No. 92051-6

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

vs.

LEE BUNN

BRIEF OF APPELLANT ON DIRECT REVIEW

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Dear Sir or Madam:
Attached for filing in the referenced case is the Brief of Appellant. Thank you for your assistance.
(CC to Kitsap County Prosecutor's Office).
Yours truly,

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TABLE OF AUTHORITIES

Cases

A. Assignments of Error

Assignment of Error

The trial court erred by concluding the warrantless seizure of Mr Bunn's computer was authorized by the plain view doctrine when: (1) the seizure was not pursuant to an inadvertent discovery of contraband; and (2) the officer did not immediately recognize the potential evidence as being contraband

Issues Pertaining to Assignments of Error

1 Pursuant to article 1, section 7 of the Washington Constitution, may an officer seize a computer in "plain view" when the officer did not discover the alleged contraband on the computer inadvertently?

2 Pursuant to the Fourth Amendment and article 1, section 7 of the Washington Constitution, may an officer seize a computer in "plain view" when the officer observes a file name that suggests the computer may contain contraband, but does not observe any actual contraband?

B. Statement of the Case

Lee Bunn was charged by Information with one count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree. CP, 1 Prior to trial, he filed a motion to suppress evidence he claimed was illegally seized by the Kitsap County

Sheriff's Office. CP, 7. The Court held an evidentiary hearing on July 6, 2015 where two officers from that office testified. RP, 1. The Court denied the motion and entered Findings of Fact and Conclusions of Law. CP, 75. Mr. Bunn does not object to the findings as they are all supported by substantial evidence.

On July 27, 2015, Mr Bunn proceeded to a bench trial on stipulated facts. CP, 58. The trial court found him guilty. CP, 62. Judgment and sentence was entered on August 7, 2015. Mr. Bunn filed a timely notice of appeal seeking direct review in this Court. CP, 79.

On July 22, 2014, Deputy Duane Dobbins was notified by CenCom (Kitsap County Central Communications) to contact the Best Buy Store in Silverdale, Washington. RP, 12 Employees from Best Buy were reporting they had possible child pornography in their store. RP, 12. Deputy Dobbins responded to the store to see "what they had in reference to child pornography." RP, 30. While there, he did not investigate any crimes other than child pornography. RP, 30.

Arriving at 5:23 p.m., he spoke to a Mr. Everett, who was a supervisor at the "Geek Squad," a group of Best Buy employees who repair computers. RP, 13. Mr. Everett took Deputy Dobbins to a back room and pointed to an HP computer tower. RP, 13. According to Mr. Everett, the HP computer tower was owned by a customer named Lee

Bunn who had bought a new computer and wanted the data transferred from the old computer to the new computer. RP, 13. When the employees started the data transfer, there was an error message, "Destination path too long," that caused the transfer to stop. RP, 14. The error message contained the file name of the file that had caused the error. RP, 14 The full file name is "Homeclips-Spycam-13 Year Old Sister Masturbation & Orgasm With Panties On. Lesbian dildo vagina sex porn Pamela paris ron Jeremy Hentai anime kiddie incest preteen fuck Item type Movie Clip." When the employees saw the error message, they stopped working and called CenCom RP, 11 Deputy Dobbins did not see any actual images of child pornography. RP, 33. Deputy Dobbins is aware that file names can be changed. RP, 33.

When Deputy Dobbins saw the error message, he instructed Mr. Everett to take a "screen shot" of the computer, which is a picture that captures whatever is on the computer monitor at the time. RP, 16. He then instructed the Best Buy employees to unplug the computer and it was secured as evidence. RP, 17. Deputy Dobbins then transported the computer to his patrol car RP, 20

Prior to leaving Best Buy, Deputy Dobbins instructed the employees that if Mr. Bunn called inquiring about the computer, they were to give "inaccurate information" and say they were still working on the

transfer. RP, 37. (Deputy Dobbins claims it was not "technically" inaccurate information, but was instead a "ruse[1]." RP, 42.) The reason he used this ruse was to allow the sheriff's office more time to process the computer. RP, 37.

