No. 99546-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL ELWELL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Court-appointed attorneys stand on the front line of our adversarial system to ensure fair trials and defend against the mass incarceration of the poor. Daniel Elwell, a poor man charged with a property crime, sought to suppress the State's evidence against him based on article I, section 7's protection against warrantless searches. But Mr. Elwell's court-appointed attorney refused to file a motion to suppress.

The court denied Mr. Elwell's request for a new lawyer. Though he did not ask to represent himself or waive counsel, the court told Mr. Elwell to file his own motion to suppress, leaving him without a lawyer at this critical stage. Counsel further undermined Mr. Elwell by disparaging the motion and proposing the court decide it *after* the State introduced at trial the very evidence Mr. Elwell sought to suppress.

Forcing Mr. Elwell to proceed without counsel at a critical stage and with an attorney who opposed him deprived Mr. Elwell of the representation *Gideon v. Wainwright* promised and undermined the core of our adversarial system.

B. ISSUES PRESENTED

1. Mr. Elwell had the right to counsel, which he never waived. But his attorney refused to file a motion to suppress unlawfully seized key evidence, told the court Mr. Elwell's argument was meritless, and defeated

the objective of suppression by suggesting the court decide the motion after the jury heard the evidence. Mr. Elwell asked for new counsel, but the court refused. The court deprived Mr. Elwell of his constitutional right to conflict-free counsel where it required him to proceed with an attorney who abandoned and undermined him at a critical stage of the proceedings.

2. Mr. Elwell did not ask to represent himself, to file a pro se motion, or for hybrid representation. He asked for representation by a new lawyer. The court denied his request and pressed Mr. Elwell to file his own motion to suppress without any request to do so and without a knowing, intelligent, and voluntary waiver of counsel. The court deprived Mr. Elwell of the representation guaranteed by article I, section 22 and the Sixth Amendment when it foisted self-representation on him.

3. Article I, section 7 prohibits any disturbance of private affairs without authority of law. Police saw Mr. Elwell walking down the street, pushing a box-shaped object entirely concealed by a blanket. The police could not see inside the box until they unwrapped the blanket and removed a plastic covering. The narrow open view exception to article I, section 7 does not permit the warrantless search of this closed container.

C. STATEMENT OF THE CASE

Daniel Elwell, who is indigent, asked the court to appoint him a new lawyer four times. RP 3-7, 8-13, 27-31, 204-05; CP 60. Among the

reasons he cited was his lawyer's refusal to move to suppress evidence of the charged crime. RP 9, 27, 30; CP 60. The court denied one request and avoided or ignored the others. RP 13, 30-31. Rather than appoint a new attorney, the court told Mr. Elwell, "[Y]ou can make that motion even though [defense counsel] is not pursuing it on your behalf." RP 31.

Mr. Elwell did not ask to file the motion himself or proceed pro se or as hybrid counsel. The court did not inquire if Mr. Elwell was waiving his right to counsel. Left without counsel, Mr. Elwell researched the issues as best he could from jail and filed a handwritten motion. CP 47-60; RP 156-57. He again asked the court for new counsel. CP 60.

Mr. Elwell's attorney opined Mr. Elwell's suppression issue – one of the issues on which this Court granted review – "is not a meritorious claim," though he knew the court would be deciding that very issue. RP 21; CP 323. In addition to telling the court Mr. Elwell had no "viable challenge" to the search, CP 14, counsel twice urged the court to litigate the motion in front of the jury as part of the trial, rather than at a hearing before trial. RP 22-24; CP 15. This request guaranteed the jury would hear the incriminating evidence before the court decided the motion.

The incriminating evidence Mr. Elwell wanted to suppress was a tabletop Pac-Man machine the police found in a closed box they searched without a warrant. CP 47-60, 336-37; RP 21. When the police stopped

him, Mr. Elwell was walking down the street, in broad daylight, pushing a rectangular object completely covered and concealed by a blanket. CP 337; Exs. 6, 8. Recognizing Mr. Elwell from a surveillance video of an apartment building burglary, police stopped him. CP 337.

The officer believed the covered, concealed, opaque box contained the Pac-Man machine stolen in the burglary. CP 337. Instead of getting a warrant to search the box, the officer "unwrapped the blanket and a plastic bag that was on top of the box" to uncover the contents. CP 337. He then arrested Mr. Elwell. Ex. 6.

At counsel's urging, the jury heard the circumstances of the search during the State's case in chief. RP 194-215; Ex. 6. After the jury heard that the police recovered the Pac-Man machine from Mr. Elwell and the State rested, the court denied the motion to suppress. RP 227-28; CP 337.

