NO. 92051-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEE EARL BUNN,

Appellant.

ON DIRECT REVIEW FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00360-5

BRIEF OF RESPONDENT

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SERVICE		
	Thomas E. Weaver Po Box 1056 Bremerton, WA 98337 Email: tweaver@tomweaverlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 8, 2016, Port Orchard, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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2. Whether a visible computer file extension indicating the presence of child pornography in the computer makes the computer immediately recognizable as seizable contraband.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Lee Earl Bunn was charged by information filed in Kitsap County Superior Court with possession of depictions of minor (sic) engaged in sexually explicit conduct in the second degree. CP 1. Bunn moved to suppress the evidence upon which the charge was based. CP 7. The issues were extensively briefed; there are six briefs filed on the single issue of seizure of Bunn's computer.

The trial court denied Bunn's suppression motion. CP 75. The matter was resolved by bench trial on stipulated facts. CP 58. The trial court found Bunn guilty. CP 62. Judgment and sentence were entered on August 7, 2015. CP 63. Bunn was given a standard range sentence with legal financial obligations and supervision requirements. Id. Bunn timely appealed, seeking direct review in the Supreme Court. CP 79. The state

did not challenge Bunn's request for direct review.

B. FACTS

Bunn does not challenge the trial court's findings from the CrR 3.6 hearing, admitting that those findings are supported by substantial evidence. Brief at 2. Moreover, on the single issue raised, Bunn's statement of the case provides a fair statement of the facts relevant to the issue presented. Additional facts may be asserted as necessary for argument.

III. ARGUMENT

A. THE SEIZURE OF BUNN'S COMPUTER WAS LAWFUL BECAUSE IT WAS LAWFULLY DISCOVERED, BECAUSE IT WAS IMMEDIATELY RECOGNIZED AS CONTAINING CONTRABAND, AND BECAUSE INADVERTENCE IN THAT DISCOVERY AND RECOGNITION IS NOT REQUIRED.

Bunn argues that the warrantless seizure of his computer violates article 1, section 7 of the Washington Constitution only. *Sub silentio* Bunn does not challenge the seizure under the Fourth Amendment to the United States Constitution. He claims that the seizing officer did not inadvertently come across Bunn's computer and did not immediately recognize contraband when he did and thus the state is not entitled to the plain view exception to the warrantless seizure herein. Brief at 1. This claim is without merit because inadvertence is not required and probable

cause to seize was immediately apparent. In the alternative, should the Court hold that inadvertence is required, the seizing officer's discovery was sufficiently inadvertent under the circumstances of the present case.

Under both the United States Constitution and the Washington Constitution, warrantless seizures are prohibited unless one of the narrow exceptions to the warrant requirement applies. *State v. Weller,* 185 Wn.App. 913, 922, 344 P.3d 695 (2015) *rev denied* 183 Wn.2d 1010 (2015). The state has the burden of establishing that a particular warrantless seizure falls within one of these exceptions. Id., *citing State v. Duncan,* 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Trial court conclusions of law in motions to suppress evidence are reviewed *de novo.* 185 Wn.App. at 922. Application of an exception to the warrant requirement constitutes a conclusion of law reviewed *de novo. Id.*

Among the exceptions, and the object of this appeal, is plain view, "which allows officers to seize an object if they are lawfully present in a constitutionally protected area and the object is in plain view." Id., *accord State v. Arreola,* 176 Wn.2d 284, 292, 290 P.3d 983 (2012) (in extensive discussion of article 1, section 7 privacy rights, noting that plain view remains an exception to warrant requirement). In 2003, this Court said

> The "plain view" doctrine is an exception to the warrant requirement that applies after police have intruded into an area in which there is a reasonable expectation of privacy. The doctrine

> requires that the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other item useful as evidence of a crime.

State v. O'Neill, 148 Wn.2d 564, 582-83, 62 P.3d 489 (2003) (internal citation omitted). The Court noted, in footnote 6, that

> [i]n 1990, the United States Supreme Court eliminated a third requirement, i.e., that the officer's discovery of the evidence be inadvertent. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

Id. This observation is contrary to Bunn's assertion that because the police observation in *O'Neill* was arguably inadvertent there was "no need for this Court to discuss inadvertence." Brief at 6. In fact, it is in noting that inadvertence is no longer an element of the plain view doctrine that the Court eliminated the necessity of further discussing inadvertence. *See State v.Ruem,*179 Wn.2d 195, 200 (concurrence at 216), 313 P.3d 1156 (2013) (discussing plan view with no reference to inadvertence, by footnote or otherwise, in both majority and concurrence); *State v. Kull,* 155 Wn.2d 80, 85, 118 P.3d 307 (2005) (discussing plain view and again noting in a footnote, citing *O'Neill,* that inadvertence is no longer required); *State v. Khounvichai,* 149 Wn.2d 557, 565-66, 69 P.3d 862 (2004) (discussing plain view, citing *O'Neill*, and making no reference, footnote or otherwise, to inadvertence); *but see State v. Bustamante-Davila,* 138 Wn.2d 964, 982-83, 983 P.2d 590 (1999) (inadvertence

included without analysis in brief discussion of plain view).