At the suppression hearing, Deputy Dobbins testified he considered the need for a warrant and called his sergeant to inquire. RP, 34. He was told a warrant was unnecessary and the detectives unit would handle the investigation from there. RP, 36. No warrant was obtained authorizing the seizure of the computer.

The next day, July, 23, 2014, the case was assigned to Detective Gerald Swayze. RP, 45. Detective Swayze did some follow up investigation and sought a search warrant for the computer on August 1, 2014. RP, 51 Based upon the search warrant, the computer was sent to the crime lab for analysis CP, 59.

The trial court concluded that the computer was in plain view. CP, 77. The trial court concluded Deputy Dobbins immediately recognized the computer as contraband based upon the file name he observed CP, 77. The trial court concluded inadvertence is not required by article 1, section 7 of the Washington Constitution. CP, 78. Although the State asked the

[1] According to the dictionary com, a "ruse" is "an action intended to deceive someone." Apparently, Deputy Dobbins was more comfortable with taking an action intended to deceive than he was giving inaccurate information, "technically" speaking, of course

trial court to make a finding that the evidence was found inadvertently, the trial court specifically declined to make such a finding. The Conclusion of Law II reads, "[H]e had a prior justification for being where he was when he observed the evidence, and ~~inadvertently~~ discovered it and he immediately recognized it as evidence of a crime." CP, 77 (cross out in original).

C. Argument

1. The computer was not in plain view because law enforcement did not discover it inadvertently, as required by article 1, section 7 of the Washington Constitution.

Mr. Bunn's basic contention is that his computer was seized without a warrant and held for ten days before a search warrant was procured. A warrantless seizure is per se unreasonable unless it fits within one of the exceptions to the warrant requirement. *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007). One of those exceptions is when evidence is in "plain view." Washington Courts have repeatedly said a plain view search requires three things: (1) prior justification for an intrusion; (2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by the police that they had evidence before them. *State v. Murray*, 8 Wn. App. 944, 509 P.2d 1003 (1973), citing *Coolidge*

v. New Hampshire, 403 U.S. 443, 91 S.Ct 2022, 29 L.Ed.2d 564 (1971). See also *State v. Dimmer*, 7 Wn.App. 31, 497 P 2d 613 (1972).

The trial court in Mr. Bunn's case declined to follow *Murray* and *Dimmer*, however, pointing out correctly that inadvertence is no longer required by the Fourth Amendment. *California v. Horton*, 496 U.S. 128, 110 S.Ct. 230, 1110 L.Ed 2d 112 (1990). The trial court also pointed out that in at least one case, this Court cited the plain view doctrine without mentioning the inadvertence requirement. *State v. O'Neill*, 148 Wn.2d 564, 62 P 3d 489 (2003). But *O'Neill* is easily distinguishable because the seized item in that case was clearly viewed inadvertently, so there was no need for this Court to discuss inadvertence.

This Court should determine for the first time whether article 1, section 7 of the Washington Constitution requires plain view seizures be inadvertent In doing so, this Court should consider the six criteria laid out in *State v Gunwall*, 106 Wn.2d 54, 66, 720 P.2d 808 (1986): (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Because of the textual language of article I, section 7, the differences between it and the Fourth Amendment, the constitutional history, and the structural differences between state and federal law, it has been repeatedly and consistently found to be more

protective of the rights of Washington citizens *State v. Ferrier*, 136 Wn 2d 103, 960 P.2d 927 (1998).

This Court has also pointed out that these textual and historical differences are intended to provide broader privacy protection for Washington citizens than the Fourth Amendment. While the exclusionary rule of the Fourth Amendment is designed primarily to deter police misconduct, article 1, section 7 serves three distinct purposes: (1) protect individual privacy against unreasonable governmental intrusion; (2) deter police from acting unlawfully; and (3) preserve the dignity of the judiciary by refusing to consider evidence that has been obtained through illegal means. *State v Eserjose*, 171 Wn.2d 907, 259 P 3d 172 (2011)

The purpose of the inadvertence requirement was well explained by Justice Stewart in the *Coolidge* decision and by Justice Brennan in his dissent in *Horton*.

