's case is going badly and the prosecutor was looking for an excuse to start over."[40]

Here, there is no evidence that the prosecutor wanted to start over. To the contrary, the trial court specifically found that prior to the improper testimony, the State's case was strong.

Turning to the slightly broader Oregon standard, the court in *Lewis*, observed that retrial was barred if the deliberate misconduct of the prosecutor created a risk of mistrial, perhaps to avoid the serious danger of acquittal, perhaps to harass the defense, or maybe just to retaliate against defense counsel in some way. This court agreed with the trial court that the prosecutor's misconduct was serious, its questions prejudicial, and that the prosecutor had wrongfully persisted despite three sustained objections. Nonetheless, this court deferred to the trial court's "first hand observations and sound

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[37] *Id*. at 742.

[38] *Id*. at 742.

[39] *Id*. at 745-46.

[40] *Id*. at 743

judgment" and its determination that the prosecutor's conduct was insufficient to bar retrial.

In this case, as in *Lewis*, the trial court did not find that the prosecutor either intended a mistrial or was indifferent to the possibility. It also recognized that it had the discretion to "weigh the balance of justice," and it determined that dismissal would not support the ends of justice.

As in *Lewis*, we conclude that the trial court did not abuse its discretion in determining that retrial was not barred by double jeopardy.

SEIZURE OF MORGAN'S CLOTHING

Exigent Circumstances

Morgan argues that the trial court improperly failed to suppress the evidence obtained from his clothing because the clothing was illegally seized without a warrant. He further argues that the subsequent warrant to analyze bloodstain patterns was unlawful because it was obtained based on evidence from the unlawfully seized clothing. We agree with both arguments.

As a general rule, a warrantless seizure is a per se violation of article 1, section 7 of the Washington Constitution.[41] There are a few "carefully drawn exceptions to the warrant requirement" including exigent circumstances.[42]

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[41] *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010).

[42] *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (quoting *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002)).

"The exigent circumstances exception to the warrant requirement applies where 'obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.'"[43] The supreme court has identified five circumstances from federal cases that "could be termed 'exigent'" circumstances.[44] They include "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence."[45] However, merely because one of these circumstances exists does not mean that exigent circumstances justify a warrantless search.[46] There must be a true emergency and a warrantless search is unlawful if other, less intrusive, options were available.[47]

In determining whether exigent circumstances exist, the court looks to the totality of the circumstances.[48] Six nonexclusive factors that may aid in determining whether exigent circumstances exist are:

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[43] *Tibbles*, 169 Wn.2d at 370 (quoting *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009)).

[44] *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) (emphasis added).

[45] *Id.* (citations omitted); see also *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986).

[46] *E.g.*, *Tibbles*, 169 Wn.2d at 370; *State v. Patterson*, 112 Wn.2d 731, 735, 774 P.2d 10 (1989).

[47] *State v. Cruz*, 195 Wn. App. 120, 126-27, 380 P.3d 599 (2016).

[48] *Smith*, 165 Wn.2d at 518.

> '(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) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.'[49]

When reviewing the trial court's denial of a motion to suppress, we review challenged findings of fact for substantial evidence.[50] We review de novo whether exigent circumstances exist to justify the warrantless seizure.[51]

"The State bears a heavy burden" and "must establish the exception to the warrant requirement by clear and convincing evidence."[52]

The issue before us is whether, under article 1, section 7 of the Washington Constitution, the warrantless seizure of Morgan's clothing from the storage bags in his hospital room-a per se violation of the constitution-was done "under authority of law." Specifically, whether the State met its heavy burden to show that either the "exigent circumstances" or "plain view" exceptions applies.

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[49] *State v. Cardenas*, 146 Wn.2d 400, 406, 47 P.3d 127 (2002).

[50] *Garvin*, 166 Wn.2d at 249.

[51] *City of Seattle v. Pearson*, 192 Wn. App. 802, 811-12, 369 P.3d 194 (2016).

[52] *Garvin*, 166 Wn.2d at 250.

