Supreme Court No. 1040091
(COA No. 58888-9-II)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMMY DARREN TYSON,

Petitioner.

REPLY TO ANSWER

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A. ARGUMENT

RAP 13.4(d) authorizes a reply to an answer if the answering party seeks review of issues not raised in the petition for review. The State raises two new issues in the Answer not addressed in the Petition for Review: the plain view doctrine exception to the search warrant requirement and harmless error. For the plain view argument, the State failed to cross appeal this issue it lost in the superior court. For the harmless error argument, the State should be precluded from raising an issue it failed to brief in the Court of Appeals.

1. THIS COURT SHOULD DECLINE TO REVIEW THE PLAIN VIEW DOCTRINE ARGUMENT AS THE STATE FAILED TO CROSS APPEAL THIS ISSUE

The petition for review did not address the plain view doctrine exception to the warrant requirement, as the trial court ruled that the State failed to prove the cellphone was in plain view and immediately recognizable, and the Court of Appeal agreed with Tyson that the State failed to cross appeal the issue and therefore waived the issue.

In appellate practice, when a defendant files an appeal, the State must file a cross appeal if it believes that the judge made erroneous decisions that the State would like the Court of Appeals to rule on.

RAP 2.4(a) provides,

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

Failure to cross appeal prevents the State from seeking relief that would alter or enlarge the trial court's decision in its favor.

At oral argument, Presiding Chief Judge Anne Cruser agreed with Mr. Tyson at oral argument that the plain view doctrine issue was not preserved because the State "did not cross-appeal that issue." Wash. Court of Appeals oral argument, *State v. Tyson,* No. 58888-9 (Jan. 28, 2025 at 10 minutes, 41 to 49 seconds).

Should the Court decide to consider the issue, Mr. Tyson argues that the trial court was correct in ruling that the plain view doctrine did not apply in this case, "because the nature of

the evidence was not immediately recognizable." CP 294, Conclusion of Law II. In its oral ruling, the Court elaborated,

> There are a number of factors the Court must consider in deciding whether or not plain view applies, one of which is that the nature of the evidence must be immediately recognizable. The Court encounters one problem in regards to it being immediately recognizable in that the officer had to inquire further with all the individuals about whose cell phone it was and if it was the cell phone in question. Given that fact, the Court cannot find the plain view exception is the appropriate standard to consider given that, again, the cell phone was not immediately recognizable as relevant evidence.

10/21/22RP 53.

Under the "plain view" doctrine, probable cause is required to satisfy the immediate recognition prong. *State v. Hudson,* 124 Wn.2d 107, 118, 874 P.2d 160 (1994), citing *Arizona v. Hicks,* 480 U.S. 321, 326, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (187). Deputy Astorga knew that Tyson would be home with his cell phone, when the deputy came to Tyson's house. Deputy Astorga saw a black cellphone on a side table directly next to Tyson's mother. CP 292; 10/21/22RP 21. Astorga first thought it might be Tyson's mother's cellphone and asked her if it was. CP 292; 10/21/22RP 21. It was not

until he discovered that it was not her phone that Astorga turned to asked Tyson if it was his phone. *Id.* The cellphone had no "incriminating character" that was "immediately recognizable." *Hudson,* 124 Wn.2d at 114.

The plain view doctrine does not apply in Mr. Tyson's case and this Court should reject the State's argument as waived and meritless.

2. THIS COURT SHOULD REJECT THE STATE'S HARMLESS ERROR ARGUMENT, WHICH IS BRIEFED FOR THE FIRST TIME IN THE STATE'S ANSWER TO THE PETITION FOR REVIEW

In the Answer, the State raises for the first time a harmless error analysis. Answer at 29, 30. The first mention of harmless error was submitted by the State in a Statement of Additional Authority, filed on January 22, 2025, a few days before oral argument. Statement of Additional Authorities, No. 58888-9-II, Jan. 22, 2025. In the Statement, the State not only raised this issue for the first time, but then argued the issue briefly in the Statement. *Id.* at 2-3.

At oral argument in the Court of Appeals, Mr. Tyson argued that the Court should not consider a harmless error issue not raised in briefing, but instead addressed for the first time in a Statement of Additional Authority:

> They talk about harmless error for the very first time in the Statement of Additional Authority that doesn't support any arguments that they made in their briefing. I know that this Court is very aware that you won't accept arguments raised on the first time in a Reply Brief. This is an argument raised for the first time in a Statement of Additional Authorities.

Wash. Court of Appeals oral argument, *State v. Tyson,* No. 58888-9 (Jan. 28, 2025 at 28 minutes, 23 to 43 seconds).

