NO. 19-494

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ZACHARY MORGAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADAM CORNELL
Snohomish County Prosecuting Attorney

Seth A. Fine
Deputy Prosecuting Attorney
Counsel of Record
3000 Rockefeller Ave. M/S 504
Everett, WA 98201
(425) 388-3618

TABLE OF CONTENTS

JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 1
A. Initial Investigation And Seizure Of Petitioner's Clothes 1
B. State Court Proceedings 3
SUMMARY OF ARGUMENT 4
ARGUMENT 6
A. Because The Petitioner's Arguments In The Washington Supreme Court Were Solely Based On The State Constitution, This Court Lacks Jurisdiction To Review A Newly-Asserted Federal Claim. 6
B. Since The Record Is Unclear About What Facts Were Perceived By The Officers At The Time Of The Seizure, This Case Presents An Unsuitable Vehicle For Clarifying The "Immediately Apparent" Requirement. 12
C. The Test Applied By The Washington Supreme Court In This Case Is Similar To The Test Used By Other Jurisdictions. 17
CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Adams v. Robertson
520 U.S. 83 (1997) 6

Coolidge v. New Hampshire
403 U.S. 443 (1971) 6-7

Horton v. California
496 U.S. 128 (1990) 6-7, 9, 11, 20

Soldal v. Cook County
506 U.S. 56 (1992) 11

State v. Chrisman
100 Wash. 2d 814, 676 P.2d 419 (1984) 7, 11

State v. Dobbs
323 S.W.3d 184 (Tex. Crim. App. 2010) 6, 18-20

State v. Hatchie
161 Wash. 2d 390, 166 P.3d 698 (2007) 7, 9

State v. Kull
155 Wash. 2d 80, 118 P.3d 307 (2005) 7-9, 11

State v. Ladson
138 Wash. 2d 343, 979 P.2d 833 (1999) 10

State v. McKinney
148 Wash. 2d 20, 60 P.3d 46 (2002) 9

State v. Murray
84 Wash. 2d 527, 527 P.2d 1303 (1974) 7, 19

State v. Myers
117 Wash. 2d 332, 815 P.2d 761 (1991) 7

State v. Myrick
102 Wash. 2d 506, 688 P.2d 151 (1984)...........9-10

State v. O'Neill
148 Wash. 2d 564, 62 P.3d 489.............................7

State v. Parker
139 Wash. 2d 486, 987 P.2d 73 (1999................10

State v. Reep
161 Wash. 2d 808, 167 P.3d 1156 (2007)..........7, 9

United States v. Aguirre
839 F.2d 854 (1st Cir. 1988)................................17-18

United States v. Beal
810 F.2d 574 (6th Cir. 1987) 6, 18-19

United States v. Garces
133 F.3d 70 (D.C. Cir. 1998) 6, 19-20

United States v. McLernon
746 F.2d 1098 (6th Cir. 1984) 18-19

United States v. McLevain
310 F.3d 434 (6th Cir. 2002) 18

United States v. Rukowski
877 F.2d 139 (1st Cir. 1989)..................6, 17-18, 20

Whren v. United States
517 U.S. 806 (1996) 10

Constitutional Provisions

U.S. Const., amend. 4. .... 4-5, 9-11, 20

Wash. Const., art. I, § 7 .... 1, 3-4, 7, 9-10

Statutes

28 U.S.C. § 1257 .... 1, 6, 11

Court Rules

Wash. Super. Ct. Crim. R. 3.6 16-17

JURISDICTION

This court does not have jurisdiction under 28 U.S.C. § 1257(a). As discussed below, no right under the United States Constitution was set up or claimed in the Washington Supreme Court

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1, § 7 of the Washington Constitution states:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

28 U.S.C. § 1257(a) states in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States.

STATEMENT OF THE CASE

A. Initial Investigation And Seizure Of Petitioner's Clothes

On the evening of November 16, 2014, police and firefighters responded to a house fire in Lynnwood, Washington. The petitioner (defendant), David Morgan, and his ex-wife, Brenda Welch, were both injured in the fire. They were taken to separate hospitals. 1 CP 314-15.

