No. 19-494

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The BIO is mostly distraction. It tells the Court there is no conflict because no jurisdiction "precludes an officer from considering previously known facts" when assessing probable cause. BIO 18-19. Of course no court does that; the petition never said otherwise. The petition described a specific conflict: Whether the plain-view exception allows the government to justify a warrantless seizure based on that probable cause alone, or whether "immediately apparent" requires that the government's justification be based on the perception of something incriminating about the property seized. The evasion all but concedes the conflict.

The BIO otherwise raises a jurisdictional argument that makes little sense and literally hides one of the questions presented to the Washington Supreme Court. And its asserted "factual problems" about how

Officer Breault "found Mr. Morgan's [bagged] clothing" or whether "the clothing was 'detectable in the plastic hospital bags,'" BIO 5, 12, are red herrings.

The BIO does not identify *a single piece of evidence*—testimony or otherwise—that Officer Breault perceived something incriminating about Petitioner's clothing before taking it (a point the State conceded in the trial court and also in its QP to the Washington Supreme Court). The government's failure to introduce that evidence does not make the record "unclear," BIO 17; it squarely presents whether the government was required to do so.

The BIO never contests the centrality of the "immediately apparent" requirement, and does not dispute that its position renders this Court's condition meaningless. The Court should grant certiorari.

ARGUMENT

I. The Court Has Jurisdiction.

This Court has jurisdiction over any federal issues "specially set up or claimed" before a state high court. 28 U.S.C. § 1257. That is met if the issue was presented "with fair precision," *Street v. New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)), or "the state court has considered and decided" it. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 313 n.8 (1987); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991). Thus, "if the record as a whole shows either expressly or by clear intendment that" the federal issue was presented, *Street*, 394 U.S. at 584, or "the highest state court passe[d] on it," *Raley v. State of Ohio*, 360 U.S.

423, 436 (1959), this Court has jurisdiction. Here, both happened.[1]

The BIO does not contest that Petitioner's trial pleadings challenged the seizure under the Fourth Amendment and state constitution. Pet. 7; BIO 3 (citing CP 298 and 302, which state "[t]his motion is based on the United States Constitution" and invoke "[t]he Fourth Amendment to the United States Constitution"). After the trial court upheld the seizure under the federal and state constitutions based on exigency and after Petitioner challenged that holding under "[t]he Fourth Amendment and article I section 7" of the state constitution,[2] *the State* presented plain view to the court of appeals as an alternative basis for affirming the trial court's judgment, Addendum 14a-15a, and, after losing there, to the Washington Supreme Court, Addendum 2a. The BIO represents that, when the State presented plain view to the Washington Supreme Court, it "focused on" whether the state constitution requires inadvertence and the issue was thus "based solely on the Washington Constitution." BIO 5-6. This is nonsense.

To begin with, the argument makes little sense. It would mean the State presented the plain-view exception as a basis to "alternatively" affirm the district court's judgment—which sustained government conduct under the federal *and* state constitutions—but would now be construed as exclusive to the state constitution (and thus not actually a basis to affirm). Addendum 15a.

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[1] Given the BIO's superficial account, Petitioner attaches pertinent pleadings as addenda.

[2] Petr's COA Br. 4.

The BIO's account of the issues presented to the Washington Supreme Court also is not candid. After the State asserted plain view as an alternative basis, the court of appeals rejected it on two grounds: *First*, that the state constitution required inadvertence, Pet.App. 44a; *second*, the requirement that "the incriminating character must be immediately apparent," which it found unmet based on Fourth Amendment precedent because Officer Breault did not perceive "relevant crime information" upon seeing the clothing, such as "blood" or "the scent of gasoline." Pet.App. 45a & n.86. For the latter, the court applied *State v. Hudson*, 874 P.2d 160 (Wash. 1994), as the governing standard—a case premised exclusively on the Fourth Amendment and this Court's interpretation of "immediately apparent" in *Arizona v. Hicks*, 480 U.S. 321 (1987), and *Minnesota v. Dickerson*, 508 U.S. 366 (1993). *Hudson*, 874 P.2d at 165-67.

To reverse, the State had to present both grounds to the Washington Supreme Court. And that's exactly what it did. Its petition for review asserted two questions: *First*, whether the court of appeals erred by adopting an inadvertence requirement; and *second*, whether the plain-view exception is satisfied by "probable cause" even though "the incriminating nature of the evidence is not 'immediately apparent.'" Addendum 2a. The petition's body similarly asked the court to decide whfether the federal "immediately apparent" standard "set out in" *Hudson* is "only a requirement that [officers] have probable cause based on the surrounding circumstances," and does not require "officers directly observe incriminating evidence." Addendum 10a. Petitioner responded that "the Court of Appeals properly determined" the incriminating nature

"was not immediately apparent" given no perception of anything incriminating about the clothing. Answer to Pet. for Review 8.