Here, CrR 3.5 and 3.6 hearings on Morgan's motions to suppress were held successively on February 4, 2016. There are written findings of fact and conclusions of law for the CrR 3.5 hearing. For unexplained reasons, the record contains no written findings or conclusions for the CrR 3.6 hearing that is now at issue.

Nevertheless, in a careful review of the record, we consider both the evidence presented at the hearing and the trial court's rationale for its decision to deny Morgan's motion to suppress the clothing evidence.

We first note that the trial court considered the written statements of Officer Breault and Officer Brad Reorda that were attached to Morgan's motion to suppress. It also considered the written statement of Sergeant Curtis Zatylny that was introduced into evidence at the hearing. The trial court found these statements insufficient to justify the seizure of the clothing.[53] The State does not contest this finding on appeal.

Thereafter, the State presented the testimony of Officer Breault, the only person to testify at the CrR 3.6 hearing. He was one of several officers who had testified at the CrR 3.5 hearing that immediately preceded the CrR 3.6 hearing.

During the CrR 3.6 hearing, Officer Breault testified that he arrived at Swedish Edmonds Hospital around 8:45 p.m. to obtain information from Morgan and provide medical updates to police authorities.[54] He spent a couple of hours with

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[53] Report of Proceedings Vol. 1 {February 4, 2016) at 149-50.

[54] *Id*. at 158.

Morgan, in his hospital room, without noticing Morgan's bagged clothing.[55]

Two detectives arrived to interview Morgan after the officer had been with him for a couple of hours. Officer Breault first noticed Morgan's bagged clothing when he left the room following the arrival of the detectives.[56] According to this officer, the clothing was "in several plastic bags that the hospital had provided and then placed on the back counter" of Morgan's hospital room.[57]

The record is unclear on who directed the seizure of Morgan's clothing. The officer testified that it might have been the two detectives or some other police official not present in the hospital room. What is clear is that he did not seize the evidence on his own.

He also testified that neither he nor anyone else sought Morgan's permission to seize the clothing. Moreover, he testified that neither he nor anyone else sought a telephonic warrant.[58]

Nevertheless, Officer Breault testified that, when dealing with clothing that may contain bodily fluids or gasoline, police procedure is to separate these items and package them properly depending on the type of evidence. He further testified that substances such as gasoline and chemicals rapidly

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[55] *Id*. at 159.

[56] *Id*.

[57] *Id*. at 151.

[58] *Id*. at 162.

dissipate and such evidence needs to be packaged quickly and efficiently to preserve it for later testing.

On cross-examination, he testified that he had no knowledge of the timing of dissipation for anything that might have been on Morgan's clothing.[59] He further testified that he could not testify about what chemicals might have been on the clothing.[60] He also testified that his incident report made no mention of why he assisted in packaging the clothing into the special arson bags that another officer brought to the scene.[61]

A few months after Morgan's clothing was packed, sealed, and taken to the crime lab, one of the two detectives that interviewed Morgan at the hospital on the night of the fire visually inspected the clothes and noticed blood spatter on Morgan's jeans and shirt. The clothing was sent to a forensic scientist with the Washington State Patrol Crime Lab, who performed a bloodstain pattern analysis.

Morgan sought to suppress both the clothing and the bloodstain pattern analysis. The trial court determined that the State had met its burden to establish exigent circumstances justifying the seizure of Morgan's clothes. However, it also determined that any testing for purposes other than the presence of accelerants was not justified by exigent circumstances and thus required a warrant. The trial court then suppressed the results of the forensic

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[59] *Id*. at 161.

[60] *Id*.

[61] *Id*. at 163.

scientist's bloodstain pattern analysis because exigent circumstances no longer applied.

Morgan moved to reconsider the denial of the suppression motion based on the absence of any showing by the State that it was impractical to get a warrant to seize the clothing.[62] But the trial court denied the motion. It reiterated its determination that Officer Breault had to act quickly once he saw the bag of clothes to preserve any accelerant and avoid cross contamination.

Relying on this court's decision in *City of Seattle v. Pearson*, Morgan argues that the warrantless seizure of his clothing was not justified by exigent circumstances.[63] Morgan is correct.