This Court, in *O'Neill, Ruem, Kull*, and *Khounvichai*, has answered much of Bunn's argument: this Court considers the plain view exception without reference to inadvertence. And, each of these cases is decided under article 1, section 7. In *O'Neill*, for instance, the trial court found the evidence admissible under the Fourth Amendment but suppressed under article1, section 7. Id. at 573. While engaged in a thorough review of the law of search and seizure under the Washington Constitution, the *O'Neill* Court simply noted that inadvertence is not required in plain view cases. In no other case found since *O'Neill* has the Washington Supreme Court retreated from this position. Indeed, in the 2013 update to the *Survey of Washington Search and Seizure Law,* the commentators observed that

> For a warrantless seizure to fall within this ""plain view" exception, the following two requirements must be met: (1) the police must have a prior justification for the intrusion into the constitutionally protected area, and (2) the police must immediately realize that the object they observe is evidence--the incriminating character of the evidence must be immediately apparent. Previously, courts imposed a third requirement: the discovery of the incriminating evidence must be inadvertent. However, neither article I, section 7, nor the Fourth Amendment still require inadvertent discovery to justify a seizure under the plain view exception.

36 Seattle U. L. Rev. 1581, 1709 (internal citation omitted). This definitive commentary follows this Court's cases; article 1, section 7 does

not require inadvertence in plain view exceptions to the warrant requirement.

However, it is axiomatic that

> [w]hen presented with arguments under both the state and federal constitutions, we start with the state constitution. It is well established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. Article I, section 7 is grounded in a broad right to privacy and protects citizens from governmental intrusion into their private affairs without the authority of law.

State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014) (internal citation and quotation omitted). And, "the authority of law required by article 1, section 7 is a valid warrant unless the State shows that a search or seizure falls within one of the jealously guarded and carefully drawn exceptions to the warrant requirement." Id. As we have seen, in the four cases named above, this Court applied these same principles and did not undertake to jealously guard inadvertence. It is in this context that Bunn endeavors to resurrect the inadvertence element of plain view.

Previously, this Court included inadvertence in its analysis of plain view. *See State v. Myers,* 117 Wn.2d 332, 346, 815 P.2d 761 (1991). In *Meyers*, inadvertence was held to mean that "the officer discovered the evidence while in a position that does not infringe upon a reasonable expectation of privacy, and did not take any further unreasonable steps to find the evidence from that position." Id. Moreover, this "does not mean

that the officer must act with a completely neutral, benign attitude when investigating suspicious activity." Id. But by 1992, Washington courts noted that inadvertence was no longer required. *State v. Goodin,* 67 Wn.App. 623, 627-28, 838 P.2d 135 (1992) *rev denied* 121 Wn.2d 1019 (1993). Citing *Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the *Goodin* Court held that "inadvertent discovery is no longer required under the Fourth Amendment to justify a seizure of evidence in plain view and has never been explicitly required under Article 1, section 7 of the Washington Constitution." Id. (original citation moved). In 1994, the Washington Supreme Court formulated plain view as follows

> The plain view doctrine is applicable where the police are justified by warrant, or by an exception to the warrant requirement, to search in a protected area for a specified object. If, in the course of that search, they happen across some item for which they had not been searching and the incriminating character of the item is immediately recognizable, that item may be seized.

State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994) (again, noting in footnote #1 that inadvertence is no longer required). In *Hudson,* the word inadvertent appears in comment on the police activity only: "[t]he plain view doctrine has an obvious application by analogy where an officer *inadvertently* discovers contraband during an otherwise lawful weapons search." Id. (emphasis added).

Hudson, then, is the last case in the Washington Supreme Court

where the term inadvertent is used in conjunction with the plain view doctrine. Moreover, there the word is merely descriptive, not part of the analysis of the doctrine because not a part of it. Now, over twenty years since *Hudson,* and twenty-five years since *Meyers*, the last case in which inadvertence was mentioned as part of the doctrine, Washington courts do not require inadvertence in plain view cases. *See e.g. State v. Weller,* 185 Wn.App. 913, 926, 344 P.3d 695 (2015) (requiring that police be lawfully present and the object seized be in plain view only) *citing State v. Hudson, supra.* Bunn's assertion that "Washington Courts have repeatedly said a plain view search requires three things," that is, requires inadvertence, is true only for a relatively brief period between two United States Supreme Court case considered below. Brief at 5-6. In support of this assertion, Bunn cites cases from 1971, 1972, and 1973—the most recent being forty-two years old. Further, the 1971 United States Supreme Court cases cited, *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, was reversed by *California v. Horton, supra,* in 1990. This authority, then, does little to inform the present case because since *Horton* and before *Coolidge* the plain view doctrine has been applied without the inadvertence element in both Washington and federal courts (excepting *Meyers*, which was decided just months after *Horton).*

The issue arises from the change of the plain view doctrine in the

federal courts. First, in *Coolidge v. New Hampshire, supra,* the United States Supreme Court considered the warrantless seizure and subsequent search of an automobile that was implicated in a murder. 403 U.S. at 447-48. This seizure was warrantless because the Court held that the warrant used was not issued by a "neutral and detached magistrate." Id. at 453. The court then proceeded to consider applicable exceptions to the warrant requirement. Id. The state argued plain view--that the car could be seized as an instrumentality of the crime found in plain view. Id. at 464. The Court rejected this argument. Id. In so doing, the Court reviewed the plain view doctrine at length. Much of that discussion is premised on questions that are relevant to the present discussion of inadvertence but do not apply to the present facts, such as Justice Stewart's resort to considerations of warrant requirements and exceptions as they apply to the heightened protections of the home and as they apply to searches incident to arrest. The present seizure was neither in Bunn's home nor incident to his arrest. Further, in this plurality opinion, the Court was sharply divided.