Three times the BIO purports to describe the procedural posture. Each time it omits the court of appeals' second ground and the second QP below, saying the only issue was state-law inadvertence. *See* BIO 3-4, 4-5, 6-11. In fact, the State presented the precise point of conflict described in the certiorari petition, and this Court has jurisdiction to review it.

In any event, the Court also has jurisdiction because "the highest state court passe[d] on" the Fourth Amendment's "immediately apparent" requirement. *Raley*, 360 U.S. at 436. After rejecting state-law inadvertence, the Washington Supreme Court expressly considered whether "it was immediately apparent that the clothing was associated with criminal activity." Pet.App. 7a. *Every single case* the court invoked for that analysis was grounded exclusively in the Fourth Amendment: The court set forth the federal standard it articulated in *Hudson*, then relied on *Arizona v. Hicks*, 480 U.S. 321 (1987), and *Texas v. Brown*, 460 U.S. 730 (1983), to conclude "immediately apparent" is satisfied by probable cause, "without having to *see* blood or *smell* gasoline on the clothing." Pet.App. 7a-8a & nn.5-6.[3]

It is true that Washington's constitution "provides greater protection than the Fourth Amendment." BIO 5. The Fourth Amendment has been incorporated only

[3] The other two cases cited, *State v. Lair*, 630 P.2d 427 (Wash. 1981), and *State v. Murray*, 527 P.2d 1303 (Wash. 1974), were also Fourth Amendment cases.

as the floor: Article I, section 7 "necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment," but "[i]n some cases . . . may provide greater protection." *State v. Garcia-Salgado*, 240 P.3d 153, 156 (Wash. 2010); *State v. Erickson*, 225 P.3d 948, 950 (Wash. 2010); *Blomstrom v. Tripp*, 402 P.3d 831, 839 n.15 (2017). Accordingly, when parties make a specific argument for expansive interpretation of the state constitution, Washington courts consider it (like "inadvertence" below). But the BIO cites no authority indicating the Washington Supreme Court would have relegated the second issue presented—the meaning of "immediately apparent"—exclusive to the state constitution. That is because Washington law says the opposite: When an argument does not specifically assert a difference between the federal and state provisions, courts "analyze [the] claims under the federal provisions." *State v. Carver*, 781 P.2d 1308, 1312 (Wash. 1989); *see also*, *e.g.*, *Sprague v. Spokane Valley Fire Dep't*, 409 P.3d 160, 172 (Wash. 2018); *State v. Jackman*, No. 48742-0-II, 2018 WL 286809, *4 (Wash. Ct. App. Jan. 4, 2018); *State v. Allstead*, 86 Wash. App. 1037, *1 (Wash. Ct. App. 1997); *State v. Rangel*, 88 Wash. App. 1007, *6 n.3 (Wash. Ct. App. 1997); *State v. Harryman*, 87 Wash. App. 1054, *1 (Wash. Ct. App. 1997).

Here, the BIO's argument again fails on its own terms. It says one way to know whether Washington courts believe a claim rests exclusively on the state constitution or includes the Fourth Amendment is to look at their language: When Washington courts rely exclusively on the state constitution, they adopt "the language that has been used by the Washington Supreme Court," *i.e.*, "immediate knowledge." BIO 10-

11. When Washington courts consider claims that involve the Fourth Amendment, they adopt this Court's language, *i.e.*, "immediately apparent." *Id.* Here, (i) the court of appeals' decision, (ii) the question presented to the Washington Supreme Court, and (iii) the Washington Supreme Court itself *all* applied the federal "immediately apparent" standard, not the state constitutional language. Addendum 2a; Pet.App. 7a & n.5, 10a, 12a, 45a.[4]

Respondents frequently attempt to insulate state court decisions by marshaling a § 1257 argument, and have done so for centuries. *E.g.*, *Green Bay & M. Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 66-68 (1898) (finding argument "sufficiently disposed of" where, as here, trial pleadings explicitly claimed federal right and state supreme court ruling "necessarily held adversely to these claims of federal right"). This is one of the weaker attempts.[5]

II. The BIO All But Concedes The Split.

The petition set forth a specific conflict on whether the plain-view exception allows the government to forgo a warrant and seize property provided it later

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[4] Contrast the express presentation and resolution of a Fourth Amendment claim, applying the Fourth Amendment standard and Fourth Amendment caselaw, with *Adams v. Robertson*, 520 U.S. 83, 87-89 (1997), where neither the petitioner or court below even mentioned a due process claim.