Officer Christopher Breault of the Lynnwood Police Department was sent to the hospital where the

petitioner was being treated. He was told to obtain information from him and provide medical updates on his status. 1 RP 115. The petitioner told Officer Breault that he had gone downstairs because he smelled something. He found Ms. Welch, who was on fire. He tried to rip the sweater off her body, because it was covered in flames. As he was doing so, he slipped and fell. He couldn't take it anymore, so he ran out of the residence. 1 CP 316.

While Officer Breault was in the Petitioner's hospital room, he "noticed that the clothing of the defendant's had been placed basically in several plastic bags that the hospital had provided and then placed on the back counter." 1 RP 151. He described the bags as "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."1 RP 158. He was concerned that the clothing needed to be packaged properly, so that any evidence on them would not be lost. 1 RP 154-55. Officer Breault was unsure whether he had collected the clothing on his own initiative, or whether another officer had directed him to do so. 1 RP 159, 168.

A crime scene technician, Officer Brad Reorda, was also directed by detectives to go to the hospital. 1 RP 159-60. Officer Reorda had previously been at the hospital with Ms. Welch. The nurses there had told him that Ms. Welch's clothes smelled like gasoline. 1 CP 315. At the petitioner's hospital, Officer Reorda and Officer Breault removed the petitioner's clothes from the plastic bags and placed them in "arson bags," which are designed to preserve volatile chemicals. 1 CP 315; 1 RP 155-57.

Later examination of the clothing showed blood spatter on the jeans and the left side of the shirt. 3/29 RP 80, 84-85. Spatter results when force is applies to a source of liquid blood. The pattern is different from that which results from blood spurting or transfer. 3/29 RP 81.

B. State Court Proceedings

The petitioner was charged with attempted first degree murder, first degree assault, and first degree arson. 1 CP 182. He moved to suppress the clothing. 1 CP 298-317. The State argued that the evidence was admissible on theories of exigent circumstances and plain view seizure. 1 CP 210-18. Following the hearing, the trial court rejected the "plain view" argument. It nonetheless admitted the evidence on the basis of exigent circumstances. Writ App. 59a, 60a-62a. It later denied a motion to reconsider that ruling. Writ. App. 56a.

A jury found the petitioner guilty as charged. 1 CP 58-61. At sentencing, the court merged the assault count into the attempted murder count. 15 RP 2844. The petitioner was accordingly sentenced for attempted first degree murder and first degree arson. 1 CP 32-45.

The Washington Court of Appeals reversed the convictions. It disagreed with the trial court's conclusion that the State had established exigent circumstances. Writ App. 43a. It also rejected the State's argument that the seizure was justified by the "plain view" doctrine. Writ. App. 44a-45a. The court therefore held that the warrantless seizure violated Article I, section 7 of the Washington Constitution. Writ. App. 33a, 44a.

The Washington Supreme Court granted the State's petition for review. It agreed with the Court of Appeals that exigent circumstances had not been established. Writ App. at 4a-5a. The Court held, however, that the seizure satisfied the requirements of the "plain view" doctrine. Writ App. at 5a-8a. In so holding, it clarified that the Washington Constitution does not contain any separate "inadvertence" requirement. Writ App. 6a. The court therefore concluded that the State had established "authority of law" for the seizure, as required by Article I, § 7 of the state constitution. Writ App. at 4a. It remanded the case to the Court of Appeals for further proceedings (*i.e.*, consideration of issues that had not been passed on by that court). Writ App. 8a. The case remains pending in the Washington Court of Appeals.

SUMMARY OF ARGUMENT

For this court to grant certiorari, the petitioner's federal claims must have been either addressed by, or properly presented to, the highest state court. That requirement has not been satisfied in this case. The petitioner's arguments in the Washington courts were based on a three-part test that had been formulated by the Washington Supreme Court. That test reflected the court's interpretation of the "private affairs" provision of the Washington Constitution, art. I, § 7. The test included an "inadvertence" prong that has been rejected by this court.

