SUPREME COURT NO. _____

NO. 48742-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE JACKMAN,

Petitioner.

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

The Honorable Keith Harper, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Shane Jackman asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished divided[1] decision in State v. Jackman, filed January 4, 2018 ("Op."), which is appended to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. The trial court concluded that a police officer's foray off the path of travel to a residence, along the length of a car, to the front of the car, and then the viewing of a vehicle identification number (VIN) through the car's windshield, did not did not constitute an illegal warrantless search. But where this conclusion contravenes a case from this Court involving similar facts, a recent United States Supreme Court decision, as well as a seminal decision by this Court, did the trial court err in denying the petitioner's motion to suppress the evidence?

2. Was Gunwall[2] analysis necessary, as the Court of Appeals majority asserts, where the law is clear that article 1, section 7 is more

[1] Bjorgen, J., dissented, and would have found the search illegal. Op. at 14-22.

[2] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

protective than the Fourth Amendment in this context and—in any event—the petitioner prevails under the Fourth Amendment?

D. STATEMENT OF THE CASE

1. Procedural facts

The State charged Jackman with two counts of possession of a stolen motor vehicle (1996 black Honda Accord and 1991 turquoise Honda Accord) (counts 1 and 2); theft of a motor vehicle (1990 black Acura Integra) (count 3); and third degree possession of stolen property (iPhone) (count 4). CP 22-34; RP 138-39. Following a CrR 3.6 hearing, the court denied Jackman's motion to suppress. CP 136-43; RP 105-25. Jackman was convicted as charged. RP 130-39; CP 97-98 (court's findings); CP 38-95 (stipulated evidence, including police reports).

2. CrR 3.6 suppression hearing and court's findings.

Jackman moved to suppress evidence police discovered on his property, as well as his confession. CP 8-18. He argued in part that sheriff's deputies violated his constitutional rights by deviating from the driveway used to access his family's residence and garage. Police acted illegally, he argued, by approaching a car parked out of, and facing away from, the

driveway, and then peering into the car's windshield to examine its VIN.[3] Jackman argued the offices' behavior was inconsistent with that of a reasonably respectful citizen, resulting in an illegal search. CP 11, 13. As a result, the fruits of the initial illegal search (including Jackman's confession and additional evidence) had to be suppressed. CP 14.

The two deputies who had conducted the search on Jackman's curtilage testified at the hearing. On December 2, 2015, at around 6 p.m., Deputy Adam Newman and Sergeant Andrew Pernsteiner met to discuss a stolen iPhone. RP 5. The phone owner had reported his black Acura Integra was stolen from Bremerton. The phone was in the car at the time. RP 5-7, 22, 30. The "Find My iPhone" application identified 512 Seal Rock Road in Jefferson County as the phone's last location. RP 5-6, 30.

Newman and Pernsteiner drove to the address and realized it was an unoccupied waterfront vacation home. RP 6-7. There was, however, another residence nearby, located west of the vacation home across United States Route 101. RP 7, 15. After searching the vicinity for the black Acura, the deputies parked on 101 and approached the residence, located at

[3] A call to dispatch revealed that car was reported stolen. Then, the deputies, who were initially visiting the residence to ask about a phone, went to the door of the garage's dwelling unit and confronted Jackman about the car. CP 10

304694 U.S. 101, on foot. RP 8, 31. The deputies planned to ask the occupants about the missing phone. RP 28. It was after dark. RP 18.

The residence's driveway is a loop that travels around the residence as well as a garage, with an outlet leading to a neighbor's residence. RP 8. Just west of 101, the driveway immediately forks, with one branch heading straight, or west, up a hill directly toward the main residence, and the other branch turning left, or south, and then curving to the right, or west. That branch forks again, heading straight (west) to a neighbor's house, or to the right (north) past a garage structure, and then past the main residence, where it loops back east toward 101. RP 8; Exhibits 1, 2, and 3.

Newman and Pernsteiner took the left, or southbound, fork around the south end of the garage. RP 8, 17. Newman testified that, based on prior visits to the residence, this was the normal direction of travel around the driveway. RP 25-26, 85.

The deputies saw lights through an east-facing sliding glass door, located in what Newman described as the garage's "living quarters." RP 9; Exhibit 4. A set of stairs leads from the grass lawn to this door, which faces the highway. RP 20. Newman characterized this as the "front door" of the garage's living quarters. RP 19-20, 27, 90. Newman was familiar with the residence, including the garage, from prior visits. RP 12.