[5] Mindful of the duty to oversee federal law conflicts created by state courts, when respondents advance *a plausible* § 1257 issue the Court's practice is to direct the parties to address it with the merits. *E.g.*, *Kansas v. Marsh*, 544 U.S. 1060 (2005); *Local No. 438 Const. & Gen. Laborers' Union v. Curry*, 369 U.S. 883, 883 (1962); *Pope v. Atl. Coast Line R.R. Co.*, 344 U.S. 863 (1952). Each case later confirmed jurisdiction and resolved the federal issue.

shows probable cause, or whether "immediately apparent" requires the government to show *at least some* causal connection between the perception of the property and the justification for its seizure.

The BIO has nothing to say about that conflict. Instead, it asks whether each jurisdiction "precludes an officer from considering previously known facts." BIO 18-19 (repeating this inquiry). Pretending that is the conflict, the BIO concludes lower courts apply "essentially the same rule," under which officers can "consider their observations in light of facts previously known to them." BIO 17.

The BIO is correct: No court precludes an officer from considering "previously known facts" to determine whether he has probable cause to believe something is incriminating. But the conflict is whether the plain-view exception allows a warrantless search based on that probable cause alone, or whether the justification must be based on perceiving something incriminating about the property seized. On that point, the BIO leaves untouched the account laid out in the petition, Pet. 15-19, and, in some respects, reinforces it:

A. The petition explained that the Colorado and Washington high courts equate "immediately apparent" with probable cause, declining to limit the exception to instances in which the seizing officer perceived something incriminating about the seized property. Pet. 19-20 (discussing the decision below and *People v. Swietlicki*, 361 P.3d 411, 415-16 (Colo. 2015)). The BIO agrees (and embraces) that the Washington Supreme Court has adopted this rule. *See* BIO 5-6, 17 (recognizing the rule below requires only that "considering the surrounding circumstances, the police can

reasonably conclude that the subject evidence is associated with a crime"). The BIO never cites the Colorado Supreme Court's decision in *Swietlicki*, and presumably has no quarrel with its express conclusion to the same effect: "the 'immediately apparent' requirement of the plain view exception means nothing more than the police must possess probable cause" and "carries [no] independent meaning." *Swietlicki*, 361 P.3d at 415-16.

B. The petition also described the analysis of several lower courts that interpret "immediately apparent" to limit the plain-view exception to circumstances in which the government can show at least a causal connection between the officer's perception of property and the probable cause justifying its seizure. Pet. 15-19 (discussing the Sixth, First and D.C. Circuits, and the TCCA).

The BIO does not contest those jurisdictions adopt this limiting principle. In fact, the degree to which the BIO avoids the lower-court analysis quoted in the petition speaks volumes. For instance, the petition described the Sixth Circuit's unambiguous rejection that "immediately apparent" means "the police need only have probable cause to believe the seized item has criminal significance or evidentiary value." Pet. 16 (quoting *United States v. McLernon*, 746 F.2d 1098, 1125 (6th Cir. 1984)). It pointed to the Sixth Circuit's explicit holding that "[t]he agents' 'immediate' sensory perception must produce probable cause of crime." Pet. 15 (quoting *McLernon*, 746 F.2d at 1125). The BIO has nothing to say about that, even though it conflicts with the BIO's description of the rule below. BIO 17.

Similarly, in addressing the First Circuit and D.C. Circuits, the BIO ignores their constraint that where the probable-cause light bulb "does not shine during the currency of the search, there is no 'immediate awareness' of the incriminating nature of the object." Pet. 16-17 (quoting *United States v. Rutkowski*, 877 F.2d 139, 142 (1989)); *see also United States v. Garces*, 133 F.3d 70, 76 (D.C. Cir. 1998) (the probable-cause light bulb must "shine *during the currency of the search*" (emphasis by the court)). The BIO's only response is *United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988). BIO 18. But that case reinforces the point. In *Aguirre*, officers executed a search warrant on the home of someone who they suspected had just used a Ford truck to facilitate "a major drug purchase." 839 F.2d at 858-59. During the search, they found keys and observed the keys to be "conspicuously marked" with Ford insignia, providing the probable cause the officers relied on to connect the keys the crime. *Id*. Indeed, *Rutkowski* expressly distinguished *Aguirre* on this basis: the officers' perception of the Ford keys "closed any remaining gap" by providing an "obvious connection between the keys and the plot," triggering the probable-cause light bulb. *Rutkowski*, 877 F.2d at 143.[6]

Finally, the BIO completely ignores the TCCA's conclusion that "immediate" must be given its historical connotation, which "denote[s] a causational . . . relationship" and contemplates that observation is a "direct" or "proximate" cause of probable cause. *State v. Dobbs*, 323 S.W.3d 184, 189 & n.14 (Tex. Ct. Crim.