In *Pearson*, this court determined that the natural rate of dissipation of THC in Tamisha Pearson's bloodstream did not justify a warrantless blood draw under the exigent circumstances exception.[64] This court held that the City failed to show that waiting for a warrant would result in losing evidence of the defendant's intoxication, and it "failed to show by clear and convincing evidence that obtaining a warrant would have significantly delayed collecting a blood sample."[65]

Here, the record at the CrR 3.6 hearing is devoid of any evidence showing that it was impractical to get a telephonic warrant once police noticed the

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[62] Report of Proceedings Vol. 1 (February 17, 2016) at 191-92.

[63] 192 Wn. App. 802, 369 P.3d 194 (2016).

[64] *See Missouri v. McNeely*, 569 U.S. 141, 152, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

[65] *Pearson*, 192 Wn. App. at 816.

bagged clothing in Morgan's hospital room. The only evidence from Officer Breault about telephonic warrants is that no one applied for one. Why the police did not apply for a warrant is not satisfactorily explained.

In *Pearson*, this court acknowledged that exigent circumstances may exist "only if the party seeking to introduce evidence of a warrantless blood test can show that waiting to obtain a warrant would result in losing evidence of the defendant's intoxication."[66] But absent such evidence, the natural dissipation of THC for example in a suspect's bloodstream, will not, by itself, constitute exigent circumstances.[67]

Applying that rationale here, we see no reason to relieve the State of its burden to show that applying for a warrant in this case would have resulted in the loss of whatever evidentiary value was in the bagged clothing. There is simply nothing in the record of the CrR 3.6 hearing on this critical evidentiary issue.

Notably, the record of the CrR 3.5 hearing shows that one of the two detectives who interviewed Morgan at the hospital on the night of the fire, during a break in questioning, contacted the on-duty homicide deputy prosecutor to determine how to proceed.[68] Thus, to the extent consideration of material outside the record of the CrR 3.6 hearing is proper, it appears that the means of seeking a telephonic warrant were readily available. In our view, this buttresses the absence of evidence that

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[66] 192 Wn. App. at 812-13.

[67] *Id*.

[68] Report of Proceedings Vol. 1 (February 4, 2016) at 103.

exists at the CrR 3.6 hearing to show that application for a warrant was impractical.

We turn again to Officer Breault's testimony in support of the warrantless seizure. In *Pearson*, there was testimony that obtaining a warrant would typically take 60 to 90 minutes and the dissipation window was at least three to five hours.[69] Here, there was no testimony about what chemicals might have been on Morgan's clothing or what the dissipation rates for such chemicals were. Simply saying dissipation was likely is patently insufficient to support this seizure.

There was also testimony about the risk of cross contamination of the clothing evidence. While we do not dismiss this general concern, this record does not appear to support the argument. The bagged clothing remained undisturbed for hours on a shelf in the hospital room, while Morgan was almost constantly in the presence of police officers. He was not going anywhere. There simply is no evidence to support the view that anyone would have been successful in contaminating the evidence without the police being able to stop them.

The assessment of exigency requires a "careful case-by-case" analysis, and the seriousness of the crime being investigated is a factor.[70] Here, the seriousness of the crime weighs in favor of exigency. But that alone is not enough to overcome the need for a warrant. If officers could reasonably obtain a warrant before seizing Morgan's clothing without

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[69] 192 Wn. App. at 815-16.

[70] *McNeely*, 569 U.S. at 152; *Smith*, 165 Wn.2d at 518.

significantly undermining the seizure, they had to do so.[71]

The State relies on *State v. Welker* to support its argument-that the potential loss of evidence provided exigent circumstances justifying a warrantless seizure of Morgan's clothes.[72] Its reliance is misplaced.

In *Welker*, officers pursued Kenneth Welker shortly after responding to a reported rape in the neighborhood.[73] They knew Welker from previous investigations and came to his house to speak with him.[74] The officers were invited into the house by Welker's mother and wife but denied entrance to the basement.[75] They went down anyway and found Welker, cowering naked under the stairs.[76] They arrested him.[77]

The court held that exigent circumstances justified the warrantless entry into the basement because officers had a reasonable belief Welker was hiding there and was likely to quickly destroy any evidence of the rape that remained on his body.[78] The rape had been reported at 1:47 a.m., and an officer testified that trace evidence usually present in rape cases such as hair, fibers, bodily secretions and

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[71] *McNeely*, 569 U.S. at 152.