In the Washington Supreme Court, the State argued (successfully) that "inadvertence" was not an independent requirement under the Washington Constitution. In response, the petitioner criticized the State for its "misguided effort" to apply Fourth

Amendment analysis. He claimed that his position was supported by the Washington Constitution, which provides greater protection than the Fourth Amendment. It is thus clear that the petitioner's arguments in the Washington Supreme Court were based solely on the Washington Constitution, not the Fourth Amendment. His belated attempt to raise a federal constitutional argument is not a basis for certiorari.

This case also presents factual problems. The petitioner claims that it is "undisputed" that the seizing officer could not perceive anything about the seized object. In the trial court, however, the petitioner never raised such an argument. Rather, he claimed that the seizing officers could not "fully view" the clothing. In the Washington Supreme Court, he argued that the manner in which the officer found the clothing was "unknown."

No written findings were entered by the trial court. The court's oral opinion did not specifically address this issue, since it focused instead on the "inadvertence" requirement. The Washington Supreme Court concluded that the petitioner's clothing was "detectable in the plastic hospital bags on the counter" in his hospital room. Writ. App. 7a. The record does not clearly show that this conclusion was wrong.

The petitioner claims that the decision of the Washington Supreme Court conflicts with those of other jurisdictions. This supposed conflict is illusory. The Washington Supreme Court said that the "immediately apparent" requirement is satisfied "when, considering the surrounding circumstances, the police can reasonably conclude that the subject

evidence is associated with a crime." Writ App. 7a. This is similar to the formulation applied by the Sixth Circuit: that the requirement is satisfied if, on the facts available to the officers, they can at the time of discovery "determine probable cause of the object's incriminating nature." *United States v. Beal*, 810 F.2d 574, 577 (6th Cir. 1987). It is also similar to formulations applied by the First Circuit, the District of Columbia Circuit, and the Texas Court of Criminal Appeals. *United States v. Rukowski*, 877 F.2d 139 (1st Cir. 1989); *United States v. Garces*, 133 F.3d 70, 75 (D.C. Cir. 1998); *State v. Dobbs*, 323 S.W.3d 184, 189 (Tex. Crim. App. 2010). There is no conflict for this court to resolve.

ARGUMENT

A. Because The Petitioner's Arguments In The Washington Supreme Court Were Solely Based On The State Constitution, This Court Lacks Jurisdiction To Review A Newly-Asserted Federal Claim.

Under 28 U.S.C. § 1257(a), this court has jurisdiction to review a decision of a state court if a right under the United States Constitution is "specially set up or claimed." With "very rare exceptions," this court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

In this case, the arguments focused on an issue under the Washington Constitution: whether a valid plain view search requires that the discovery of evidence be "inadvertent." The "inadvertence" requirement arose from the plurality decision in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). This

court, however, repudiated such a requirement in *Horton v. California*, 496 U.S. 128 (1990).

Based on *Coolidge*, the Washington Supreme Court set out a three-part test for a valid plain view search. The requirements under this test were:

> [1] A prior justification for intrusion, [2] an inadvertent discovery of incriminating evidence, and [3] immediate knowledge by police that they have evidence before them.

State v. Murray, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974). These requirements were later incorporated into the Washington Supreme Court's interpretation of the "private affairs" provision set out in Wash. Const., art. I, § 7. *State v. Chrisman*, 100 Wash. 2d 814, 819, 676 P.2d 419, 423 (1984).

After *Horton*, the decisions of the Washington Supreme Court were inconsistent. Some cases continued to apply the three-part test. *See, e.g.*, *State v. Myers*, 117 Wash. 2d 332, 346, 815 P.2d 761, 769 (1991); *State v. Kull*, 155 Wash. 2d 80, 85 ¶ 8, 118 P.3d 307, 309 (2005); *State v. Reep*, 161 Wash. 2d 808, 816 ¶ 20, 167 P.3d 1156, 1160 (2007). Other cases applied a two-part test that omitted the "inadvertence" requirement. *See, e.g.*, *State v. O'Neill*, 148 Wash. 2d 564, 583, 62 P.3d 489, 500 (2003); *State v. Hatchie*, 161 Wash. 2d 390, 395 ¶ 11, 166 P.3d 698, 702 (2007). At the time the present case was litigated, the three-part test was thus solely an aspect of Washington law. It included an "inadvertence" requirement that had been repudiated by this court in *Horton*.