> As Justice Stewart explained in *Coolidge*, we accept a warrantless seizure when an officer is lawfully in a location and inadvertently sees evidence of a crime because of the inconvenience of procuring a warrant to seize this newly discovered piece of evidence. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the argument that procuring a warrant would be "inconvenient" loses much, if not all, of its force. Barring an exigency, there is no reason why the police officers could not have obtained a warrant to seize this evidence before entering the premises. The rationale behind the inadvertent discovery requirement is simply that we will not excuse officers from the general requirement of a warrant to

> seize if the officers know the location of evidence, have probable cause to seize it, intend to seize it, and yet do not bother to obtain a warrant particularly describing that evidence. To do so would violate the express constitutional requirement of Warrants particularly describing the things to be seized, and would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure

Horton at 144-45 (Justice Brennen, dissenting), citing *Coolidge* at 2040

This Court recently emphasized the need for particularity in the area of computer searches because of the overlapping First Amendment concerns. *State v. Besola*, __ Wn.2d __ (decided November 5, 2015). In *Besola*, this Court was concerned with a search warrant that authorized the seizure of computers and computer software without stating with particularity the items to be seized and searched. The probable cause was based upon handwritten titles and file names suggesting the presence of child pornography. Rather than seize the items immediately, the police sought to expand the search warrant. This Court held that the expansion was illegal because it permitted the police to seize both illegal child pornography and legal adult pornography. Mr. Bunn's case is even more egregious: the police did not even bother to obtain a warrant for the seizure in his case. There is, therefore, no warrant to review for its particularity.

Keeping these general principles in mind, this Court should retain the inadvertence requirement of the Plain View Doctrine. First,

preexisting case law requires its retention. All of the early cases such as *Murray* and *Dimmer* cite inadvertence as a requirement of the Plain View Doctrine.

This Court has repeatedly shown a willingness to inquire into a police officer's subjective intent and, upon a finding that the intent was to avoid a search warrant, declare the search illegal. In *State v. Michaels*, 60 Wn.2d 638, 374 P 2d 989 (1962) this Court held that pretextual arrests are unlawful. In *State v. Ladson*, 138 Wn.2d 343, 979 P 2d 833 (1999) this Court extended *Michaels* to all traffic stops. In doing so, this Court rejected the position of the United States Supreme Court, which has held that the officer's subjective intent is irrelevant under the Fourth Amendment. *Whren v United States*, 517 U.S. 80, 6116 S.Ct 1769, 135 L.Ed 2d 89 (1996)

This Court, in discussing *Steagald v United States*, 451 U.S. 204, 212, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), has also provided greater protection than the United States Supreme Court in the context of warrantless entries into third party homes In *State v Hatchie*, this Court held an arrest warrant (as opposed to a search warrant) constitutes "authority of law" under article 1, section 7 to search the residence of a third party when (1) the entry is reasonable, (2) the entry is *not a pretext* for conducting other unauthorized searches or investigations, (3) the police

have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of the entry *State v. Hatchie*, 161 Wn.2d 390, 392-93, 166 P.3d 698 (2007) (Emphasis added).

The discussion in *State v Ferrier*, 136 Wn 2d 103, 960 P.2d 927 (1998) is also worth noting. In *Ferrier*, this Court looked at a common police procedure called the "knock and talk," whose goal is to "gain entry to the home" where insufficient evidence exists to get a search warrant. See *Ferrier* at 407. "The core of [the appellant's] argument is that the police here violated her expectation of privacy in her home because they conducted the knock and talk in order to search her home, thereby avoiding the general requirement that a search warrant be obtained." *Ferrier* at 114 Although this Court did not find the "knock-and-talk" procedure illegal per se, it did find that the procedure was sufficiently coercive to require additional protections and created the now well-known *Ferrier* warnings

Second, the inadvertence requirement furthers the privacy interest of Washington citizens. Failure to limit plain view seizures to items discovered inadvertently has the potential of turning every situation into a pretext for an exploratory search. As the Court of Appeals said in *Dimmer*, "This is not the type of case where police had reason to believe

evidence other than what was described in the warrant would be found and, knowing that, simply failed to get a search warrant to cover it." *Dimmer* at 34. The inadvertence requirement serves the same normative values as the particularity requirement for search warrants: prevent general exploratory searches and eliminate the danger of unlimited discretion in the executing officer's determination of what to seize. *State v. Perrone*, 119 Wn. 2d 538, 545, 834 P.2d 611 (1992). If the officer expects to find evidence at a particular location, he or she should apply for and secure a warrant prior to the seizure.