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[6] "Officer Breault seized Petitioner's clothing because it was conspicuously _____," is a sentence the State cannot finish.

App. 2010). The BIO itself accepts that the TCCA's determination of whether "the items could properly be seized" was "[b]ased on" what officers learned about the items "[d]uring the search." BIO 18-19; Pet. 18.

The BIO concludes the "thrust of" all cases is the same because it ignores what they say. BIO 19. Borrowing the lower courts' words, the distance here is whether "immediately apparent" "carries [no] independent meaning," *Swietlicki*, 361 P.3d at 416, or imposes a "vital constraint," *United States v. Garcia*, 496 F.3d 495, 510 (6th Cir. 2007).

III. The BIO Does Not Dispute The "Immediately Apparent" Condition Is Of Central Importance, Or That The Decision Below Renders It Meaningless.

The BIO does not contest that allowing the plain-view exception to be satisfied by a showing of probable cause—untethered from the perception of something incriminating about the seized property—effectively swallows the warrant requirement, and enables "the type of general warrant the Framers abhorred, undermining the Fourth Amendment's requirement that the 'things to be seized' be described with particularity." Br. of Profs. Holland & Levin 3; Pet. 22-24. The BIO also never disputes that its position renders one of this Court's express "conditions" meaningless. Pet. 21 (quoting *Horton*, 496 U.S. at 136).

IV. This Is An Exceptional Vehicle.

The petition observed that the following features of this record make it an unusually good vehicle:

(1) The plain-view exception was the sole basis for the decision below. Pet. 24.

(2) The State has never argued harmless error. *Id*.

(3) It is undisputed Officer Breault perceived nothing incriminating about the clothing before seizing it. Pet. 5, 24.

All are reinforced. The BIO acknowledges its other asserted justification, exigency, was unanimously rejected below, BIO 4, and abandons it. The BIO does not dispute the State has no basis to argue harmlessness. And the BIO does not identify *a single piece of evidence*—testimony or otherwise—that Officer Breault perceived anything incriminating about Petitioner's clothing.

The BIO claims "factual problems" because it is "unknown" how Officer Breault "found Mr. Morgan's [bagged] clothing" and because "the petitioner's clothing was 'detectable in the plastic hospital bags.'" BIO 5, 12-16. This is distraction. This case has nothing to do with how Officer Breault found the bags and no one disputes Officer Breault knew it was clothing in the bags. *See* Pet. 3 (accepting Officer Breault "believed [the bags] to contain Petitioner's clothing").

The State had the burden to justify its warrantless seizure and the point of conflict is whether, for the plain-view exception, that included showing that Officer Breault perceived *at least something* incriminating about the clothing, rather than preexisting probable cause that could have been brought to a magistrate. Below, the State conceded the seizure was not based on such perceptions, RP 146—in fact, its question presented to the Washington Supreme Court postulated "the incriminating nature of the evidence [was] not 'immediately apparent,'" Addendum 2a.

Contrary to the BIO, the government's failure to introduce such evidence does not make the record "unclear" or "unsuitable," BIO 17, it squarely presents the question of whether the government was required to do so.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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ADDENDUM

ADDENDUM A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[filed June 29, 2018]

STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	
	)	No. 96017-8
v.	)	
	)	
DAVID ZACHERY MORGAN,	)	
	)	
Respondent.	)	

PETITION FOR REVIEW

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* * *

[1] I. IDENTITY OF PETITIONER

The State of Washington asks for review of the decision designated in part II. The State was plaintiff in the trial court and respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed the respondent's conviction in an opinion filed May 29, 2018. A copy of the opinion is in the Appendix.

III. ISSUES

(1) While in a place that they had a right to be, police seized evidence that was in plain view. Was this seizure illegal because police knew in advance that the evidence was present?

(2) 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"?

(3) Police observed items whose evidentiary value could readily be destroyed by cross-contamination. The items were accessible to both the defendant and third parties. Was seizure of these items justified by exigent circumstances?