The lead opinion framed the plain view issue thus

> It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

403 U.S at 465. The opinion provides examples involving service of a warrant and finding evidence not specified therein or hot pursuit or search incident to arrest. In sum, the Court said

> What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plan view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Id. at 467-68. This core holding announces the rule: prior justification, inadvertent discovery of evidence that is immediately apparent as such. Here, it can be noted that this formulation suffers very little if at all if the word "inadvertently" is removed.

The Court noted that warrant exceptions must comport with policies of the Fourth Amendment, which are that searches or seizures be based on prior determination of probable cause and that they are limited to avoid the "specific evil" of a "general warrant." Id. at 467. The plain view doctrine serves these principles:

> The 'plain view' doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In

> each case, this initial intrusion is justified by a warrant or by an exception such as 'hot pursuit' or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

Id. at 467-68 (citation omitted). Again, this statement suffers little if any analytical damage should the word "inadvertently" be omitted. Also, here we find a statement that is more in line with the present facts—that the officer herein had an "extraneous valid reason" for his presence at the Best Buy store. He was investigating a report of a crime. *See State v. Bell,* 108 Wn.2d 193, 197, 737 P.2d 254 (1987) (then necessary inadvertence satisfied because firefighters had duty to investigate fire when they discovered marijuana-growing operation).

The *Coolidge* plurality then asserts inadvertence as necessary under the Fourth Amendment

> The second limitation is that the discovery of evidence in plain view must be inadvertent. The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the

> evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'

Id. at 469-471 (footnote and page breaks omitted). Significantly, the Court does not undertake to actually define the term. Only by negative implication is a definition found; inadvertence is not the case if officers know of the evidence and intend to seize it before they take action without a warrant or without particularly describing the property to be seized. Later, in response to the dissent, arguably dictum, the negative is maintained as "the determining factors are advance police knowledge of the existence and location of the evidence, police intention to seize it, and the ample opportunity for obtaining a warrant." Id. at 482. But the definition of inadvertence based upon what it is not is closely followed in the opinion by the opposite sentiment with regard to search incident to arrest with "[w]e. . .do not suggest here, that police must obtain a warrant if they anticipate that they will find specific evidence during the course of such a search." Id. These seemingly contradictory statements at least point out the difficulty attendant to ascertaining the actual subjective intentions of the police in determining inadvertence.

Concurring in part and dissenting in part, Justice Black roundly criticized the majority's plain view holding. Specific to inadvertence,

Justice Black reviewed the cases and concluded

> The majority confuses the historically justified right of the police to seize visible evidence of the crime in open view at the scene of arrest with the 'plain view' exception to the requirement of particular description in search warrants. The majority apparently reasons that unless the seizure made pursuant to authority conferred by a warrant is limited to the particularly described object of seizure, the warrant will become a general writ of assistance. Evidently, as a check on the requirement of particular description in search warrants, the majority announces a new rule that items not named in a warrant cannot be seized unless their discovery was unanticipated or 'inadvertent.' The majority's concern is with the scope of the intrusion authorized by a warrant. But the right to seize items properly subject to seizure because in open view at the time of arrest is quite independent of any power to search for such items pursuant to a warrant. The entry in the present case did not depend for its authority on a search warrant but was concededly authorized by probable cause to effect a valid arrest. The intrusion did not exceed that authority. The intrusion was limited in scope to the circumstances which justified the entry in the first place—the arrest of petitioner. There was no general search; indeed, there was no search at all. The automobile itself was evidence properly subject to seizure and was in open view at the time and place of arrest.
>
> Only rarely can it be said that evidence seized incident to an arrest is truly unexpected or inadvertent. Indeed, if the police officer had no expectation of discovering weapons, contraband, or other evidence, he would make no search. It appears to me that the rule adopted by the Court today, for all practical purposes, abolishes seizure incident to arrest. The majority rejects the test of reasonableness provided in the Fourth Amendment and substitutes a per se rule—if the police could have obtained a warrant and did not, the seizure, no matter how reasonable, is void. But the Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only 'unreasonable searches and seizures.' The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.

403 U.S. at 507-511. Here, we come closer to the present case in that the deputy in the present case also made no search at all. In our case, again, the deputy did not intrude into a constitutionally protected place where he saw the evidence. In investigating a citizen report of a crime, he went to the store and saw the evidence himself.