D. ARGUMENT

The right to representation by counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 67, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (internal quotations omitted); U.S. Const. amends. VI, XIV; Const. art. I, § 22; CrR 3.1. A person "cannot be assured a fair trial unless counsel is provided." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

"The constitutional requirement of substantial equality and fair process" requires counsel act as "an active advocate in behalf of his client." *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). As a "zealous and active" advocate, *Powell*, 287 U.S. at 58, counsel must subject the government's case to "meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

The court deprived Mr. Elwell of this indispensable right when it required he proceed with conflicted counsel who abandoned and opposed him. It deprived Mr. Elwell of this right when it forced him to represent himself against the unwarranted disturbance of his private affairs. Mr. Elwell is entitled to a new and fair trial where conflict-free counsel represents him and the court suppresses the illegally seized evidence.

1. The court deprived Mr. Elwell of his right to counsel when it forced him to proceed with an attorney who actively opposed him and undermined his objectives.

a. Conflict-free counsel includes the right to an attorney who pursues basic defense objectives and does not oppose or abandon their client.

The right to the effective assistance of counsel encompasses the right to representation "free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). Conflicts of interest may occur where the lawyer advances an interest adverse to the

client or in violation of the duty of undivided loyalty to the client. *State v. Regan*, 143 Wn. App. 419, 426-28, 177 P.3d 783 (2008). "[A]ny situation where defense counsel represents conflicting interests" may pose a violation of the right to conflict-free counsel. *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983).

A violation of the "duty of loyalty" or "duty to avoid conflicts of interest" impairs the right to conflict-free effective representation. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). Any consideration preventing a lawyer from "single-mindedly" pursuing the client's interests can be a conflict tainting representation. *Wood*, 450 U.S. at 271-72.

At base, "A lawyer . . . is a representative of clients." RPC, Preamble 1. Lawyers must be guided in their representation by a client's decisions "concerning the objectives of representation" and "shall consult with the client as to the means by which they are to be pursued." RPC 1.2(a), 1.4(a). Attorneys violate this duty when they take actions inconsistent with their client's objectives. *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 307, 209 P.3d 435 (2009).

"A criminal defense attorney, whether appointed or retained, has a duty to zealously and diligently defend his or her client. This includes . . . filing motions." *In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159, 169, 75 P.3d 950 (2003). Counsel need not believe the motion

is likely to prevail or is case-dispositive. Instead, counsel should file motions, including motions to suppress, "whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief." Wash. State Bar Ass'n (WSBA), *Performance Guidelines for Criminal Defense Representation*, 5.1(a), (b)(7) (Sep. 18, 2020); Nat'l Legal Aid & Defender Ass'n (NLADA), *Performance Guidelines for Criminal Defense Representation*, 5.1(a), (b)(7). A motion "may have many objectives in addition to the ultimate relief requested by the motion." WSBA, *Guidelines*, 5.1(c); NLADA, *Guidelines*, 5.1(c).

Counsel must "take all necessary action to vindicate" a client's rights, such as "moving to suppress illegally obtained evidence" and consulting with the client about legal strategy, including "what trial motions should be made." WSBA, *Guidelines*, 1.4(e), (h); NLADA, *Guidelines*, 5.1. Professional standards and the RPCs serve as "important guides" in assessing whether the right to counsel was fulfilled, even where this Court has not formally adopted them. *Missouri v. Frye*, 566 U.S. 134, 145, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1134 (W.D. Wash. 2013).

Lawyers may advance a position where there is "a basis in law and fact for doing so that is not frivolous." RPC 3.1. Motions are not frivolous

"even though the lawyer believes that the client's position ultimately will not prevail." RPC 3.1, comment 2; *accord* Am. Bar Ass'n (ABA), *Model Rules of Professional Conduct*, 3.1, comment 2. A court's actual or anticipated rejection of an argument does not demonstrate it is frivolous. Even where it is unlikely to prevail or without adequate foundation, an argument is not frivolous unless it is "totally devoid of merit." *In re Recall of Boldt*, 187 Wn.2d 542, 556, 386 P.3d 1104 (2017).

b. A lawyer abandons his client when he refuses to make a potentially meritorious key motion that is consistent with defense objectives and requested by the client.

There are but few narrowly drawn exceptions to the warrant requirement, and the State bears the burden of proving police action met an exception. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Mr. Elwell's objective of holding the State to its burden of proof included requiring it to prove the police lawfully seized property without a warrant.