Rather than proceeding directly to the east-facing door with the light on, the deputies continued along the driveway. RP 9. They passed a parking area with room for two cars, located in front of the large garage doors used by vehicles. RP 9; CP 17. The parking area is located near the driveway, but is off the path of travel. RP 9, 41-42.

The deputies noticed two cars parked in front of the garage doors. RP 9. A silver Acura Integra, the same make and model as the car reported stolen, was facing away from the garage and toward the southern loop of the driveway. RP 17. But the Acura was a different color and was obviously not the stolen car. RP 9, 33. However, according to the deputies, the car's stock wheels were in the process of being replaced with a set of aftermarket rims. RP 9-10, 33. The deputies ran the Acura's license plate. Nothing was amiss. RP 34.

The car next to it, a greenish Honda, was parked with its nose to the garage. RP 42. It did not have a license plate. RP 10, 33, 42. Intrigued, Sergeant Pernsteiner left the driveway, walked the length of the car toward the garage doors, and peered through the windshield at the VIN. RP 34, 42. Although it was dark out, a motion-activated light illuminated the car's interior. RP 10-11, 18. The deputies called in the VIN to dispatch, which revealed the car had been reported stolen. RP 11, 34. Although a no-

trespassing sign was posted on the garage, the deputies did not see it. RP 34; CP 138 (Findings of Fact 17 and 18).

Armed with additional suspicions, the deputies decided to approach the living quarters of the garage. Pernsteiner went to the east- facing door, while Newman went to the door on the west side of the building for "officer safety." RP 12-13, 87. Jackman answered the east-facing door. Pernsteiner told him the deputies were there for the phone. Jackman replied, "[l]et me go get it." RP 35. He retrieved an iPhone, which, according to Pernsteiner, unlocked to the Acura owner's four-digit pass-code. RP 35. Jackman said he found the phone in Shelton. RP 35; RP 73 (Jackman's testimony).

Pernsteiner asked Jackman to step outside. Jackman obliged. Pernsteiner then asked Jackman about the "stolen car" parked in front of the garage. RP 36. Jackman hung his head and sighed. RP 36. According to police reports, Jackman ultimately admitted to stealing the black Acura from Bremerton, although it was no longer in his possession. CP 41. Jackman also consented to a search of the garage, after the deputies told him they were going to obtain a search warrant. CP 42. The deputies found a second stolen Honda in the garage. CP 45.

Newman and Pernsteiner each testified they would have gone to the residence at 304694 U.S. 101 to ask about the missing phone regardless of their discovery of the stolen car. RP 28.

The court denied the motion to suppress the evidence and statements. The court's findings largely reflect the deputies' testimony as set forth above. CP 136-40. Among other findings, the court found that the primary path of travel on the loop driveway was as Newman had described, i.e., clockwise. CP 137-38 (Findings 7 and 8). The court found that, while the deputies did not see a "no trespassing" sign on the garage near where Pernsteiner peered into the windshield, such a sign *was* posted. CP 138 (Findings 17 and 18). Finally, the court found that "the deputies indicated that they intended to go to the garage[and attached residential unit] regardless of whether or not any vehicle had been present in the driveway." CP 140 (Finding 28).

For its "conclusions of law," the court outlined its perception of the key points of five Washington state cases. CP 140-42. The document also contains a section entitled simply, "Conclusion," which provides

> The Deputies . . . were headed to the residential . . . portion of the garage since that was the only part of 304694 that appeared to be inhabited at the time. The deputies intended to speak with [Jackman] about the missing phone regardless of any vehicles that were parked nearby. At the time the deputies went to speak with [Jackman], he was not suspected of being involved with the stolen car or phone.
>
> The security light activated as the deputies approached two vehicles that were parked outside of [Jackman's] garage. One of the vehicles was of the same make and model as the one reported stolen, though a different color. Next to it was stacked tires with aftermarket

> black rims, similar to those that were on the stolen car. The deputies were suspicious of this vehicle because of the tires and because it did not have a license plate.
>
> *The only intrusion, if it constituted an intrusion, was committed by the deputies when one of them walked to the front of the vehicle to view the VIN through the vehicle's windshield. This did not constitute a substantial and unreasonable departure from a non-intrusive area. The officer did not enter the vehicle, look for anything else or nay contraband, nor did the officer engage in any questionable activity after having observed the VIN.*

CP 142-43 (emphasis added).