In sum, this Court has a long, well-established and consistent track record of requiring police officers to get a search warrant any time they have time to do so. When police officers truly come upon evidence inadvertently, they may forgo the "inconvenience" of getting a warrant and may seize the evidence in plain view. But when police engage in behavior as a pretext for a larger search, they must first seek and obtain a search warrant that describes with particularity the items to be seized and searched.

Should this Court should reject the analysis of the *Horton* majority, it would not be alone in doing so. At least three states have refused to follow *Horton* on state constitutional grounds. *Commonwealth of Massachusetts v. Balicki* 762 N.E.2d 290 (2002); *People of New York v.*

Manganaro, 561 N.Y.S.2d 379 (1990); *State of Hawaii v Meyer*, 893 P.2d 159 (1995) The state of New Hampshire has also indicated it might decline to follow it for items not inherently dangerous, such as guns and drugs. *State of New Hampshire v. Nieves*, 999 A.2d 389 (2010). This Court should follow the lead of the Massachusetts, New York and Hawaii courts and reject the *Horton* decision.

In this case, Deputy Dobbins went to Best Buy expecting to find a computer with child porn. When he arrived, he observed an error message that referenced a file with a provocative file name He considered obtaining a warrant, and even called his sergeant to inquire about the need for one, but ultimately decided to seize the computer without a warrant. The seizure of the computer was not inadvertent and, under article 1, section 7 of the Washington Constitution, was unlawful.

1. The computer was not in plain view because law enforcement did not immediately recognize the evidence as contraband.

The trial court found that the file name in this case seen by Deputy Dobbins was immediately recognizable as contraband and, therefore, could be seized without a warrant. This was error.

First, the officer (and the trial court) erred by relying solely on the file name Files names are easily manipulated and changed. In fact, adult

pornographers frequently use terms in the file name to suggest childlike images when the image does not contain child pornography at all. One study conducted by the United States General Accounting Office studied 1,286 titles and file names using 12 keywords known to be associated with child pornography on the Internet, determining that 543 (about 42 percent) were associated with child pornography images. Of the remaining, 34 percent were classified as adult pornography and 24 percent as nonpornographic. In another search using three keywords, a Customs analyst downloaded 341 images, of which 149 (about 44 percent) contained child pornography.[2] In other words, less than half of the file names found on the Internet with terms suggesting child pornography actually contain child pornography and nearly a quarter of the files contain no pornography at all.

Although Deputy Dobbins' error message on Mr. Bunn's computer displayed a file name that contained some provocative terms that suggested the presence of child pornographic images, the deputy did not observe actual child pornography and could not immediately identify the error message as contraband. While the file name did contain terms like "13 Year Old Sister Masturbation" and "Preteen," it also contained many

[2] GAO Report Number GAO-03-537T; see http://www.gao.gov/assets/110/109718.html

terms suggesting adult pornography, such as "Pamela Paris,"[3] and "Ron Jeremy."[4] Additionally, two of the terms ("anime" and "hantai"[5]) suggested the image was virtual and not actual images. Virtual images of child pornography are not unlawful. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234; 122 S. Ct. 1389; 152 L. Ed. 2d 403 (2002). As one court said in a different context, "[A] label on a container is not an invitation to search it. If the government seeks to learn more than the label reveals by opening the container, it generally must obtain a search warrant." *United States v. Villarreal*, 963 F.2d 770, 776 (5th Cir. 1992).

Second, even if the file name did arouse the suspicion of Deputy Dobbins, it still required additional investigation to determine if the file image in fact contained child pornography. The seminal case in this area is *Arizona v. Hicks*, 480 U.S. 321, 94 L.Ed.2d 347, 107 S.Ct. 1149 (1987). In *Hicks*, the officer observed a television set that he suspected was stolen. Trying to confirm his suspicions, he tipped the television enough to write down the serial number. The Supreme Court held that the tipping of the television was an illegal seizure because the officer did not immediately

[3] This is an apparent reference to Pamela Anderson and Paris Hilton, two adult celebrities that have made popular videos of themselves having sex

[4] Ron Jeremy is the unlikely star of hundreds of adult pornographic movies featuring himself as an overweight, unattractive man having sex with beautiful women

[5] Anime is a form of Japanese animation. Hantai is a subgenre of anime that features highly sexualized images

recognize the television as contraband. The television was not in plain view.