Counsel refused to file a motion to suppress, and the court directed Mr. Elwell to do so pro se if he wished to attack the invasion of his private affairs. RP 30-31. Mr. Elwell's attorney actively undermined Mr. Elwell when he told the court the suppression motion lacked merit. RP 21; CP 14, 269-70, 323. Counsel undercut the purpose of suppression when he urged the court to delay ruling "until after the evidence is placed on the record during the trial in chief." CP 15; RP 22. Counsel explained that if the court

found a basis to suppress, it could simply instruct the jury "to not consider that part of the testimony." RP 23. Counsel told the court such a process would not prejudice Mr. Elwell because "the jury is presumed to disregard evidence the court says it must disregard." RP 24.

The duties of loyalty and independent judgment required counsel to advocate on Mr. Elwell's behalf. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); RPC 1.7, comment 1. Instead, counsel refused to advocate for Mr. Elwell and told the court Mr. Elwell's motion – which the court accepted and his attorney argued in part – was meritless. Counsel's actions conflicted with his duty of loyalty to Mr. Elwell. RPC 1.7.

Mr. Elwell's motion to suppress was not frivolous, and it advanced the defense objective of holding the State to its burden of proof. Counsel did more than refuse to file the nonfrivolous motion. He advocated *against* Mr. Elwell, opining the motion, which the court had yet to decide, lacked merit. He defeated the purpose of suppression by proposing the court consider the motion after the jury heard the evidence. These acts violated Mr. Elwell's "entitle[ment] to be represented by a lawyer willing to advocate for the position [he adopts] . . . if there is a basis in law and fact for doing so that is not frivolous." *Friends of North Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 138, 336 P.3d 632 (2014).

The suppression issue counsel refused to raise and told the court was meritless is the same suppression issue on which this Court has granted review. It is certainly not frivolous. Counsel abandoned Mr. Elwell, leaving him without a lawyer advocating for him.

c. A lawyer who tells the court his client's position is meritless and opposes his client is not a conflict-free advocate.

Where an attorney tells the court his client's position is meritless, the proceeding is no longer "an adversary proceeding." *State v. Stump*, 185 Wn.2d 454, 463, 374 P.3d 89 (2016). For example, a brief containing "'a preface advising the court that the author of the brief is convinced that his or her arguments are frivolous and wholly without merit'" is no advocate's brief. *Id.* at 462 (*quoting McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 439 n.13, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988)). Where a lawyer files an *Anders* brief advising the court that the client's position is without merit, the client "is not in a true adversarial contest with the State" because the brief is "against that indigent's interest." *Id.* at 464.

In the same way, a person is without an advocate and "is not in a true adversarial contest with the State" when counsel informs a trial court the argument he makes is meritless. When trial counsel "suggest[s]" to the court "that his client's position [is] frivolous," he creates a conflict of

interest with his client and leaves his client effectively unrepresented. *State v. Chavez*, 162 Wn. App. 431, 434, 257 P.3d 1114 (2011).

The United States Supreme Court long ago held that when an attorney files a "no-merit letter" informing the court the client's appeal is frivolous, he does not act with the "dignity" required to fulfill his role as "an active advocate." *Anders*, 386 U.S. at 744. Active advocacy requires "forceful" and "vigorous representation." *Penson v. Ohio*, 488 U.S. 75, 84-85, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). So too, an attorney who informs a trial court his client's motion is meritless does not fulfill his role as an active advocate. Here, when counsel told the court Mr. Elwell's motion was meritless, he ceased to be an advocate and created a conflict.

In *Chavez*, the defendant wanted to withdraw his guilty plea, but the attorney representing him told the court he "could not 'find any assignment of error that would support a meritorious challenge to the entry of the guilty plea.'" 162 Wn. App. at 436. The lawyer presented Mr. Chavez's objections "in a way that clearly distanced counsel from his client and suggested . . . that his client's position was frivolous." *Id.* at 439. The court concluded this left Mr. Chavez "not represented" at a critical stage and presumed prejudice from this denial of counsel. *Id.*

Mr. Elwell was similarly left "not represented." Counsel's opposition to Mr. Elwell's motion to suppress turned into an actual

conflict when he told the court Mr. Elwell's motion was meritless and undermined him by proposing the court allow the jury to hear the evidence before deciding the motion. Once the court told Mr. Elwell and the lawyers it would consider the motion to suppress from Mr. Elwell, his lawyer abandoned his role by encouraging the court to deny it. When an attorney opposes and argues against his client, it is no mere disagreement on strategy; it is a conflict.

d. The court abdicated its duty as protector of the right to counsel when it denied Mr. Elwell a new attorney.