Justice White, concurring and dissenting, continued the assault on the majority's inadvertence requirement. This criticism in all is too lengthy for direct quotation here but given the issue, the following is significant

> More important, the inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing. Police with a warrant for a rifle may search only places where rifles might be and must terminate the search once the rifle is found; the inadvertence rule will in no way reduce the number of places into which they may lawfully look. So, too, the areas of permissible search incident to arrest are strictly circumscribed by Chimel. Excluding evidence seen from within those areas can hardly be effective to operate to prevent wider, unauthorized searches. If the police stray outside the scope of an authorized Chimel search they are already in violation of the Fourth Amendment, and evidence so seized will be excluded; adding a second reason for excluding evidence hardly seems worth the candle. Perhaps the Court is concerned that officers, having the right to intrude upon private property to make arrests, will use that right as a pretext to obtain entry to search for objects in plain sight, cf. Chimel v. California, supra, 395 U.S., at 767, 89 S.Ct., at 2042, but, if so, such a concern is unfounded. The reason is that under Chimel the police can enter only into those portions of the property into which entry is necessary to effect the arrest. Given the restrictions of Chimel, the police face a substantial risk that in effecting an arrest and a search incident thereto they will never enter into those portions of the property from which they can plainly see the objects for which they are searching and that, if they do not, those objects will be

> destroyed before they can return and conduct a search of the entire premises pursuant to a warrant. If the police in fact possess probable cause to believe that weapons, contraband, or evidence of crime is in plain view on the premises, it will be far safer to obtain a search warrant than to take a chance that in making an arrest they will come into plain view of the object they are seeking. It is only when they lack probable cause for a search—when, that is, discovery of objects in plain view from a lawful vantage point is inadvertent—that entry to make an arrest might, as a practical matter, assist the police in discovering an object for which they could not have obtained a warrant. But the majority in that circumstance would uphold their authority to seize what they see. I thus doubt that the Court's new rule will have any measurable effect on police conduct. It will merely attach undue consequences to what will most often be an unintended mistake or a misapprehension of some of this Court's probable-cause decisions, a failing which, I am afraid, we all have.

Id. at 517-18. Thus, Justice White explains why inadvertence is unnecessary and may lead to strained results.

The next significant United States Supreme Court case considering plain view is *Texas v. Brown,* 46 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). There, the Supreme Court wrote because of "apparent uncertainty concerning the scope and applicability of [the plain view] doctrine." Id. at 733. The case involved "a routine driver's license checkpoint" that would violate article 1, section 7 under *City of Seattle v. Mesiani,* 110 Wn.2d 454, 755 P.2d 775 (1988). An officer manning the checkpoint saw Brown handling a balloon tied in half. Id. Knowing that drugs are stored in that manner and seeing other drug related items in the car, the officer had Brown alight the car, seized the balloon, and placed

Brown under arrest. The Texas appellate court suppressed holding that plain view alone was insufficient and that the officer did not "*know*" that the balloon contained drugs, i.e., that it was not "immediately apparent." Id. at 735-36 (italics in opinion).

The *Brown* Court reviewed the doctrine, saying of inadvertence that "the officer must discover incriminating evidence inadvertently, which is to say, he may not know in advance the location of [certain] evidence and intend to seize it, relying on the plain view doctrine only as a pretext." Id. at 737 (parenthesis in original), *citing Coolidge*. The Court noted that *Coolidge* rule was a plurality decision that was "sharply criticized at the time." Id. Further, as such that case was considered "not a binding precedent." Id. The *Coolidge* plurality decision was criticized as analytically "somewhat inaccurate." Id. at 738. It was noted that seizure of an item in plain view "involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." Id. Conceptually, then,

> plain view provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. Plain view is perhaps better understood, therefore, not as an independent exception to the warrant clause, but simply as an extension of whatever the prior justification for an officer's access to an object may be.

Id. at 738-39 (internal citation and quotation omitted). In *Brown*, lawful presence was established and the inquiry focused on the immediately

apparent prong of the test.

The Texas court had held that the immediately apparent prong of the test required "near certainty as to the seizable nature of the items." Id. at 741. The Supreme Court disagreed, holding that what is required is probable cause. Regarding probable cause

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief, that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.

Id. at 742 (internal citation omitted); *see State v. Hudson*, 124 Wn.2d 107, 118, 874 P.2d 160 (1994) ("objects are immediately apparent when, considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence.") Applying that principle to the facts, "the fact that [officer] Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer." Id. at 743.

Finally, *Brown* said of inadvertence that it entails that the police not "know of in advance the location of certain evidence and intend to seize it." The evil to be avoided, pretext, did not attend the driver's license stop even though the officers may have had a "generalized

expectation" that they might find contraband in that neighborhood. Id. at 744. Similarly, in the present case, the officer may indeed have harbored an expectation that he might find contraband when called to a report of child pornography. But this was no pretext. The officer had a duty to investigate the report and in doing so saw what he took to be seizable evidence. Moreover, as in *Brown*, the computer error message allowed a practical, nontechnical probability, correct or not, that there was contraband in the computer. Given that probability, and assuming that Deputy Dobbins is a man of reasonable caution, all the circumstances militate in favor of seizure of the computer. The action of the officer satisfy the *Brown* analysis whether or not inadvertence is required because he was lawfully present and had probable cause to seize the plain view contraband. Whether or not he subjectively intended to so act before he arrived is irrelevant under all the circumstances of the case.