[72] 37 Wn. App. 628, 683 P.2d 1110 (1984).

[73] *Id*. at 630.

[74] *Id*.

[75] *Id*. at 631.

[76] *Id*.

[77] *Id*.

[78] *Id*. at 633-34.

scratches is transient and short lived.[79] The court noted that "keeping the house under surveillance while a warrant was obtained at 3:30 a.m. . . . was not a practical alternative."[80] Specifically, because Welker had easy access to facilities inside the house "[m]erely preventing [his] escape would not preserve or prevent the loss of evidence which he carried on his person."[81]

Here, there was no such exigency, on this record. How Morgan, hospitalized for smoke inhalation while almost constantly in the presence of police officers interviewing him, could destroy the clothing evidence in his room is left unexplained. And the record shows that detectives were in telephonic contact with a deputy prosecutor, through whom they presumably could have applied for a warrant to seize the clothing. In short, this case is of no assistance to the State.

The State has failed to meet its burden to show that applying for a warrant would have resulted in lost evidence.[82] And the State failed to prove by clear and convincing evidence that exigent circumstances existed.

The State does not argue that this error was harmless. On this record, it could not so argue.

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[79] *Id*. at 634.

[80] *Id*.

[81] *Id*.

[82] *See Pearson*, 192 Wn. App. at 816.

Plain View

The State asserts in its cross-appeal that even if the warrantless seizure was not justified by exigent circumstances, it was justified under the "plain view" doctrine. It argues that the trial court erred in believing that this doctrine did not apply because the seizure was not inadvertent. We again disagree.

Under the plain view exception, if an officer is conducting a lawful search and comes across an item "the incriminating character of [which] is immediately recognizable, that item may be seized."[83] The plain view exception to the warrant requirement imposed by article 1, section 7 requires "prior justification for intrusion," "inadvertent discovery of incriminating evidence," and immediate knowledge of the incriminating nature of the evidence.[84]

Here, Officer Breault did not decide to seize the clothing bag when he entered Morgan's room or at any time during the next few hours. Instead, he testified that he may have been directed by other officers-none of whom testified at the hearing-to seize the bag. His testimony shows that instead of making the independent decision to seize incriminating evidence in plain view, he assisted another officer who came to collect the clothing in a special arson bag. None of the authorities of which we are aware apply to this factual pattern.

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[83] *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994).

[84] *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

In addition, the plain view exception requires that the officer immediately know that the evidence is incriminating.[85] The exception only applies if police officers have probable cause to believe the object or evidence is contraband "without conducting some further search, that is, the incriminating character must be immediately apparent."[86]

Here, the record shows that Morgan's clothing was inside apparently opaque hospital bags. And there was no testimony that Officer Breault detected the scent of gasoline or any other type of accelerant before he seized the bag. Therefore, as found by the trial court, the incriminating character of the evidence was not in plain view because neither blood nor other relevant crime information could be seen through the plastic bag. Officer Breault was not justified in seizing Morgan's bag of clothes as an item immediately recognized as incriminating evidence.

Accordingly, we reject the State's argument that the seizure of Morgan's clothing was justified under the plain view exception to the warrant requirement. There simply is no basis in this record to affirm on this basis.

Bloodstain Pattern Analysis

After the trial court suppressed the bloodstain pattern analysis results, the State obtained a warrant and Kim Duddy performed a second bloodstain pattern analysis. These results were admitted at trial. Morgan argues that the trial court

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[85] *Id.*

[86] *Hudson*, 124 Wn.2d at 118.

erred in admitting these results because the initial seizure of his clothing was unlawful. He argues that "the results of the pattern analysis were not obtained independently of the unlawful seizure." We agree.

It is well-established that when an unconstitutional seizure occurs, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed."[87] Here, the search warrant was based on the affidavit of Detective Jorgensen. Detective Jorgensen stated that he "conducted a visual examination of Morgan's clothing" when it was sealed in the evidence bags.