Faced with an apparent conflict, the court's role is not merely to stand by and observe. *Richardson,* 100 Wn.2d at 677. Instead, the court must fulfill its duty to protect the right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Courts possess both "the authority and duty" to ensure counsel is not in conflict with his client and acts ethically towards him. *Hahn v. Boeing*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980). A court violates that duty when it betrays its "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Instead, it must "jealously guard[]" the right to representation by counsel who does not have

"inconsistent interests." *Glasser v. United States*, 315 U.S. 60, 71, 62 S. Ct. 457, 86 L. Ed. 680 (1942).

In an appeal, where the court finds a nonfrivolous issue despite an attorney's assertion the appeal is frivolous, it must appoint new counsel because the attorney conflicts with the client. *State v. Nichols*, 136 Wn.2d 859, 861-62, 968 P.2d 411 (1998). Similarly, the court must appoint new counsel at trial once an attorney abandons his client or a conflict is apparent. *McDonald*, 143 Wn.2d at 513; *Chavez*, 162 Wn. App. at 439.

Mr. Elwell's attorney abandoned him when he refused to file a nonfrivolous motion that advanced the defense objectives. He created a conflict when he told the court the motion was meritless and undermined it by suggesting the court decide it after the jury heard the evidence Mr. Elwell sought to suppress. Mr. Elwell brought the conflict to the court's attention and asked for new counsel. RP 5-13, 27-31; CP 60. The conflict was evident once counsel told the court the motion was meritless. RP 21-24; CP 14-15, 323. His attorney's abandonment and opposition deprived Mr. Elwell of conflict-free counsel.

e. <u>Courts presume prejudice from the deprivation of counsel at a critical stage.</u>

The deprivation of counsel requires reversal regardless of prejudice. *Cronic*, 466 U.S. at 659. Courts presume abandonment by

counsel or representation by conflicted counsel prejudices the client. *Id.*; *Holloway v. Arkansas*, 435 U.S. 475, 488-89, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). Mr. Elwell is entitled to a new trial with conflict-free counsel.

2. Courts may not address a conflict or resolve a request for new counsel by requiring a person to proceed pro se.

The right to representation encompasses the right to the effective assistance of conflict-free counsel at every critical stage of a proceeding. *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Const. art. I, § 22; U.S. Const. amends. VI, XIV; CrR 3.1(b)(2). "A critical stage is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (internal quotation omitted).

This right to counsel is validly waived only by a timely and unequivocal request and where the court ensures the person knowingly, intelligently, and voluntarily waives the right to counsel. *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

Mr. Elwell did not ask to proceed pro se or research, write, and file his own motion to suppress without counsel. Instead, he asked for a new lawyer because he wanted counsel who would represent him on his motion

to suppress. RP 5-13, 27-31, 204-05; CP 60. An expression of dissatisfaction with counsel or a request for a new lawyer is not an unequivocal request to proceed pro se. *State v. Garcia*, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979). But in response to Mr. Elwell's request for new counsel, the court told him, "*you* can make that motion even though [counsel] is not pursuing it on your behalf." RP 31 (emphasis added). "[W]e can go ahead and address that issue regardless of whether [counsel] wants to argue it or not." RP 31.

The state and federal constitutions entitled Mr. Elwell to representation by an attorney "skill[ed] in the science of law." *Powell*, 287 U.S. at 67. He was entitled to have counsel research, write, and file a motion to suppress consistent with the attorney performance duties. RPC 1.1-1.4, 1.6-1.7. The court's refusal to appoint a new attorney and instead force him to file the motion pro se denied Mr. Elwell his right to counsel.

Requiring a person to proceed pro se in order to litigate an issue is "[a]n outright denial of the right to counsel." *State v. Harell*, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996). In *Harell*, Mr. Harell sought to withdraw his guilty plea before sentence, claiming his lawyer was ineffective. *Id.* at 803. The court held a hearing without appointing new counsel. *Id.* Mr. Harell's attorney "declined to assist Harell" at the hearing, and the court denied the motion to withdraw the plea. *Id.* Because the court forced Mr.

Harell to represent himself at the hearing without a request to do so and without a knowing, voluntary, and intelligent waiver of his right to counsel, the Court of Appeals reversed and remanded for a new hearing with new counsel. *Id.* at 804-05.