The subjective inquiry into inadvertence was discarded in *Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). The question in that case is "[w]hether the warrantless seizure of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent." Id. at 130. The answer is "[w]e conclude that even though inadvertence is a characteristic of most legitimate "plain-view" seizures, it is not a necessary condition." Id. Police obtained a warrant to search for the proceeds of a robbery. The

police had sought to search for weapons as well but the warrant authorized a search for the proceeds only. Id. at 131. No proceeds were found but weapons were. Id. The officer testified that although he was searching for the proceeds "he also was interested in finding other evidence connecting petitioner to the robbery." Id.

In applying the plain view doctrine on the question of the admissibility of the weapons, the Court first noted the distinction between searches and seizures—"A search compromises the individual's interest in privacy; a seizure deprives the individual of dominion over his or her person or property." Id. at 133. Moreover,

> The "plain-view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. A seizure of the article, however, would obviously invade the owner's possessory interest. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches.

Id. at 133-34. Thus the plain view inquiry is focused on the possessory interest lost by seizure which does not invade privacy in the same manner as a search.

Having no problem with the first prong, lawful presence at the location where the evidence can be plainly viewed, the Court analyzed the inadvertence requirement. With regard to inadvertence, the Court noted

that the reason for it is to avoid changing a valid sufficiently particular warrant into a general warrant. The Court found two flaws in this concern:

> First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant. Specification of the additional item could only permit the officer to expand the scope of the search. On the other hand, if he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.

Id. at 138-39. Thus *Horton* recognized one aspect of the unsoundness of *Coolidge* inadvertence—that actual application of the doctrine in the field will lead to strained results where lawfully present police come upon seizable items that they believed might be present but for which they had insufficient information to procure a warrant. Having invaded no privacy interest, nonetheless the police must stop and consider whether their prior belief negated inadvertence.

Further,

> Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not

> persuasive because that interest is already served by the requirements that no warrant issue unless it "particularly describ[es] the place to be searched and the persons or things to be seized," and that a warrantless search be circumscribed by the exigencies which justify its initiation. Scrupulous adherence to these requirements serves the interests in limiting the area and duration of the search that the inadvertence requirement inadequately protects. Once those commands have been satisfied and the officer has a lawful right of access, however, no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent. If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more.

Id. at 139-40. Thus, inadvertence is found to be a subjective grafting unnecessary to constitutional search and seizure protections that already exist.

Finally, in a passage particularly relevant to the privacy interest that drives article 1, section 7 jurisprudence, the Court said

> As we have already suggested, by hypothesis the seizure of an object in plain view does not involve an intrusion on privacy. If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view and there is no need for an inadvertence limitation on seizures to condemn it. The prohibition against general searches and general warrants serves primarily as a protection against unjustified intrusions on privacy. But reliance on privacy concerns that support that prohibition is misplaced when the inquiry concerns the scope of an exception that merely authorizes an officer with a lawful right of access to an item to seize it without a warrant.

Id. at 141-42. *See also State v. Samalia,* 186 Wn.App 224, 344 P.3d 722 (2015) (fleeing suspect has no reasonable expectation of privacy in abandoned cell-phone) *rev granted* 183 Wn.2d 1017 (2015).

The same problems with inadvertence become clear in Bunn's argument. Bunn asserts that "if the officer expects to find evidence at a particular location, he or she should apply for and secure a warrant prior to seizure." Brief at 11 (emphasis added). It is this expectancy that is problematic. Did the officer really expect to find incriminating evidence or just have a hunch? Does such a hunch negate inadvertence? If an officer entering lawfully with a warrant for the proceeds of a gun-store burglary thinks that the thieves may have drugs too, but she does not have probable cause to include drugs in the warrant application, and the warrant is served and drugs are found and seized, the drugs seized will fall into a subjective twilight called inadvertence. Clearly, if "expects" means probable cause to believe, then, as the United States Supreme Court appreciates, there is no reason not to include them in the warrant in the first instance. If "expects" means less than probable cause, inadvertence provides no benefit; the immediacy or probable cause part of the plain view doctrine serves to circumscribe the officer's conduct whether she was in some sense surprised by the find or not. Similar difficulty can be seen in using the term "intends." We need not plumb the depth of an officer's intentions if she is lawfully present and immediately recognizes contraband or evidence of a crime.

In *State v. Ruem, supra,* a plain view search was disapproved. This result flowed from an analysis of article 1, section 7 and the plain view

doctrine without inadvertence. There, this Court applied constitutional protections based on the lawfulness of the entry, which in turn depended on probable cause to believe a suspect for whom there was an arrest warrant was to be found in the residence. But "the deputies' entry was invalid because they lacked probable cause to believe [the arrestee] would be in the mobile home." 179 Wn.2d at 210. The well-developed concept of probable cause ruled the day, not some murky inquiry into inadvertence. Similarly, in *O'Neill, supra,* this Court undertook a comprehensive article 1, section 7 review considering arrest versus investigative detention, plain view, use of illumination at night, search incident to arrest, consent to search, and inevitable discovery never attempting to assay the officer's expectations or intentions.

In *State v. Kull, supra,* this Court focused on the first element, lawful presence, in considering plain view. Police with an arrest warrant for Kull were going to her apartment to serve the warrant. 155 Wn.2d at 82. They found her in the building's laundry room. Id. She was arrested but the police allowed her to return to her apartment to seek money to pay her booking bail. Id. at 83. At the apartment, a guest was asked to fetch her purse from a bedroom. Id. An officer followed the guest and looking from the bedroom doorway saw cocaine in plain view on the dresser. Id.