Presiding Chief Judge Anne Cruser agreed with Mr. Tyson:

> I will state since both parties are here. Counsel [for the State], it really is not appropriate to take a Statement of Additional Authority as a second and third briefing opportunity. Um, both of the Statements of Additional Authority were, contained information that could have been included in the brief. A Statement of Additional Authority would typically be appropriate when there's a new case that came out since the briefing that impacts the Assignments of Error of the arguments made. But to come back and cite cases from, you know, 10 whatever years ago and say, "Oh by the way there's also this," I haven't spoken with my colleagues about this but I don't regard that as an appropriate use of the Statement of Additional Authorities. And it also is not terribly helpful

> when it's filed so close to oral argument because counsel [for appellant] can't respond.

Wash. Court of Appeals oral argument, *State v. Tyson,* No. 58888-9-II (Jan. 28, 2025 at 28 minutes, 43 seconds to 29 minutes, 30 seconds).

Importantly, this Court has ruled that it "will not consider issues not raised or briefed in the Court of Appeals." *State v. Benn,* 161 Wn.2d 256, 262 n.1, 165 P.3d 1232 (2007), citing *State v. Halstien,* 122 Wn.2d 109, 130, 857 P.2d 270 (1993) ("An issue not raised or briefed in the Court of Appeals will not be considered by this court."). This Court should decline to consider the State's harmless error issue.

Should this Court nevertheless decide to consider the issue, the errors in this case are not harmless. The State argues that the errors were harmless because at his bench trial, Tyson stipulated to (1) the photos from his phone depicting the rape of AT and BT; (2) photos and videos from his hard drive depicting minors engaged in sexual intercourse; and (3) AT's and BT's disclosures of sexual abuse. BOR 29, citing CP 39-42.

This argument is meritless. Mr. Tyson entered a stipulated facts agreement specifically to preserve the suppression issues on appeal. The State understood this below by twice agreeing that Mr. Tyson could still pursue a challenge to the Court's ruling denying his motion to suppress evidence. CP 36, 37. The parties also agreed that if Mr. Tyson prevailed and the appellate courts remanded the case, Tyson would be put back in the position he was in prior to entering into this stipulation agreement. CP 37.[1] This clearly demonstrates that the stipulated facts cannot be used for a harmless error analysis.

A stipulation agreement, like a plea agreement, implicates the rights of the accused and triggers constitutional due process considerations. *State v. Sledge,* 133 Wn.2d 828, 839, 947 P.2d 1199 (1997), *as amended* (Jan. 28, 1998). The State must "adhere to the terms of the [stipulation] agreement." *Id.,* citing *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495,

[1] At sentencing, AT recanted his prior statements alleging abuse, saying, "I said things about Tom during interviews that were not true, I felt forced and influenced to say these things. I don't want my dad to be locked up and not having contact with me." 5/15/23RP 76.

30 L.Ed.2d 427 (1971); *United States v. Harvey,* 791 F.2d 294, 300 (4th Cir.1986). "When the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Marbry v. Johnson,* 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984); *Puckett v. United States,* 556 U.S. 129, 137, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (clarifying *Marbry,* "If [the government's] obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, *i.e.,* to withdraw his plea.").

The State's inconsistent position from its agreement at trial is troublesome, and the State is now in breach of the stipulation agreement because Mr. Tyson gave up his right to a bench trial, specifically for that agreement. The State has duty to adhere to the terms of the stipulation agreement. This Court should reject the State's argument briefed for the first time in an answer to a petition for review that Mr. Tyson's stipulations can

be viewed when considering whether harmless error applies in his case.

B. CONCLUSION

Mr. Tyson requests this Court grant review of the Court of Appeals decision under RAP 13.4(b). Mr. Tyson respectfully requests this Court decline to accept the State's plain view doctrine argument, because the State failed to cross appeal. Mr. Tyson also requests this Court decline to consider the State's harmless error argument, as it was not first addressed in the Court of Appeals.

In compliance with RAP 18.17, this Reply contains 1,688 words.

DATED this 11th day of June, 2025.

Respectfully submitted,

s/ Jason Saunders
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CERTIFICATE OF SERVICE

I, Ellen Goncher, state that on the 11th Day of June, 2025, I caused the original **Reply to Answer to Petition for Review** to be filed in the **Washington State Supreme Court** and a true copy of the same to be served on the following in the manner indicated below:

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I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

Name: *s/ Ellen Goncher* Date: 6/11/2025
Ellen Goncher
Legal Assistant
The Law Offices of Gordon & Saunders

LAW OFFICES OF GORDON & SAUNDERS, PLLC

June 11, 2025 - 1:12 PM

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