[2] IV. STATEMENT OF THE CASE

The defendant (respondent), David Morgan, was found guilty by a jury of attempted first degree murder and first degree arson.[1] 1 CP 58, 61. The evidence at trial is summarized in the Brief of Respondent at pages 2-10. Since this petition focuses on the seizure of evidence, only the evidence at the pre-trial hearing will be summarized.

On November 16, 2015, there was a fire at a house in Lynnwood. The house was almost completely

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[1] The jury also found the defendant guilty of first degree assault. 1 CP 59. This conviction merged with the attempted murder conviction. 15 RP 2844. The defendant was therefore sentenced for only attempted murder and arson. 1 CP 32-45.

burned. Two people were removed from the house and taken to hospitals. Brenda Welch was transported to Harborview Medical Center. The defendant, David Morgan, was transported to Swedish Edmonds Hospital. Police officers were sent to both locations. 1 CP 314-16; 1 RP 63-66. Both people smelled like gasoline. 1 RP 93.

At Harborview, Officer Reorda learned that Ms. Welch had multiple skull fractures and numerous laceration to the head. These injuries were not common for someone who had been in a house fire. 1 CP 314.

[3] At Swedish Edmonds, the defendant was questioned by Officer Breault and by Dets. Cohnheim and Jorgensen. He told them that he was watching TV when he got hit with something on the side of his head. He smelled something and went downstairs. He saw Ms. Welch standing near a door. She was on fire. He tried to rip the sweater off her body, because it was covered in flames. He tried to help her, but he "couldn't take it anymore," so he left the house. 1 CP 316; 1 RP 98-99.

Officer Breault noticed that the defendant's clothing had been placed in plastic shopping bags. They were on the back counter in the room where the defendant was being treated. He was aware that gasoline and similar substances can dissipate rapidly. There could also be cross-contamination involving any evidence that was on the clothing. 1 RP 154-55. After the detectives left, Officer Reorda arrived at the hospital. He and Officer Breault seized the clothing and packaged it in bags that would prevent the dissipation of volatile chemicals. 1 RP 159-60; 1 CP 314-15, 317.

The defendant was charged with attempted first degree murder, first degree arson, and first degree assault. 1 CP 182-83. He moved to suppress evidence obtained from the clothing. 1 CP [4] 298-317. The State argued that the seizure of the clothing was justified by exigent circumstances and by the "plain view" doctrine. 1 CP 213-16.

The trial court concluded that discovery of the clothing was not "inadvertent." It therefore held that the seizure was not justified under the "plain view" doctrine. 1 RP 180-81. The court held, however, that the seizure was justified by exigent circumstances. It therefore denied the motion to suppress evidence. 1 RP 180-83.

On appeal, the Court of Appeals rejected both justifications for the seizure. It held that there was an insufficient showing of exigent circumstances. Slip op. at 21-25. Because Officer Breault had been directed to seize the clothing, his discovery of the evidence was not "inadvertent." Additionally, because Officer Breault had not himself smelled gasoline on the clothing, "the incriminating character of the evidence was not in plain view." Slip op. at 25-26. The Court of Appeals therefore reversed the conviction and ordered suppression of the evidence.

[5] V. ARGUMENT

A. THE COURT OF APPEALS DECISION REFLECTS ONGOING CONFUSION ABOUT THE "INADVERTENCE" REQUIREMENT OF THE "PLAIN VIEW" DOCTRINE.

This case presents an important issue concerning the requirements for seizure of evidence under the

"plain view" doctrine. The decisions of this court reflect confusion about the requirements for that doctrine. In particular, it is unclear whether "inadvertence" exists as an independent requirement for a valid "plain view" seizure.

This court's early decisions on "plain view" applied three requirements:

> (1) a prior justification for intrusion, (2) an inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the police that they have evidence before them.

State v. Daugherty, 94 Wn.2d 263, 267, 616 P.2d 649 (1980), citing *State v. Murray*, 84 Wn.2d 527, 533-34, 527 P.2d 1303 (1974). These requirements were derived from Federal Fourth Amendment cases. *Murray*, 84 Wn.2d at 533, quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Later, however, the United States Supreme Court held that "inadvertence" is not a separate requirement under the Fourth [6] Amendment. *Horton v. California*, 496 U.S. 128,110 S.Ct. 2301, 110 L. Ed.2d 112 (1990). Since *Horton*, this court's decisions have been inconsistent. Some cases have continued to apply the three-part standard set out in *Daugherty*. *E.g.*, *State v. Kull*, 155 Wn.2d 80, 85 ¶ 8, 118 P.3d 207 (2005). Other cases have applied a two-part test:

> A plain view search is legal 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 ¶ 11, 166 P.3d 698 (2007); see *State v. O'Neill*, 148 Wn.2d 564, 583, 62 P.2d 489 (2003). The conflicting cases were summarized by the Court of Appeals in an unpublished decision in *State v. Bunn*, 197 Wn. App. 1004, 2016 WL 7109125 (2016).[2]

The seeming inconsistency may be explained by this court's analysis in *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991). The court there cited the three-part standard for "plain view" seizures. *Id.* at 346. It then explained the "inadvertence" requirement:

> [7] Discovery is inadvertent if the officer discovered the evidence while in a position that does not infringe upon any reasonable expectation of privacy, and did not take any further unreasonable steps to find the evidence from that position. The requirement that a discovery be inadvertent does not mean that an officer must act with a completely neutral, benign attitude when investigating suspicious activity.

Id. (citation omitted). Under *Myers*, inadvertence is thus not an independent requirement. If the other two requirements are satisfied, "inadvertence" is satisfied as well.

Under a dictionary definition, "inadvertent" means "unintentional" or "inattentive." http://www.dictionary.com/browse/inadvertent (visited 6/27/18); Webster's New Twentieth Century Dictionary at 919 (Unabridged 2nd ed. 1978). *Myers* makes it clear that the

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[2] Because this decision is unpublished, it has no precedential value. This court may give it such persuasive value as the court deems appropriate. GR 14.1(a).

discovery of evidence need *not* be "inadvertent" in that sense for a plain view seizure to be valid. In *Myers*, police received a tip that a suspect was selling drugs from his home. They went there to investigate. After obtaining the suspect's permission to enter the house, they went inside and saw drugs, which they seized. That seizure was *not* unintentional or inattentive—the officers found exactly what they had hoped to find. Yet the seizure was valid under the "plain view" doctrine:

> Because [the suspect] consented to the officers entering his home, they had a prior justification for [8] their intrusion. The officers' discovery was "inadvertent." They did not take further unreasonable steps to find the contraband: the items were on a table in the room by which the officers passed at [the suspect's] invitation. The officers immediately recognized the items as contraband. The officers did not violate the "plain view" doctrine when they seized the [contraband] in [the suspect's] living room.

Myers, 117 Wn.2d at 347.

In the present case, it was undisputed that the officers were legitimately present in the hospital room. The trial court agreed that, without further examination of the clothing, the officers could infer that it contained evidence. 1 RP 196-97. The trial court nonetheless held that because the officers expected to find the evidence, the discovery was not "inadvertent." 1 RP 180-81. The Court of Appeals reasoned as follows:

> Here, Officer Breault did not decide to seize the clothing when he entered Morgan's room or at any time during the next few hours. In-

> stead, 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 fact pattern.

Slip op. at 26.

The basis for this analysis is unclear. None of this court's decisions hold that a "plain view" seizure must be conducted at the [9] earliest possible moment. Nor has this court ever distinguished between seizures made on an officer's own initiative and those made at the direction of others. These distinctions could be important if the seizure had to be "inadvertent" in the sense of "unintentional". *Myers* makes it clear, however, that this is not a requirement.

The decision of the Court of Appeals conflicts with *Myers*. Both that decision and the trial court's decision reflect continuing confusion about the "inadvertence" requirement. That confusion has been enhanced by this court's seemingly-inconsistent formulations of the "plain view" doctrine." Clarifying that doctrine presents a significant question of constitutional law and an issue of substantial public interest. Review should be granted under RAP 13.4(b)(1), (3), and (4).

B. THE COURT OF APPEALS DECISION ALSO REFLECTS CONFUSION RESULTING FROM A SEEMING INCONSISTENCY IN THIS COURT'S FORMULATION OF THE "IMMEDIATE RECOGNITION" REQUIREMENT OF THE "PLAIN VIEW" DOCTRINE.

The Court of Appeals decision also raises a second issue about application of the "plain view" doctrinez: the "immediate recognition" requirement. That requirement has been stated by this court in varying ways. According to some cases, the police must [10] immediately know that they have evidence before them. *Daugherty*, 94 Wn.2d at 267; *Kull*, 155 Wn.2d at 85 ¶ 8. Other cases say that the police must be immediately able to realize that the evidence is associated with criminal activity. *Hatchie*, 161 Wn.2d at 395 ¶ 11. There does not appear to be any significant difference between these formulations. Under them, the requirement was satisfied in this case. In particular, the seizing officers were aware that gasoline had been smelled on the defendant's clothing, which would be evidence of the crime of arson. 1 RP 93.