3. Appeal, resulting in majority and dissenting opinions

Jackman appealed, arguing first that the trial court erred in denying the motion to suppress the evidence. With respect to counts 1 and 2, moreover, Jackman argued the charging document omitted an essential element of the crime of possession of a stolen motor vehicle.

The Court of Appeals agreed as to Jackman's second argument and ordered those convictions dismissed. Op. at 1, 12.

But it disagreed as to the first argument, engaging in a lengthy digression explaining why it would not treat suppression analysis differently under the state constitution, as the parties had not engaged in Gunwall analysis. Op. at 4-7. This is puzzling because Jackman argued

suppression was required based on cases primarily applying the Fourth Amendment. Brief of Appellant (BOA) at 11-21.[4]

The dissent, however, agreed the search violated the Fourth Amendment. Op. at 14-17 (Bjorgen, J., dissenting). The dissent also criticized the majority's unprovoked assertions regarding the need for Gunwall analysis because, consistent with this Court's prior jurisprudence, the state constitution clearly provided for broader protections in this context. Op. at 18-22 (Bjorgen, J., dissenting).

Jackman asks this Court to accept review and reverse.

E. REASONS REVIEW SHOULD BE ACCEPTED

UNDER RAP 13.4(b)(1) AND (3), THIS COURT SHOULD GRANT REVIEW AND REVERSE THE COURT OF APPEALS' DIVIDED DECISION BECAUSE IT CONFLICTS WITH CONSTITUTIONAL DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT.

This Court should accept review under RAP 13.4(b)(1) because the decision conflicts with State v. Daugherty, 94 Wn.2d 263, 616 P.2d 649

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[4] The second paragraph on page 7 of the opinion is particularly bizarre. Invoking the state constitution, Jackman *did* argue that, under state law, the remedy was suppression, because no independent source, or theory of inevitable discovery or attenuation, could salvage illegal search. BOA at 23-28. But the State did not ultimately so argue, instead relying on an argument that no illegal search occurred. Brief of Respondent at 5-14.

Curiously, the same panel of judges issued another opinion the same day, with the same writing judge highlighting a purported failure to engage in a Gunwall analysis, and the same judge dissenting. See State v. Mayfield, noted at ___ Wn. App. ___, 2018 WL 286810 (Jan. 4, 2018).

(1980), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) and State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981). Moreover, the case involves a significant question under the state and federal constitutions, implicating the Supreme Court's decision in Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). Although Jackman prevails under the Fourth Amendment, the case also presents the question of whether the state constitution can safely be said to present broader protection in this context. Op. at 18-22 (Bjorgen, J., dissenting).

Approaching a residence after dark, sheriff's deputies, present to contact an occupant, bypassed what a sheriff's deputy described as the "front door" of the garage's living quarters, which was lit up. Continuing along the driveway on foot, they veered off the obvious path of travel, ran the license plate of a car that was obviously not the car police were investigating, discovered it was not stolen, saw another car without a license plate, moved along the length of that car to its front, caused a motion sensor light to activate, and then peered into the car's windshield to view its VIN. This conduct violated the state and federal constitutions. The resulting evidence, including incriminating statements, must be suppressed.

1. Introduction to applicable law.

Unless the State proves an exception is present, a warrantless search is impermissible under the state and federal constitutions. U.S. CONST. amend. IV; CONST. art. I, § 7;[5] State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The Fourth Amendment and article 1, section 7 render warrantless searches per se unreasonable unless they fall within "a few specifically established and well-delineated exceptions." State v. Chrisman, 100 Wn.2d 814, 817, 676 P.2d 419 (1984). Evidence resulting from an illegal search must generally be suppressed under the exclusionary rule. Gaines, 154 Wn.2d at 716-17.

Article 1, section 7 is more protective of an individual's right to privacy than its federal counterpart; this protection is even greater when the intrusion involves the home of an accused. "In no area is a citizen more entitled to his privacy than in his or her home. [T]he closer officers come to intrusion into a dwelling, the greater the [article 1, section 7] protection." State v. Ferrier, 136 Wn.2d 103, 111-12, 960 P.2d 927 (1998).