Similarly, the trial court forced Mr. Elwell to represent himself without requesting to do so and without a knowing, intelligent, and voluntary waiver of the right to counsel. To the contrary, Mr. Elwell asked for counsel. Courts must "indulge in every reasonable presumption against waiver" of the right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). Rather than indulge in every reasonable presumption against waiver, the court here "presume[d] acquiescence in the loss of fundamental rights" and instructed Mr. Elwell to proceed pro se on his motion to suppress. *Johnson*, 304 U.S. at 464 (internal quotations omitted). Foisting self-representation upon Mr. Elwell in the face of his repeated requests for representation by counsel violated the court's duty to protect Mr. Elwell's Sixth Amendment right.

Leaving a person unrepresented at a critical stage requires reversal without consideration of prejudice. *Cronic*, 466 U.S. at 659; *Heddrick*, 166 Wn.2d at 910. This includes forcing a person entitled to counsel to act pro se without a valid waiver. *Harell*, 80 Wn. App. at 805; *Penson*, 488

U.S. at 88. The court entirely deprived Mr. Elwell of counsel at a critical stage of the proceeding. Mr. Elwell is entitled to a new trial.

3. In the alternative, counsel's deficient performance prejudiced Mr. Elwell and denied him effective representation.

The court denied Mr. Elwell his right to representation by conflict-free counsel and forced him to proceed pro se at a critical stage even though he never waived his right to counsel. These errors constitute a complete deprivation of counsel and require reversal without consideration of prejudice. In addition, his attorney's deficient performance prejudiced Mr. Elwell and merits reversal under *Strickland*, 466 U.S. at 688.

It is not a legitimate strategy or reasonable tactic to tell the court a motion is meritless. It is patently unreasonable for counsel to abandon his client, refuse to address a potentially meritorious motion to suppress key evidence, and undermine the client's position. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). It is reasonably probable that this critical lapse in the lawyer's role as advocate affected the case's outcome, given Mr. Elwell's meritorious suppression issue. *See* Section D.4 *infra*.

An attorney's refusal to move to suppress is ineffective where no legitimate tactical reason supports forgoing the motion and where the court likely would have granted it. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Counsel's failure to move to suppress "the most

important evidence the State offered" cannot be a conceivable legitimate tactic. *Id.* Mr. Elwell need not show the motion would have necessitated dismissal of the charge but only a reasonable probability the verdict would have been different. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Mr. Elwell has made that showing.

4. Article I, section 7's narrow open view exception does not excuse a warrantless search where the property is not visible but is concealed in a closed, covered box.

The Washington Constitution prohibits police from disturbing any private affairs "without authority of law." Const. art. I, § 7. Our "broad exclusionary rule" affords "uniquely heightened privacy protections." *State v. Mayfield*, 192 Wn.2d 871, 882, 434 P.3d 58 (2019). It commands courts to suppress the fruits of a police search where the government fails to establish a valid warrant or one of the "limited and narrowly drawn" exceptions to the warrant requirement. *Parker*, 139 Wn.2d at 496.

Article I, section 7's broad and careful safeguard of private affairs prohibits warrantless searches of areas that could reveal intimate, discrete details of a person's life. *State v. Pippin*, 200 Wn. App. 826, 838, 403 P.3d 907 (2017). This jealous and careful protection against warrantless searches includes "personal effects" a person wears, holds, or has within their possession. *Parker*, 139 Wn.2d at 498-99. This strong constitutional guarantee requires police action to be justified at every step, and the

subsequent discovery of evidence does not excuse a warrantless search or seizure. *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975). "Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement." *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010).

The open view doctrine provides one such narrow exception to the warrant requirement. When an officer "is able to detect something by using one or more of his senses while lawfully present at a vantage point," the item is "voluntarily exposed to the public," and a warrant is not required. *State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004). Examples include observations of inherently and obviously illegal items appearing as "an exposed object" for anyone to see. *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991).

Where the State proves an officer "observes an item with the unaided eye from a noninstrusive vantage point," the observation is not subject to the warrant requirement. *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994). "To look at the *exterior* of an object from a lawfully obtained vantage point, *without moving the object*, is neither a search nor a seizure," and so police do not need a warrant. *State v. King*, 89 Wn. App. 612, 622, 949 P.2d 856 (1998) (emphasis added) (observing serial number on gun not a search because numbers in open view). In short, "[t]he mere

observation of that which is there to be seen," is not a search, *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981), and police may observe such "exposed object[s]" without a warrant. *Myers*, 117 Wn.2d at 345.