Based on that visual examination, Detective Jorgensen sought the warrant so that a bloodstain pattern analysis could be performed. Because the seizure was unlawful, the results of the bloodstain pattern analysis should have been suppressed.

Harmless Error

This court applies a harmless error analysis when the trial court erroneously admits evidence that is the product of a warrantless search.[88] A constitutional error is harmless if the untainted evidence is so overwhelming as to necessarily lead to a finding of guilt.[89]

Morgan argues that the error here was not harmless because there were no witnesses to the

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[87] *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

[88] *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

[89] *Id*. at 426.

crime, and the bloodstain pattern analysis was the only evidence indicating that he was in close proximity to Welch when she suffered her head injuries.

The State does not argue otherwise.

The denial of the suppression motion constitutes reversible error.

Because we reverse on the bases explained, we only address those remaining issues that may recur at trial on remand. It is unnecessary to address the other issues raised in this appeal.

MIRANDA

Morgan argues that his statements to the detectives who interviewed him in his hospital room should have been suppressed because they failed to advise him of his *Miranda* rights.[90] We disagree.

"*Miranda* warnings were designed to protect a defendant's right not to make incriminating statements while in police custody."[91] They are required "when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent."[92]

Whether an interrogation is "custodial" depends on whether the suspect's movement was restricted at the time of questioning.[93] The test is "whether a

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[90] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694(1966).

[91] *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

[92] *Id*.

[93] *Id*.; *See State v. Sargent*, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).

reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest."[94]

We review a trial court's findings of fact following a CrR 3.5 hearing for substantial evidence and review de novo whether the findings support the conclusions of law.[95] Unchallenged findings of fact are verities on appeal.[96] We review de novo whether an interrogation was custodial.[97]

Morgan only challenges the statements he made to the detectives, not to Officer Breault. The following testimony was introduced at the CrR 3.5 hearing.

Around 10:40 p.m., two detectives arrived at Swedish Edmonds to question Morgan. They were wearing civilian clothes, but they had badges. Officer Breault went into the hallway to give them privacy.

The detectives questioned Morgan until 11:30. They then left the room while a nurse provided medical treatment and assisted Morgan with the bathroom. The detectives resumed their questioning at 12:05 a.m. and questioned Morgan until around 12:45 a.m.

Morgan told the detective that he had come home from work and fallen asleep. He awakened by being struck on the head. He heard a voice that he thought

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[94] *Lorenz*, 152 Wn.2d at 37.

[95] *State v. Radcliffe*, 164 Wn.2d 900, 907, 194 P.3d 250 (2008); *Lorenz*, 152 Wn.2d at 30.

[96] *Lorenz*, 152 Wn.2d at 30, 36.

[97] *Id*.

might belong to Welch. He went downstairs through thick smoke and found the house on fire with Welch against the back wall. She was on fire so he ripped off her burning sweater and tried to pat out the flames. He ran outside and only then realized that Welch was not with him. At some point, he realized she was in the garage.

One detective testified that he did not immediately suspect Morgan but this quickly changed once Morgan began answering the detectives' questions because his story did not match up with the physical evidence. For example, despite saying that he tried to put out the flames on Welch's burning sweater, Morgan's hands were not burnt. When the detectives returned to Morgan's room at 12:05 a.m., the conversation became "a little more confrontational." The detectives told Morgan that they believed he had assaulted Welch and started the fire. Morgan was arrested the next evening when he left the hospital.

Morgan challenges the trial court's statement in its oral ruling that the conversation between Morgan and the detectives did not rise to the level of an "interrogation" or "custodial interrogation." This statement is not part of the trial court's written findings and conclusions. Moreover, it is irrelevant unless the trial court also determined that Morgan was in custody when the detectives were interviewing him.[98] It did not.

Morgan challenges the trial court's factual findings that he was not under guard, not restrained,

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[98] *Id*. at 36.

and was not under arrest. He also challenges the trial court's conclusions that he was not in custody to the degree associated with an arrest and thus *Miranda* warnings were not required.