Throughout the litigation in this case, the defense relied on the three-part test. The defendant's

pre-trial motion to suppress evidence quoted the three-part test from *Kull*. 1 CP 306. That case was decided solely under the Washington constitution. *Kull*, 155 Wash. 2d at 85 ¶ 8, 118 P.3d at 309. The trial court rejected application of the plain view doctrine because there was no "inadvertent discovery." App. at 59a. The court instead admitted the evidence on the basis of exigent circumstances. App. at 60a-61a.

On appeal to the Washington Court of Appeals, the defendant's opening brief did not mention the "plain view" doctrine (because the trial court's ruling on that point was favorable to the defendant). The State's responsive brief argued that the search could be upheld under that doctrine. The State pointed out that this court had rejected any "inadvertence" requirement, but acknowledged that some Washington cases continued to recognize it. The State then argued that the trial court had misconstrued that requirement as defined by Washington law. Brief of Respondent at 25-26.[1]

In the defendant's reply to this argument, he made it clear that he was relying on the Washington Constitution:

> The State claims the trial court was wrong to consider whether the discovery was inadvertent because the United States Supreme Court has rejected this requirement under the Fourth

---

[1] The briefs filed in both the Washington Court of Appeals and the Washington Supreme Court are available at https://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08 (under cause no. 96017-8).

> Amendment. Resp. Br. at 25 (citing *Horton v. California*, 496 U.S 128, 110 S.Ct. 2301, 110 L. Ed. 2d 112 (1990)). But *Kull* analyzed the defendant's rights under article I, section 7, not the Fourth Amendment. 155 Wn.2d at 85. And contrary to the State's claim, our supreme court has continued to require the discovery of evidence be inadvertent to satisfy the plain view exception under article I, section 7, despite recognizing no such requirement exists under the Fourth Amendment. *See e.g., State v. Reep*, 161 Wn.2d 808, 816, 167 P.3d 1156 (2007), *Kull* remains the controlling authority, and the trial court was correct to adhere to its analysis.

Reply Brief of Appellant at 11-12. The Washington Court of Appeals agreed with this analysis. In suppressing the evidence, it relied on "the plain view exception to the warrant requirement imposed by article 1, section 7." Pet. App. 44a.

The State sought review of this decision in the Washington Supreme Court. In his briefing in that court, the defendant criticized the State for its "misguided effort" to apply Fourth Amendment analysis. Supplemental Brief of Respondent at 14.

> [A]s this Court has long established, article I, section 7, provides greater protection than the Fourth Amendment. *State v. Hatchie*, 161 Wn.2d 390, 396, 166 P.3d 698 (2007) (citing *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002); *State v. Myrick*, 102 Wn.2d 506,

> 510, 688 P.2d 151 (1984); *see also [State v.] Parker*, [139 Wash. 2d 486, 493, 987 P.2d 73 (1999)] ("It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment."). Where a Fourth Amendment analysis hinges on reasonableness, article I, section 7 turns on whether a seizure was permitted by "authority of law," or a warrant. *Id.* at 397 [*sic*].

Supplemental Brief of Respondent at 16.

The decision of the Washington Supreme Court addressed the arguments that had been raised in the briefs. It discussed the "robust privacy protections" of Wash. Const., art. I, § 7. Pet. App. 4a. It pointed out that under the Washington Constitution, a seizure cannot be based on pretext. Pet. App. 6a. This is contrary to the conclusion that this court has reached under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806 (1996); *but see State v. Ladson*, 138 Wash. 2d 343, 358, 979 P.2d 833, 842 (1999) (rejecting *Whren* under the Washington Constitution). The Washington Supreme Court held, however, that the test under the Washington Constitution does not include an "inadvertence" requirement. Pet. App.6a-7a. The dissent criticized this result, not because it was inconsistent with the Fourth Amendment, but because it "severely undermines the search warrant requirement under article I, section 7 of our constitution." Pet. App. 11a.