The state in *Kull* argued that officer safety allowed the officer to be lawfully in a position to see the cocaine from the bedroom doorway. This

Court disagreed. After a discussion of officer safety cases, the *Kull* court held that the same was not supported by the facts. Id. at 88-89. Thus, "[i]n the absence of justification for the officers' presence at Kull's bedroom door, the warrantless intrusion constitutes a violation of article I, section 7 of the Washington Constitution and the cocaine was obtained illegally." Id. at 89. The lesson for present purposes is, first, that recourse to inadvertence or the officer's intention with respect to the bedroom would not have changed the conclusion reached. And, second, article 1, section 7 operates to provide necessary protection without a subjective, inadvertence type inquiry. Contraband was immediately apparent but was not seen from a lawful vantage point.

Similar to *Kull*, this Court in *State v. Khounvichai, supra,* once again considered a plain view seizure and focused on the lawful presence prong. The primary concern of the case was whether or not the warnings required under *State v. Ferrier,* 136 Wn.2d 103, 960 P.2d 927 (1998), for warrantless entry into a home for the purpose of searching are necessary when entry is for investigative purposes. 149 Wn.2d at 559. In discussing that issue, the search versus seizure distinction in the application of plain view was expressly noted. This Court said

> It is well established that a discovery made in plain view is not a search. Article I, section 7 "[does] not prohibit a seizure without a warrant, where there is no need of a search, and where contraband subject-matter or unlawful possession of it is fully disclosed and open to the eye and hand." State v. Miller, 121 Wash. 153, 154,

> 209 P. 9 (1922); see also 12 Royce C. Ferguson, *Washington Practice, Criminal Practice and Procedure* § 2404 (2d ed. 1997) ("Every observation by a law enforcement officer does not necessarily amount to a search within the meaning of the Fourth Amendment. The police may take note of anything that is evident to the senses, as long as they are in a place where they have the right to be."). The plain view discovery of evidence does not violate Article I, section 7 if the police officer has a prior justification for the intrusion and the officer immediately recognizes that he has evidence before him. State v. O'Neill, 148 Wash.2d 564, 62 P.3d 489, 500 (2003); State v. Hudson, 124 Wash.2d 107, 114, 874 P.2d 166 (1994). Thus, if an officer observes evidence of a crime or contraband in plain view, he has not conducted a search.

149 Wn.2d at 565-66. This formulation contains no inadvertence; lawful presence (here invitation with no *Ferrier* warnings required) and immediate recognition suffice. Moreover, the cite to *Miller,* from 1922, warrants the conclusion that plain view seizure, without inadvertence, has long been the rule in this state. The inadvertence requirement is a new rule announced nearly fifty years after *Miller.* And, again, we find that the privacy interest that is paramount in search cases is less vital in plain view seizure cases. As in consideration of the independent source rule, "[t]his proposition does not run afoul of the court's stated view that Const. art. 1, § 7 serves to protect personal privacy rights, rather than curb governmental actions." *State v. Gaines,* 154 Wn.2d 711, 720, 116 P.3d 993 (2005) *quoting State v. Coates,* 107 Wn.2d 882, 888, 735 P.2d 64 (1987).

Washington courts have consistently decided plain view seizure

cases without reference inadvertence for nearly a century. *State v.Miller, supra.* In *State v. Duncan,* 124 Wash. 372, 214 P. 838 (1923), then illegal liquor was seized. The defendant claimed that such seizure was done without a warrant and should be suppressed. The Court disagreed holding that "the facts of this case show no search warrant was necessary because officers did not have to make any search to find liquor. It was in plain view." Id at 376. In *State v.Nelson,* 146 Wash. 17, 26, 261 P. 796 (1927), the *Miller* rule was followed. A fish dealer had not properly registered fish from outside the state. He complained that the fish used as evidence against him were seized without a warrant and should have been suppressed. But

> no search was here necessary to find the property. The property was not concealed. The appellant was exposing it for sale at his place of business, inviting every member of the public to inspect it.

Id. Plain view applied with no inadvertence in sight. Again in *State v. Parent,* 156 Wash. 604, 287 P. 662 (1930), plain view was applied with no discussion of inadvertence. This when it appears from the facts that the police there had gone to an establishment looking for gambling devices. And, in *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968), plain view was discussed and this Court said

> No search under the constitutional interdiction takes place when items having evidentiary value are outside a building and in plain view, nor if they are in plain sight inside a building to which access has been lawfully gained.

Id. at 621. Plain sight and lawful presence are required, not inadvertent behavior by the police. Finally, in *State v. La Pierre*, 71 Wn.2d 385, 428 P.2d 579 (1967), citing *Duncan* and *Miller,* the court held that "no search warrant is necessary when contraband items are in plain view." Id at 387. And, again, there is no discussion of inadvertence.

The foregoing demonstrates that Washington merely followed *Coolidge* in grafting inadvertence onto its plain view analysis. That requirement was never discussed in the Washington Supreme Court's own plain view jurisprudence before *Coolidge*. The inadvertence requirement is a creature of the United States Supreme Court under the Fourth Amendment. That Court, in a relatively brief time-frame, thought better of the rule and discarded it in *Horton.* Preexisting state law, then, militates in favor of following *Horton. See State v. Gunwall,* 106 Wn.2d 54, 66, 720 P.2d 808 (1986).