[5] The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath . . . particularly describing the place to be searched and the persons or things to be seized." Article 1, section 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Entry onto a home's curtilage by police officers may result in violation of a resident's constitutional rights. It is *possible* for an officer on legitimate business to enter a portion of the curtilage impliedly open to the public, such as a driveway, walkway, or access route leading to the residence, without violating the resident's rights. Seagull, 95 Wn.2d at 902; State v. Petty, 48 Wn. App. 615, 618, 740 P.2d 879 (1987). "An officer is permitted the same license to intrude as a reasonably respectful citizen." Seagull, 95 Wn.2d at 902. This is so even if the purpose of the intrusion is investigative. Petty, 48 Wn. App. at 619. Moreover, if the officer is within an impliedly open area, or a non-intrusive vantage point, and he detects something using his senses, it may be considered "open view." State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991).[6]

But, either "a substantial and unreasonable departure" from an area that is impliedly open to the public, or a particularly intrusive method of viewing, exceeds the scope of the implied invitation and violates the resident's constitutional rights. Seagull, 95 Wn.2d at 903.

[6] "Plain view" applies if an officer makes a justifiable intrusion and inadvertently sights contraband. In contrast, "open view" involves observation from a non-protected area. State v. Gibson, 152 Wn. App. 945, 955, 219 P.3d 964 (2009)

2. The deputies' search in this case did not satisfy any exception to the warrant requirement.

Under federal and state law, the deputies' actions in this case constituted an invalid warrantless search.

"While law enforcement officers need not 'shield their eyes' when passing by the home 'on public thoroughfares' . . . an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. Jardines, 569 U.S. at 7 (quoting California v. Ciraolo, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)). The area around the home, the curtilage, is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." Ciraolo, 476 U.S. at 213.

In Jardines, officers entered Jardines's yard with a drug-sniffing dog and, after the dog "alerted" at Jardines's front door, they applied for and obtained a search warrant for his home. Whether the search warrant was valid turned on whether the officers' entry into the yard was "an unlicensed physical intrusion" or, rather, Jardines "had given his leave (even implicitly)" for the officers to do that. Jardines, 569 U.S. at 8.

Writing for the Court, Justice Scalia first observed that, under cases such as Katz v. United States,[7] the Fourth Amendment did not require a property trespass in order for a violation to occur. But such cases only added to the "baseline" protections under the Fourth Amendment. Katz "does not subtract anything from the Amendment's protections 'when the Government does engage in [a] physical intrusion of a constitutionally protected area.'" Jardines, 569 U.S. at 5 (quoting United States v. Knotts, 460 U.S. 276, 286, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983) (Brennan, J., concurring in the judgment)). Because the officers' investigation took place in a constitutionally protected area—Jardines's home's curtilage—the Court moved on to the question of whether it was accomplished through an unlicensed physical intrusion. Jardines, 569 U.S. at 7. The Court then summarized the applicable common law:

> "A license [to ender property] may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." McKee v. Gratz, 260 U.S. 127, 136, 43 S. Ct. 16, 67 L. Ed. 167 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." Breard v. Alexandria, 341 U.S. 622, 626, 71 S. Ct. 920, 95 L. Ed. 1233 (1951). *This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger*

[7] Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967) (surveillance of telephone booth conversation violated Fourth Amendment).

> *longer) leave.* Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. *Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."* Kentucky v. King, 563 U.S. [452, 469], 131 S. Ct. 1849, []179 L. Ed. 2d 865 (2011).
>
> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that* . . . . To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. *The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.*

Id. at 7-9 (first, second, and fourth emphasis supplied; footnotes omitted).

A concurring opinion authored by Justice Kagan would have decided the case on privacy grounds. But she offered her own example of limitations on a resident's implied license to approach the front door:

> A stranger comes to the front door of your home carrying super-powered binoculars. . . . He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest comers. . . . Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? *Yes, he has.*

Id. at 12 (Kagan, J., concurring) (emphasis added).[8]

Here, even though the police officers did not have drug- (or stolen car-) sniffing dog in tow, their actions clearly exceeded the scope of the implied invitation. There is no customary invitation for after-dark visitors to wander off a driveway and peer into the windshields of cars facing away from the driveway under looming no-trespassing signs.