In the Washington Courts, the defendant repeatedly referred to the governing test as

"immediate knowledge." 1 CP 206 (motion in trial court); Reply Brief of Appellant at 11 (brief in Washington Court of Appeals); Supp. Brief of Respondent at 11 (brief in Washington Supreme Court). That is the language that has been used by the Washington Supreme Court in explaining the requirements of the Washington constitution. *See, e.g.*, *Kull*, 155 Wn.2d at 85 ¶ 8, 118 P.3d at 309; *Chrisman*, 100 Wash. 2d at 819, 676 P.2d at 423. This court's decisions phrase the Fourth Amendment test as "immediately apparent." *Horton*, 496 U.S. at 136; *Soldal v. Cook County*, 506 U.S. 56, 69 (1992). The language used in the defendant's briefs thus clearly reflects an argument under the Washington Constitution, not the United States Constitution.

In short, an argument based on the United States Constitution was neither addressed by nor presented to the Washington Supreme Court. To the contrary, the defendant's argument was explicitly based on a three-part test that this court had already repudiated. In arguing for this test, he repeatedly emphasized that the Washington Constitution is more protective than the Fourth Amendment. Reply Brief of Appellant at 12; Supplemental Brief of Respondent at 16. He cannot now assert the contrary. Since no right under the United States Constitution was "specially set up or claimed" in the Washington Supreme Court, this court lacks jurisdiction under 28 U.S.C. § 1257(a).

B. Since The Record Is Unclear About What Facts Were Perceived By The Officers At The Time Of The Seizure, This Case Presents An Unsuitable Vehicle For Clarifying The "Immediately Apparent" Requirement.

The petitioner asserts that the record in this case is "uniquely good to resolve whether 'immediately apparent' requires an office to perceive *at least something* about the seized object because, here, it is undisputed the Officer Breault did not and *could not*." Pet. at 24 (petitioner's emphasis). This assertion is incorrect. Because of the way this case was litigated, the record is unclear about what exactly the seizing officer perceived. In the Washington Supreme Court, the defendant specifically relied on the *lack* of evidence on this point. Supplemental Brief of Respondent at 11 ("How Officer Breault found Mr. Morgan's clothing, which had been placed in plastic shopping bags in the back counter of Mr. Morgan's hospital room, is unknown").

As discussed above, the defendant's motion to suppress was primarily based on a claim that the seizure was not "inadvertent." The defendant also argued that the plain view exception was not satisfied because "Officer Reorda had to manipulate the bag and remove its contents before being able to fully view the clothing and recognize the stains that could be considered incriminating evidence." 1 CP 307. The motion did not claim that the officers could not see the clothing *at all* — it claimed that the officers could not "fully view the clothing."

At the pre-trial hearing, Officer Breault testified briefly concerning his discovery of the clothing:

> So I noticed that the clothing of the defendant's had been placed basically in several plastic bags that the hospital had provided and then placed on the back counter of the – kind of the smaller hospital room.

1 RP 151.

> Q In regard to this case, you indicated that you saw the defendant's clothing over where? Where was it?
>
> A. It was on the back counter in the hospital room that the defendant was being treated in.
>
> Q And how was it packaged?
>
> A They – all the clothing and everything had been placed in several plastic shopping like bags and then placed on the counter.

1 RP 154-55.

> Q And describe the bags that they were in. You said they were shopping bags. But what do you mean?
>
> A It was almost like they were 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.

1 RP 158.

In closing argument at the pre-trial hearing, the defense did not dispute that the officer saw clothing in the bag. Rather, he argued that "plain

view" requirements were not satisfied because the seizure had been ordered by another officer:

> The State's argument in their brief about what supports plain view actually undercuts that we're in a plain view scenario. As I already stated, and what we have support – are what the facts are is that Officer Zatylny ordered the collection, the seizure of the clothing. This isn't a situation where an officer is talking to somebody, they're investigate – they're investigating something and then they see something that they recognize to be incriminating evidence, and then they have the ability to seize it.