The holdings of other jurisdictions do not change this analysis. This Court will consider well-reasoned, persuasive authority from other state and federal jurisdictions. *See State v. Murray,* 110 Wn.2d 706. 709, 757 P. 2d 487 (1988). Clearly, federal courts do not require inadvertence, but Bunn musters three state cases wherein, he asserts, inadvertence has been retained post-*Horton.* In Massachusetts, inadvertence was retained under that state's constitutional analysis. *Commonwealth v. Balicki,* 46 Mass. 1, 762 N.E.2d 290 (2002). The *Balicki* Court cautioned that "[w]e

do, however, take this opportunity to clarify that the inadvertence requirement means only that the police lacked probable cause to believe, prior to the search, that specific items would be discovered during the search." Id. at 11. In *State v. Meyer,* 78 Hawaii 308, 314, 893 P.2d 159 (1995), the Supreme Court of Hawai'i announced its adherence to the inadvertence requirement by footnote. The case does not further discuss inadvertence, which played no apparent part in decision of the case. In 2010, the Supreme Court of New Hampshire found that "[o]ur case law concerning the inadvertence requirement is not settled." *State v. Nieves,* 160 N.H. 245, 250, 999A.2d 389 (2010). In that case, the Court abolished the requirement "with respect to drugs, weapons and other items dangerous in themselves." Id. So, two of fifty states have retained inadvertence with one other doing so partially.

The third state alleged by Bunn to have retained inadvertence, New York, has not clearly retained that requirement. Bunn cites *People v. Manganaro,* 561 N.Y.S.2d 379, 148 Misc.2d 616 (1990). There, a New York trial court ordered evidence suppressed. There, the judge choose to include inadvertence in the plain view decision. However, the New York appellate court reversed that decision. *People v. Manganaro,* 574 N.Y.S.2d 587, 176 A.D.2d 354 (1991). The higher court did not abrogate inadvertence but criticized the trial court's use of it and noted that its "nonbinding" genesis, *Coolidge,* has been "expressly repudiated" in

Horton. 176 A.D.2d 356. In sum, these few states among the many do not provide this Court with the type of well-reasoned authority that might assist in an article 1, section 7 decision.

It is established that inadvertence is simply not a piece of the plain view doctrine as it is applied in Washington Courts. The duel requirements of lawful presence in the place where the evidence is seen and immediate recognition of seizable evidence suffice to provide Washington citizens protection from seizure of property by police. Under both prongs the well-developed principles of probable cause and exigency are dispositive. *See e.g. State v. Bell,* 108 Wn.2d 193, 198 (footnote 2), 737 P.2d 254 (1987) (immediately apparent prong equal to probable cause). And these principles are objectively applied obviating the need to delve into an officer's intentions or objectives but for a single one—to ferret out crime. If she, the investigating officer, strays into protected areas with neither warrant nor exception, her discovery will be suppressed.

In the present case, Bunn makes no argument that the officer was not lawfully present when he saw the words on the computer screen. Clearly under the present facts there was no constitutionally cognizable intrusion. Inadvertence simply is not required. But, whether required or not, it is clear that the officer herein meets the negative definition of inadvertence because he cannot be said to have formed probable cause to seize the computer before he actually saw the salacious error message on

the screen. Before that, no fact shows intent to seize anything even though he had been advised by a citizen that seizable evidence might be found at that particular location. The difficulty is manifest: suppose the officer said during his travel to Best Buy that if I see child porn, I'll seize it. If an accurate statement of the officer's intentions or objectives, that statement would cut against inadvertence. But it would comport with the principle of probable cause, i.e., that regardless of his intentions or objectives at times before he saw the evidence, he was unable to form probable cause until he did actually see it. How he felt about it before he saw it is irrelevant. The officer was simply investigating a citizen report that did not by itself provide probable cause to seize. Lawful presence and inadvertence, though unnecessary, are established.

But Bunn complains that the since the error message by itself does not constitute child pornography, it was not immediately recognizable as contraband. Brief at 12. Here, as we have noted above, the issue is one of probable cause. With regard to plain view

> In order for substances to be immediately recognizable as contraband, the officer need not possess certain knowledge that the substance is contraband. Rather, the test is whether, "considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence." Evidence of involvement with drugs can provide probable cause to believe that an unidentified substance is a controlled substance.

State v. Higgs, 177 Wn.App. 414, 433-34, 311 P.2d 1266 (2013) *rev denied* 179 Wn.2d 1024 (2014) (internal citation omitted); *accord State v.*

Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994). Further, "[w]hen evaluating probable cause we look to the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Hatchie,* 161 Wn.2d 390, 404, 166 P.3d 698 (2007) *citing Brinegar v. U.S.,* 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). And, "probable cause means a fair probability, not certainty, and requires consideration of the totality of the circumstances." *U.S. v. Hill,* 459 F.3d 966, 970 (9th Cir. 2006). Finally, "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

In the present case, the trial court findings include that Deputy Dobbins "immediately recognized the [error] message as evidence of a crime, and recognized that the computer held evidence of a crime." CP 76. Further, "Dep. Dobbins did not "search" the computer for the purposes of search and seizure law." These unchallenged findings are verities on review. *O'Neill, supra.* Bunn does not cite or argue the probable cause standard. Significantly, Bunn raises no issue and posits no argument that the warrant eventually issued to search his computer lacked probable cause.