Morgan argues that he was under guard and in police custody because the room was small, two armed officers were inside, and another uniformed officer was just outside the door. He further argues that the trial court erred in finding that he was "unrestrained" given that he was wearing an oxygen mask and "tethered to medical equipment," making it difficult for him to get out of bed and to need assistance to use the bathroom. Moreover, he was alone and without family, friends, or any other persons during the interrogation.

None of these arguments is persuasive in light of the evidence in the record that supports the trial court's findings and conclusions. First, there was testimony that law enforcement placed no restrictions on Morgan's movements, and he could have left the room at any time. Officer Breault testified that he was outside the door because the room was small and he wanted to give the detectives privacy, not because he was guarding Morgan.

In addition, to whatever extent Morgan was unable to leave the room without assistance, his lack of mobility was caused by his injuries, not any actions on the part of the detectives. In these circumstances, an accused is not "in custody" for purposes of *Miranda* because in order to constitute custody, the restriction on the suspect's freedom of

movement must be police-created.[99] Although Morgan may have felt alone or that he was restricted by his medical condition or the presence of law enforcement, his psychological state is not relevant to the objective determination of whether law enforcement restricted his freedom of movement.[100]

Morgan relies on the Ninth Circuit Court of Appeals decision in *United States v. Craighead*, as support for his argument that he was in custody because he did not feel free to leave.[101] His reliance is misplaced because *Craighead* concerned an interrogation by law enforcement in Ernest Craighead's own home.[102] The court recognized that, "[t]he home occupies a special place in the pantheon of constitutional rights" and its "the most constitutionally protected place on earth."[103] Also, in *Craighead* there were eight law enforcement officers from three different law enforcement agencies present, and the agents put Craighead in a storage room at the back of his house to interrogate him.[104]

Finally, although Morgan cites to the four factors listed in *Craighead*, including whether the suspect is isolated from others and whether officers told the suspect that he was free to leave, and claims that these factors must be considered under a "totality of

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[99] *See, e.g.*, *State v. Butler*, 165 Wn. App. 820, 827-28, 269 P.3d 315 (2012).

[100] *Sargent*, 111 Wn.2d at 649.

[101] 539 F.3d 1073 (9th Cir. 2008).

[102] *Id*. at 1077.

[103] *Id*. at 1077, 1083.

[104] *Id*. at 1078.

circumstances" analysis, he is wrong. The court specified that those factors apply in determining whether an in-home interrogation was custodial.[105] In Morgan's case, the test is whether a reasonable person would feel that they are in custody to the degree associated with a formal arrest.[106] Under that test, Morgan was not in custody. Thus, *Miranda* warnings were not required during the interrogation.

JURY INSTRUCTIONS

Morgan argues that the trial court committed reversible error when it refused to instruct the jury that it must presume the fire was the result of accident or natural causes. We hold there was no abuse of discretion in declining to give this proposed instruction.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law."[107] This court reviews a trial court's decision to reject a party's jury instruction for an abuse of discretion.[108]

Morgan requested a jury instruction that:

> Where a building is burned, the presumption is that the fire was caused by accident or

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[105] *Id*. at 1084.

[106] *Lorenz*, 152 Wn.2d at 37.

[107] *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

[108] *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

> natural causes rather than by the deliberate act of the accused.[109]

The jury was properly instructed on the elements of arson, that Morgan was presumed innocent, and that the State had the burden of proving those elements beyond a reasonable doubt. In light of these instructions, the trial court did not abuse its discretion in excluding Morgan's requested instruction.[110]

Morgan relies on *State v. Smith*, as support for his contention that the court's refusal to give the requested instruction is reversible error.[111] But his reliance is misplaced because in *Smith*, the court did not address what other instructions were given to the jury or whether those instructions would cure any error.[112] As recognized by the court in *State v. Picar*d, the *Smith* opinion is "dubious authority for the proposition that failure to give an instruction that a fire is presumed to be accidental is reversible error."[113]

In addition, Morgan has cited to no evidence in the record that would support the presumption that the fire was of accidental or natural causes. The trial court did not abuse its discretion in refusing to give

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[109] Clerk's Papers at 108.