The Court of Appeals, however, relied on a different formulation set out in *State v. Hudson*, 124 Wn.2d 107, 874 P.2d 160 (1994). *Hudson* was a "plain feel" case. While conducting a weapons frisk, a police officer felt an item that he believed to be a baggie of cocaine. Citing *Myers*, this court said that a "plain view" seizure would be proper if "the incriminating character of the item is immediately recognizable." *Hudson*, 124 Wn.2d at 107-14. The court then went on to explain this requirement:

> [P]robable cause is required to satisfy the immediate recognition prong of the "plain view"

> doctrine. Objects are immediately apparent when, considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence.

[11] *Id.* at 118.

In the present case, the Court of Appeals determined that the seizing officer had not smelled the scent of gasoline or observed blood or other relevant crime information. The Court therefore concluded that "the incriminating character of the evidence was not in plain view." Slip op. at 27. This is a misapplication of the doctrine. There is no requirement that the officers directly observe incriminating evidence at the time of the seizure. There is only a requirement that they have probable cause based on the surrounding circumstances. *Hudson*, 124 Wn.2d at 118. The circumstances of this case, including the previously-detected odor of gasoline, provided that probable cause.

The Court of Appeals decision conflicts with the probable cause standard set out in *Hudson*. It appears, however, that this court's re-formulation of the standard in *Hudson* has confused the Court of Appeals. This court should grant review to dispel that confusion. Review should again be granted under RAP 13.4(b)(1), (3), and (4).

[12] **C. THIS COURT COULD SHOULD ALSO REVIEW THE COURT OF APPEALS' MISAPPLICATION OF THE "EXIGENT CIRCUMSTANCES" DOCTRINE.**

This court should also review the Court of Appeals application of the "exigent circumstances" doctrine.

With regard to that doctrine, the Court stated the correct legal standard. The Court made, however, a serious factual error in applying that standard.

As the Court of Appeals recognized, a warrantless seizure is justified if the delay inherent in securing a warrant would permit the destruction of evidence. This is a case-by-case determination that takes into account the gravity of the offense. *State v. Smith*, 165 Wn.2d 511, 517-18 ¶¶ 15-16, 199 P.3d 396 (2009). The court also recognized that the police had a legitimate concern that trace evidence on the defendant's clothing could be contaminated. The court believed, however, that this was an insufficient basis for the seizure.

> 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.

Slip op. at 23.

[13] This conclusion mis-states the record. To being with, the defendant was not "constantly in the presence of police officers." These events took place in a hospital. Medical personnel entered the room as necessary to perform their duties. When they did, *the officers left the room*. 1 RP 69, 103.

As Officer Breault testified, items of evidence can become cross-contaminated. 1 RP 154. Moving the bags carelessly would cause the clothing items to rub against each other. If a member of the hospital staff

needed to use the counter for something else, he or she could pick the bags up and move them-thereby obscuring the nature and source of trace evidence. The defendant could do the same when officers were out of the room. Contrary to what the Court of Appeals concluded, the only effective way to protect the evidentiary value of the clothing was to seize it as soon as possible.

The Court of Appeals decision conflicts with *Smith*. Its misapplication of the "exigent circumstances" doctrine creates an issue of substantial public interest. Review of this issue should be granted under RAP 13.4(b)(1) and (4).

[14] VI. CONCLUSION

This court should accept review, reverse the Court of Appeal, and reinstate the trial court's judgment.

Respectfully submitted on June 27, 2018.

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ADDENDUM B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

[filed Aug. 29, 2017]

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 75072-1-I
	)	DIVISION ONE
v.	)	
	)	
DAVID ZACHERY MORGAN,	)	
	)	
Appellant.	)	

BRIEF OF RESPONDENT AND CROSS-APPELLANT

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II. ISSUES

(1) The trial court granted the defendant's motion for mistrial because of the prosecutor's failure to provide discovery concerning an expert witness's opinion. Under Double Jeopardy principles, does this action preclude the defendant from being re-tried?

(2) The trial court determined that notwithstanding the prior discovery violation, the defendant could be given a fair trial. Did the court abuse its discretion in denying the defendant's motion to dismiss under CrR 8.3(b) or 4.7(h)(7)(i)?

(3) Police observed the defendant's clothing on a shelf in a hospital room, where the defendant himself and other people had access to it. Any delay in collecting that evidence presented a likelihood that trace evidence could be contaminated or volatile chemicals lost by evaporation. Was seizure of this clothing justified by exigent circumstances?