The issue here is much like that in *Brown v. Texas, supra.* There,

the seizure of the balloon was upheld even though it was established that the officer could not actually see the drugs inside. There, the distinctive nature of the package, the tied balloon, spoke "volumes" as to its contents. 46 U.S. at 743. Here, the distinctive nature of the error message just as surely spoke volumes as to the contents of the computer. In both instances, it is reasonable for a prudent person to conclude that there is a probability that evidence of a crime is before her. Although no case attempts to quantify the level of probability required, Bunn says that in studies using "keywords known to be associated with child pornography" only 42 to 44 percent actually contained images of child pornography. Brief at 13.[1] With regard to child pornography and the likelihood that it will be stored in some sort of container, be it a paper file folder or a computer, and, regardless of the type of container, the container is labelled as containing child pornography, that level of probability that actual pornography will be found therein should suffice. The seizing officer need not have certainty. And, here it is significant that Deputy Dobbins did not undertake to search the computer; that was done with a valid warrant. *See State v. Hinton,* 179 Wn.2d 862, 319 P.3d 862 (2014) (disallowing warrantless search of i-phone text-messages but no issue raised as to the phone's initial seizure). Deputy Dobbins merely

[1] These studies are not found in the record.

appreciated the probability, whether right or wrong, that contraband was probably before him inside the computer. Washington citizens have no privacy interest when they expose a label to plain view that warrants any sort of probability that child pornography is to be found inside.

The case of *U.S. v. Bonitz,* 826 F.2d 954 (10th Cir. 1987), cited by Bunn, supports this position. Bunn is correct that the gun that police discovered by opening an unmarked container in a search incident to arrest was suppressed. However, the Court described the gun case as one that "did not, in and of itself, describe a rifle lying inside." Id at 956. Further, "[t]his hard plastic case did not reveal its contents to the trial court even though it could perhaps have been identified as a gun case by a firearms expert." Id. at 956. For the present purpose, suppose that the closed gun case was labelled as "one AR-15 rifle." Then, the container does in fact describe a rifle inside; the label reveals the contents at least at a probable cause level. Similarly, Bunn's computer gave at least probable cause of its contents by the label, the error message. The label is certainly a circumstance to be considered. *See State v.Tibbles,* 169 Wn.2d 364, 370, 236 P.3d 885 (2010) (look to totality of the circumstances when determining exigent circumstances). And, finally, that case is not the same as the present case as there, instead of merely seizing the gun case as is, the police searched it without a warrant. Deputy Dobbins did not in fact engage in such a search of Bunn's computer.

But Bunn claims that Deputy Dobbins "required additional investigation to determine if the file image in fact contained child pornography." Brief at 14. Bunn implies that some such additional investigation undercuts the immediate recognition prong. First, it is obvious that if it takes investigation to determine probable cause to believe an item is contraband or evidence, then that appreciation was not immediately reached. But, unless Bunn is referring to the later search warrant, the state can find no additional investigation undertaken by Deputy Dobbins. Rather, he responded, saw the error message, by that sight immediately formed probable cause to believe that there was contraband, and seized the computer.

Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), is inapposite on this point. The television moved by the police to gain view of the serial number was not itself independently labelled with the words "stolen television." The presence of a television set in a home is unremarkable by itself and would likely never support probable cause to believe that it is stolen without some more particular information about the particular television. A file entitled "Homeclips-Spycam-13 Year Old Sister Masturbation & Orgasm With Panties On (etc.)" on a computer is remarkable and simply not comparable to an unlabeled television. *Hicks* is factually inapposite. Deputy Dobbins had probable cause to seize the computer once he saw the error message. Unlike the police in *People v.*

Blair, 321 Ill.App.3d 373 (2001), he did not turn on the computer and search through it. Moreover, *Blair* was decided on a lack of probable cause to search, not on a lack of inadvertence that would allow seizure.

IV. CONCLUSION

The adjective inadvertent is defined by the Merriam-Webster online dictionary as "inattentive" or "unintentional." www.meriam-webster.com Black's Law Dictionary defines inadvertence as "heedlessness; lack of attention; want of care; carelessness." Fifth Edition, West Pub. Co., 1979. Police while doing the often difficult job of crime detection and investigation should in no sense be expected to act in an inattentive or unintentional manor. Nor do we expect, and certainly the constitution should not require, that police act heedlessly with lack of attention or want of care. The word, then, is inapt in the first instance. The word has fallen into desuetude in plain view jurisprudence. It should not be revived here.

For the foregoing reasons, Bunn's conviction and sentence should be affirmed.

DATED January 8, 2016.

Respectfully submitted,

TINA R. ROBINSON
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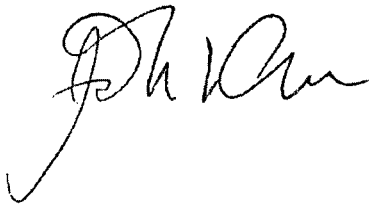

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