[110] *Picard*, 90 Wn. App. at 903; *see State v. Kindred*, 16 Wn. App. 138, 141, 553 P.2d 121 (1976).

[111] 142 Wash. 57, 252 P. 530 (1927).

[112] *Picard*, 90 Wn. App. at 903; *see generally*, *Smith* 142 Wash. at 58.

[113] 90 Wn. App. 890, 903, 954 P.2d 336 (1998).

an instruction that is not supported by the evidence.[114]

We reverse the judgment and sentence and remand for a new trial.

/s/ Cox, J.

WE CONCUR:

/s/ Schindler, J.

/s/ Applewick, C.J.

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[114] *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); *Kindred*, 16 Wn. App. at 141.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Respondent/Cross-appellant,	)	
	)	No. 14-1-02409-1
vs.	)	No. 75072-1-I
	)	
DAVID MORGAN, Appellant/Cross-respondent.	)	

EXCERPTS OF FEBRUARY 17, 2016 VERBATIM REPORT OF PROCEEDINGS

The Honorable Joseph P. Wilson
Snohomish County Court
3000 Rockefeller Ave.
Everett WA 98201

APPEARANCES

For the Plaintiff:	Paul Stern Wallace Langbehn, III Deputy Prosecuting Attorneys
For the Defendant:	Donald J. Wackerman Sarah Silbovitz Public Defenders
Reported By:	Cherie Corthell, RPR, WA CCR 2109 West College #312, Bozeman MT 59718

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[196] COURT: I'm going to deny the Defense request to reconsider my previous ruling. It is clear to me, the fact's presented and testimony taken, that the seizure of the clothes was done for the purposes of preserving any accelerant type evidence on the clothing that was detected either on the victim and potentially on the defendant at the crime scene. It was known that there was something going on. It wasn't for blood evidence; it was for the use of accelerant, gasoline, gasoline fumes, or something of that nature. That determination was made fairly quickly in the initial stages of the investigation; such that, at least from the victim's point of view, the team was sent to Harborview to obtain her clothing. That same team was going to—or same individual—was going to obtain the clothing [197] from the defendant, in due course.

What I focus on is, when does the exigent circumstances present themselves? And it presented themselves fairly quickly; that the—the decision to seize was made, not after consultation, and not three-and-a-half hours later; the decision to seize was made rather quickly, in time, in the investigation. That's, I think, where the focus of exigent circumstances begins. And I think once that decision is made, then you follow up and you seize the clothes to preserve the evidence. And then follow that up with a warrant, as I believe should have been done. I think all the facts here point to, the State has met its burden and the seizure was proper. So I'll deny the motion.

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APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Respondent/Cross-appellant,	)	
	)	No. 14-1-02409-1
vs.	)	No. 75072-1-I
	)	
DAVID MORGAN, Appellant/Cross-respondent.	)	

EXCERPTS OF FEBRUARY 4, 2016 VERBATIM REPORT OF PROCEEDINGS

The Honorable Joseph P. Wilson
Snohomish County Court
3000 Rockefeller Ave.
Everett WA 98201

APPEARANCES

For the Plaintiff:	Paul Stern Wallace Langbehn, III Deputy Prosecuting Attorneys
For the Defendant:	Donald J. Wackerman Sarah Silbovitz Public Defenders
Reported By:	Cherie Corthell, RPR, WA CCR 2109 West College #312, Bozeman MT 59718

* * * * * *

[179] THE COURT: Are you giving up your plain-view argument?

MR. LANGBEHN: No.

THE COURT: Are you giving up your incident-to arrest argument?

MR. LANGBEHN: No. On the exigent circumstances argument—

THE COURT: Why do you need all three?

MR. LANGBEHN: Beggars can't be choosers? Because I think that all three could necessarily apply. As far as the—

THE COURT: How could plain view apply?

MR. LANGBEHN: Because it's readily identifiable as evidence in the—in the—

THE COURT: They were sent there to collect them.

MR. LANGBEHN: But—

THE COURT: Exhibit 4, Zatylny sent them there to collect.