1 RP 175.

In colloquy with the prosecutor, the trial court introduced the idea that the bags were opaque:

> THE COURT; How could plain view apply?
>
> [PROSECUTOR]: Because it's readily identifiable as evidence in the – in the –
>
> THE COURT: They were sent there to collect them.
>
> [PROSECUTOR]: But –
>
> THE COURT: Exhibit 4:[2] Zatylny sent them there to collect.
>
> [PROSECUTOR]: Sent Officer Reorda. But you heard testimony from Officer Breault that he would have collected it,

---

[2] Exhibit 4 is not part of the record.

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.

[PROSECUTOR]: 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?

[PROSECUTOR]: Absolutely not.

THE COURT: And he recognized it immediately as –

[PROSECUTOR]: Nope.

THE COURT: -- inadvertent discovery?

[PROSECUTOR]: 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 --

> [PROSECUTOR]: Right.
>
> 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.
>
> [PROSECUTOR]: I understand.
>
> THE COURT: It's not a plain-view argument.

Pet. App. 58a-59a.

The defendant characterizes this colloquy as a concession that the officer could not perceive anything about the seized objects. Pet. at 24; *see* Pet. at 5, 7-8 (similar claims). This is not correct. To the contrary, the prosecutor argued that the officer "saw clothing worn by the defendant." Pet. App. 59a. This is the most reasonable inference from the officer's testimony that he "noticed" that the defendant's clothing had been placed in plastic bags. 1 RP 151. Even if the bags were opaque, the contents could be seen if the tops were not closed securely.

In the trial court, the defendant did not argue that the contents of the bags were completely hidden — he argued that the officers could not "fully view the clothing." 1 CP 307. In its oral opinion, the court did not find that the "immediate knowledge" requirement was not satisfied — it relied on the State's failure to show that the seizure was inadvertent. Pet. App. 59a. Contrary to normal Washington practice, no written findings were entered to clarify this oral ruling. Pet. App. 3a, 36a; see Wash. Super. Ct. Crim. R. 3.6(b) (requiring entry of written findings following an

evidentiary hearing on a motion to suppress evidence).

The petitioner asks this court to hold that the plain view doctrine "requires an officer to perceive *at least something* about the seized object." Pet. at 24 (petitioner's emphasis). From the record in this case, it appears that this requirement was probably satisfied. To the extent that the record is unclear, this case is an unsuitable vehicle for resolving the issue raised by the petitioner.

C. The Test Applied By The Washington Supreme Court In This Case Is Similar To The Test Used By Other Jurisdictions.

The petitioner asks this court to resolve a conflict between courts as to the meaning of the "immediately apparent" requirement. This supposed conflict is largely illusory. All of the cases cited in the petition follow essentially the same rule: in deciding whether to seize an object in plain view, police may consider their observations in light of facts previously known to them.

This is the rule applied by the Washington Supreme Court: "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." Pet. App. 7a. The court concluded that the officer's observations of the bags, considered in light of other facts known to police, was sufficient to support a reasonable conclusion that the clothing in them would have evidentiary value. Pet. App. 7a-8a.

Cases from other jurisdictions are consistent with this rule. The petitioner cites the "light bulb" analogy set out in *United States v. Rukowski*, 877 F.2d 139 (1st Cir. 1989): "The sum total of the searcher's knowledge must be sufficient to turn on the bulb; if the light does not shine during the currency

of the search, there is no 'immediate awareness' of the incriminating nature of the object." *Id.* at 142. The opinion makes it clear, however, that the officers' previous knowledge may "turn on the bulb." The court cited with approval to one of its prior decisions. *Id.* at 143, *citing United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988). There, police serving a search warrant seized a set of keys that were not included in the warrant. There is, of course, nothing inherently incriminating about keys. Police knew, however, that the suspect had used a Ford pickup truck to conduct a major drug purchase. The keys were conspicuously labeled with Ford's insignia. Based on these facts, the evidentiary value of the keys was "immediately apparent" to the officers. *Aguirre*, 839 F.3d at 858-59.