The Supreme Court has summarized the *Hicks* holding as follows: "If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i e*, if its incriminating character is not immediately apparent — the plain-view doctrine cannot justify its seizure." *Minnesota v Dickerson*, 508 U.S. 366, 375, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993) (citations omitted)

In *United States v Garcia*, 496 F 2d 495, 511 (6th Cir. 2007), officers seized and later read paper documents, such as receipts, financial records, and invoices. The Court held that these documents, in and of themselves, are lawful and innocuous items, and the testimony of the officers made it clear that in order to establish a nexus between these documents and any criminal activity, they had to undertake "further investigation." The Court held the documents were not in plain view Similarly, in *United States v Bonitz*, 826 F 2d 954, 957 (10th Cir. 1987), officers observed a hard, plastic case that, in their training and experience, was normally used to hold a gun, but, according to the trial court, could just as easily held a violin or camera. The officers opened the case

without a warrant and discovered a gun. The court held the gun was not in plain view

The discussion in *State of Montana v Lacey*, 349 Mont. 371, 204 P.3d 1192 (2009) is particularly apropos of Mr Bunn's case. The Montana Court cites extensively to *People v. Blair*, 321 Ill.App 3d 373 (2001) Together the two cases demonstrate why Mr. Bunn's computer was illegally seized.

> There is a distinction between search and seizure as noted by the Illinois Court of Appeals in *People v Blair*, 321 Ill.App.3d 373, 254 Ill.Dec 872, 748 N.E.2d 318 (2001), a case relied upon by Lacey. In that case, police officers had arrested defendant Blair for disorderly conduct while he was videotaping children at a zoo in Rock Island County, Illinois. After Blair's arrest, officers went to his residence and were greeted by Blair's father, Howard Blair (Howard). Officers were allowed inside by Howard, and then asked if they could search some of Blair's belongings. Howard led the officers to the basement where Blair stored some of his belongings. In the basement officers came upon a computer owned by Blair. At the time, Howard stated that he had no ownership interest whatsoever in the computer. Nevertheless, the officers turned it on and began searching it. The officers later stated that they believed they had Howard's permission to turn on the computer.
>
> In the course of their search, the officers discovered internet bookmarks with references to teenagers which they believed

> indicated the computer contained child pornography. They seized the computer ...
>
> The Illinois Court of Appeals reversed the denial of Blair's motion to suppress. First, citing to *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), the court noted that police officers must have probable cause to effect a seizure in the absence of either consent or a warrant. The court found probable cause was lacking because Blair's arrest for disorderly conduct and the internet bookmarks with references to teenagers were considered too ambiguous to give rise to probable cause.

State of Montana v. Lacey, 349 Mont. 371, 386-89, 204 P.3d 1192 (2009), citing *Blair* at 324-25.

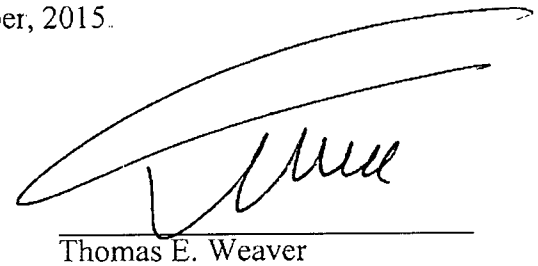
In this case, the trial court concluded the file name contained in the error massage was sufficient for Deputy Dobbins to immediately recognize it as evidence of a crime. This conclusion was error and should be reversed.[6]

D. CONCLUSION

This Court should reverse the findings of the trial court, hold the warrantless seizure of the computer to be unlawful, and dismiss the case

[6] In his Statement of Grounds for Direct review, Mr. Bunn also argued the ten day delay between the seizure of the computer and the procurement of a search warrant was unreasonable. Mr. Bunn withdraws that assignment of error.

Dated this 12th day of November, 2015.



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