MR. LANGBEHN: Sent Officer Reorda. But you heard testimony from Officer Breault that he would have collected [180] it, but for—even if he was told by Detective Jorgensen to collect it, that he would have collected it because he recognized it as important. And he—

THE COURT: He recognized through opaque shopping bags? He called them grocery bags. I know of no grocery bags that you can see through.

MR. LANGBEHN: No, I understand.

THE COURT: And he saw blood on clothing that he didn't even identify, through bags that you can't see through?

MR. LANGBEHN: Absolutely not.

THE COURT: And he recognized it immediately as—

MR. LANGBEHN: Nope.

THE COURT:—inadvertent discovery?

MR. LANGBEHN: No. What I'm saying is that he knew—he suddenly realized that: There's the defendant's clothing; we know that this is an arson; we know that it's—we're being—investigating possible accelerants; we know we need to preserve everything.

And that's not properly se—I'm not saying he saw the blood and goes, wait a minute, that's blood. What I'm saying is he saw clothing worn by the defendant—

THE COURT: So inadvertent discovery is more in tune with: We're investigating an arson—

MR. LANGBEHN: Right.

[181] THE COURT:—we went to the defendant, the suspect's room, or the person's room, and there on the counter I saw a knife that had blood on it; I wasn't there for that. That's an inadvertent discovery.

MR. LANGBEHN: I understand.

THE COURT: It's not a plain-view argument.

MR. LANGBEHN: Okay. I would argue that based on the testimony you heard that exigent circumstances absolutely does apply. I—there's also this argument about whether or not the expectation of privacy, um—

THE COURT: Well, there's a hospital case where they place the defendant's clothing—

MR. LANGBEHN: Smith.

THE COURT:—in a closet that had two doors.

MR. LANGBEHN: Right.

THE COURT: One available to a hallway the public had access to, one available to his room. I'm not so concerned about the expectation of privacy in the analysis of the warrantless search in this particular case. It is an element, obviously, under Article 1, Section 7; which give rise then to the constitutional protections as outlined.

The State's argument with regard to incident to arrest is non-persuasive.

MR. LANGBEHN: Understood.

[182] THE COURT: The issue in my mind really does come down to exigent circumstances, as you probably deduced from my questions before we began taking some formal testimony. And then you get to, is it necessary to have somebody testify as to why these items were seized in the first place? I mean, I understand somebody sending somebody to the hospital to seize clothing; but you've got to tell me why. I think the State has met its burden for this particular officer in regards to why they were seized. I do believe that in an arson investigation, where it is known that—the likelihood of an accelerant being used, then anybody who was in that fire may have accelerant on their clothing; which would further the investigatory process.

I think the record has been made that the—in these type of investigations, there are special bags that have been designed and are available to put clothing and other items into so as to preserve that particular evidence. I don't have a problem with the seizure of these particular items being placed in the bag.

The second question, then, as I alluded to, is what do we do after that? Does that seizure then allow the State unfettered access to the evidence? My understanding is these things were seized November the 16th, 2014; sent to the crime lab September 8th or something, 2015, with no additional warrants requested or authorized for an analysis.

[183] My understanding from reading the materials you folks presented was that, at some point, within a reasonable amount of time, the clothing for Mr. Morgan in the arson bags was opened and some device was inserted to determine whether there were any—chemical trail of accelerants used on the clothing. And that was within a fairly quick time frame, a week or—I don't know what it was. But whatever it was, I don't have any angst with that. I believe that that's fine, under the exigent circumstances, search and seizure.

But the question that I have, the problem that I have, is I believe another warrant was needed to send those materials to the crime lab; because now you're talking blood and blood spatter and other evidence that may or may not be on there. The exigent circumstances were satisfied; you seized it; they're not going to be destroyed; you tested for an accelerant. Now, then the exigent circumstances don't exist. There's no reason why you don't get a warrant.

I mean, you're getting a warrant for the cell phones; which I'll find exigent circumstances exist to seize those. But you search pursuant to a warrant. I'll find that the knife is a product of plain view; I think that clearly is within that. The blood on the knife I think clearly can be tested under that theory, plain view.

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