The petitioner also cites the Sixth Circuit's formulation in *United State v. McLernon*, 746 F.2d 1098 (6th Cir. 1984): under the plain view doctrine, probable cause to seize an object must be "the direct result of the officer's instantaneous sensory perception of the object." *Id.* at 1124. Nothing in this formulation precludes an officer from considering previously-known facts. To the contrary, one of the factors considered by the Sixth Circuit is whether probable cause of an item's incriminating nature can be determined from the facts available to the officers at the time of the item's discovery. *United States v. McLevain*, 310 F.3d 434, 441 (6th Cir. 2002); *United States v. Beal*, 810 F.2d 574, 577 (6th Cir. 1987).

The petitioner cites the decision of the Texas Court of Criminal Appeals in *State v. Dobbs*, 323 S.W.3d 184 (Tex. Crim. App. 2010). The court held that a plain view seizure is lawful if probable cause "arises while the police are still lawfully on the premises, and their 'further investigation' into the nature of those items does not entail an additional and unjustified search of ... or presence on ... the premises." *Id.* at 189. Again, nothing in this test precludes consideration of previously-obtained information. In *Dobbs*, police who were

serving a search warrant observed golf clubs and golf shirts. There is nothing inherently incriminating about such items. During the search, however, police learned that similar items had been stolen in a burglary. *Id.* at 186. Based on that information, the items could properly be seized. *Id.* at 188.

The District of Columbia Circuit has stated a similar test: "the incriminating nature of the item must have become apparent, in the course of the search, without the benefit of information from any unlawful search or seizure." *United States v. Garces*, 133 F.3d 70, 75 (D.C. Cir. 1998). Once again, this test does not preclude consideration of previously-obtained information.

The thrust of several of these cases is that an item cannot be seized if further examination is necessary to establish its evidentiary significance. *McClernon*, 746 F.2d at 1126; *Beal*, 810 F.2d at 577; *Garces*, 133 F.3d at 76. The Washington Supreme Court agrees with that proposition. It specifically said that the plain view doctrine would not apply if an officer had to manipulate the item to determine its incriminating nature. Writ App. 8a; *see Murray*, 84 Wn.2d at 535, 527 P.3d at 1308.

The decision of the Washington Supreme Court is thus consistent with that of other courts that have considered this issue.

- "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." Pet. App. 7a.

- "The immediacy prong of the test requires that the executing officer can at the time of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature." *Beal*, 810 F.2d at 577 (emphasis omitted).

• "[T]he incriminating nature of the item must have become apparent, in the course of the search, without the benefit of information from any unlawful search or seizure." *Garces*, 133 F.3d at 75.

• "Immediately apparent" means "simply that the viewing officers must have probable cause to believe an item in plain view is contraband before seizing it." *Dobbs*, 323 S.W.3d at 189.

• "The sum total of the searcher's knowledge must be sufficient to turn on the bulb." *Rukowski*, 877 F.2d at 142 (1989).

There is no fundamental difference between these formulations. Accordingly, there is no conflict that this court needs to resolve.

The amicus briefs argue that the plain view doctrine, as applied by the Washington Supreme Court, subverts the requirement for a search warrant. This is essentially a re-formulation of the arguments that were rejected in *Horton*. The dissenters in that case argued, "The Fourth Amendment demands that an individual's possessory interest in property be protected from unreasonable governmental seizures, not just by requiring a showing of probable cause, but also by requiring a neutral and detached magistrate to authorize the seizure in advance." *Horton*, 496 U.S. at 148-49 (Brennan, J., dissenting). The court, however, held that seizure of items found in plain view does not violate the warrant requirement, so long as the scope of the search is limited to that authorized by the warrant. *Id.* at 141-42. The same analysis answer the contentions of amici.

CONCLUSION

The petition for certiorari should be denied.

RESPECTFULLY SUBMITTED

ADAM CORNELL
Snohomish County
Prosecuting Attorney

Seth A. Fine
Deputy Prosecuting Attorney
Counsel of Record
3000 Rockefeller Ave. M/S 504
Everett, WA 98201
(425) 388-3618

December 30, 2019