(4) Was seizure of the clothing justified under the "plain view" doctrine, where police were entitled to be in the hospital room, and it was immediately apparent that the clothing constituted evidence? (Issue relating to counter-assignment of error)

(5) The defendant was questioned by two police officers in a hospital room. The officers did not restrain the defendant, place him under arrest, or isolate him from hospital personnel. Was the defendant in "custody" so as to require *Miranda* warnings?

(6) When a crime can be committed by multiple means, and there is substantial evidence of each of the means, must the jury unanimously agree on which means was proved?

(7) The jury was correctly instructed on the elements of first degree arson, on the burden of proof, and on the presumption of innocence. Was the court required to give an additional instruction that fires are presumed to result from accidental or natural causes, absent any substantial evidence to support such an instruction?

* * *

[21] **B. THE DEFENDANT'S CLOTHING WAS LAWFULLY SEIZED.**

* * *

[23] **2. Alternatively, The "Plain View" Doctrine Allows Police Who Are Lawfully Present To Seize Items That Can Be Immediately Recognized As Evidence.**

If this court determines that the seizure of the clothing was not justified by exigent circumstances, it should consider whether the evidence was properly seized under the "plain view" doctrine. A trial court's ruling can be affirmed on any legal basis supported by [24] the record. *State v. Vanderpool*, 145 Wn. App. 81, 85 ¶ 12, 184 P .3d 1282 (2008).

> A plain view search is legal 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 ¶ 11, 166 P .3d 698 (2007).

Here, the defendant conceded that the officers had a lawful reason to be in the hospital room. 1 CP 306-07. The defendant's clothing was sitting in plastic bags on a counter in the back of the room. 1 RP 154-55. At the time the clothes were seized, police knew the following: Ms. Welch had suffered burns as a result of a fire. She had also suffered serious lacerations and a skull fracture. Her clothes smelled of gasoline. The defendant had described pulling a burning sweater off of her. 1 CP 314-15; 1 RP 72-73, 81. Based on this information, it was immediately apparent to

the officers that the defendant's clothing would contain evidence that would cast light on the perpetrator of the arson and assault. Consequently, they could lawfully seize the evidence without a warrant or exigent circumstances.

The trial court believed that the "plain view" doctrine did not apply because the seizure was not inadvertent. The court therefore [25] declined to suppress evidence of a knife found on a counter in the same room, because the officers had not expected to find it. The clothing, however, could not be seized, because the officers knew that it was in the room. 1 RP 180-81.

This reasoning was erroneous. To begin with, it is doubtful that "inadvertence" is a separate requirement for a valid "plain view" seizure. Some Washington cases have listed this as a requirement. *E.g.*, *State v. Kull*, 155 Wn.2d 80, 85 ¶ 8, 118 P.3d 207 (2005). The United States Supreme Court has, however, rejected any such requirement. *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *see State v. Hudson*, 124 Wn.2d 107, 114 n. 1, 874 P.2d 160 (1994). Since *Horton*, some Washington cases have set out a two-part test for "plain view" seizure, which does not include an "inadvertence" requirement. *Hatchie*, 161 Wn.2d at 395 ¶ 11; *State v. O'Neill*, 148 Wn.2d 564, 583, 62 P.2d 489 (2003); *see State v. Bunn*, 197 Wn. App. 1004, 2016 WL 7109125 (2016) (unpublished) (summarizing cases).[4]

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[4] Because this decision is unpublished, it has no precedential value. This court may give it such persuasive value as the court deems appropriate. GR 14.1 (a).

Even if the "inadvertence" requirement still exists, the trial court misconstrued that requirement.

> [26] Discovery is inadvertent if the officer discovered the evidence while in a position that does not infringe upon any reasonable expectation of privacy, and did not take any further unreasonable steps to find the evidence from that position. The requirement that a discovery be inadvertent does not mean that an officer must act with a completely neutral, benign attitude when investigating suspicious activity.

State v. Myers, 117 Wn.2d 332, 346, 815 P.2d 761 (1991) (citation omitted).

The trial court accepted that when the clothes were seized, the officers were in a place that did not intrude on any expectation of privacy. The court also accepted that, without any further examination of the clothes, it was apparent that they constituted evidence. 1 RP 196-97. This being so, the requirement of "inadvertence" was satisfied. Police can properly seize evidence from a place where they have lawful access, even if they know that the evidence is there. Under the "plain view" doctrine, the clothing was properly seized.