But the Pac-Man machine was not an "exposed object" "there to be seen." It was covered by plastic, concealed inside of a box, and entirely wrapped in a blanket. Exs. 6, 8; CP 337. The officer viewed the Pac-Man machine only after he stopped Mr. Elwell, unwrapped the red blanket covering the box, and removed a plastic covering. Ex. 6; CP 337.

When police handle an item to reveal its nature, it is in neither open view nor plain view.[1] *State v. Murray*, 84 Wn.2d 527, 534-35, 527 P.2d 1303 (1974) (where police moved television to see serial number, which confirmed it was stolen, this Court held the object was not in plain view); *State v. Johnson*, 104 Wn. App. 489, 502, 17 P.3d 3 (2001) (playing tape to confirm its contents is unauthorized search requiring warrant, not plain view exception). Indeed, such actions require a warrant even under the less demanding Fourth Amendment standard governed by reasonableness. *Arizona v. Hicks*, 480 U.S. 321, 324-25, 328-29, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) (moving stereo to observe serial number is Fourth Amendment search).

[1] The plain view exception is similar to the open view exception except that police observe the exposed object from a constitutionally protected area with cause, as opposed to from an unprotected area. *Seagull*, 95 Wn.2d at 901-02.

In rare circumstances, an object's "contraband nature" is "immediately apparent" from what a person willingly displays to the public in open view. *Carter*, 151 Wn.2d at 126-27. In *Carter*, no search occurred when a firearms instructor put an automatic rifle on a table and invited the class to handle it. *Id*. at 122. A student who was an investigator with the prosecutor's office picked up the gun and readily observed an unlawful modification. *Id.* at 123. This Court held the open display and invitation to the class eliminated the need for a warrant. *Id.* at 127.

Similarly, the open view exception excused an officer opening a bindle of cocaine without a warrant. *State v. Courcy*, 48 Wn. App. 326, 739 P.2d 98 (1987). The court relied on the distinctiveness of the packaging, its "customary use" to hold cocaine, and the officer's extensive experience in narcotics dealings. *Id.* at 329. The officer's training permitted him to "immediately recognize[]" the "distinctive nature of this container," which "clearly announced it contained contraband," excusing the need for a warrant. *Id.* at 329-32.

The closed, covered box here was not an object of "distinctive shape" or "distinctive nature" that "clearly announce[d] it contained contraband." *Id.* at 328, 331, 332. An ordinary box is not packaging whose "customary use" "clearly identifie[s] its contents" as a particular type of contraband. *Id.* at 329, 331. The "contraband nature" of the box's contents

was not "immediately apparent." *Carter*, 151 Wn.2d at 126. As even the Court of Appeals recognized when it misapplied the open view doctrine, "the object covered by a blanket did not have a nature uniquely associated with contraband," or "a distinctive shape." *Slip op.* at 8. As evidenced

from the pictures and video the State introduced, it was just a box. Ex. 8 (copied at left). Although it "exactly matched the size and shape" of what the officer saw on video being taken from the building, it also matched the size and shape of limitless other items that could fit inside a waist-high rectangular moving box delivered to doorsteps every day. CP 337; Exs. 6, 8.

The Court of Appeals' expansion of the open view doctrine excuses a warrantless search any time police reasonably believe a generic container holds an item for which they are looking. The officer may have reasonably believed Mr. Elwell burglarized a building nine hours earlier. He may have reasonably believed the concealed, covered box wrapped in a blanket contained property taken in the burglary. But no matter how reasonable the officer's belief that the box contained stolen property, the Pac-Man machine was not in open view. CP 337. If the officer believed he

had probable cause to search Mr. Elwell's property, he could have applied for a warrant. But "[p]robable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant." *Tibbles*, 169 Wn.2d at 369.

The court should have granted Mr. Elwell's motion to suppress. The State cannot prove beyond a reasonable doubt that the admission of this key evidence was harmless. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). The admission of the property stolen in the burglary, recovered from Mr. Elwell, created proof beyond a reasonable doubt. A reasonable jury could have reached a different result without the illegally obtained evidence. The court erred in denying Mr. Elwell's motion to suppress. This Court should reverse and remand for a new trial.

E. CONCLUSION

Mr. Elwell is entitled to a fair trial, free from unconstitutionally seized evidence, at which where the court honors his right to counsel.

DATED this 5th day of August, 2021.

/s Kate R. Huber
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Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL ELWELL, Petitioner.	)))))))))	NO. 99546-0

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