This Court's opinion in Daugherty, 94 Wn.2d 263, relied on by Jackman in the trial court and the Court of Appeals, is consistent with Jardines and, moreover, factually similar to his case. There, a company's employees discovered their office had been burgled and the company's safe was missing. The safe appeared to have been removed by hand truck. Daugherty, a driver, became a suspect. Daugherty, 94 Wn.2d at 265.

Officer Patterson and three other officers, including an Officer Krebs, drove to Daugherty's home. When they arrived, the officers saw Daugherty's pickup and an Army truck backed up against the open garage door. Krebs got out of the car and walked up the right side of the driveway. At the same time, Daugherty came out from behind the trucks and met Patterson in front of the trucks near the driveway entrance. Id. at 265-66.

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[8] Even the dissent agreed that the implied license to proceed up a walkway to a front door arising from custom has "spatial and temporal" limits. Id. at 19 (Alito, J., dissenting).

While Daugherty and Patterson were speaking, Krebs went to the back end of the two trucks, near the opening of the garage, for officer safety purposes. Id. at 266. From that vantage point, Krebs noticed what appeared to be a safe partially protruding from a tarp in the garage. Police officers eventually removed the tarp and discovered the stolen safe. Id.

The State argued that seizure of the safe was permissible under the "plain view" exception to the warrant requirement. Id. at 267. This Court ruled, however, that the State had failed to meet its burden of showing the warrantless search fell within any exception to the warrant requirement. Daugherty, 94 Wn.2d at 272. This Court first observed that a section of driveway that was exposed to view from the street, and that was a means of conventional access to the house, was *not* protected from (1) view by police officers or (2) from an incursion by officers with a legitimate purpose walking across it to reach the door of the home. Id. at 264, 268. On the other hand, Daugherty's entire driveway could not be considered a pathway to his house. Id. at 268.

> When [Daugherty] parked his two vehicles at the rear of his driveway, in effect blocking and obscuring from view the remaining portion of the driveway and the interior of the garage, he had a subjective expectation that a small squad of police officers would not thread around and among the vehicles in an effort to meet him at his door. . . . Moreover, the expectation revealed by [Daugherty's] action is certainly an objectively legitimate one which "society, is prepared to

> recognize as 'reasonable.'" [Katz, 389 U.S. at 361] (Harlan, J., concurring).

Daugherty, 94 Wn2d at 268-69.

This Court added that it "need not determine whether the driveway became a protected area at the front of [Daugherty]'s vehicles, or at the point where the officers first strayed substantially from a normal pathway directly to [him]." Id. at 269. Regardless, when Officer Krebs completed a "flanking action" around Daugherty to the right of the truck, he had entered a protected area. Id. If the intrusion was unlawful, the resulting seizure of the safe was also unlawful. Because the officers had no lawful right to be in that area, the evidence discovered there had to be suppressed. Id.

As stated above, this case is like Daugherty. The deputies deviated from any path to any door to any part of the garage or main residence. Only from that protected location was Pernsteiner able to peer into the car to see the VIN by the glow of the motion-activated light. But because he had no right to be in that area, an illegal search occurred.

The Court of Appeals majority dismisses Daugherty as a "plain view" case and therefore inapposite. Op. at 11-12. In doing so, the Court of Appeals begs the question. Whether the deputies were entitled to be where they were when they spied the VIN is the heart of the issue. Daugherty, like Seagull, discussed below, requires reversal.

3. This Court's *Seagull* decision, to the extent that it survives *Jardines*, also supports that a warrantless search occurred.

The Court of Appeals found the deputies' intrusion was permitted under Seagull, which is often treated as the seminal case in Washington.[9] Op. at 10-11. To the extent that the Seagull "substantial and unreasonable departure" / "particularly intrusive method of viewing" standard survives Jardines, the Daugherty decision establishes the intrusion in this case falls within that category of intrusion. Moreover, as Jackman argued in the Court of Appeals, and as the dissent acknowledges, analysis under the Seagull factors reveals that suppression was required in this case. Op. at 15-17.

In Seagull, in determining whether an officer exceeded the scope of "open view," the court considered whether the officer: (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally. Seagull, 95 Wn.2d at 905. There, only the officer's slight deviation[10] from the most direct access route to a residence's back door (based on a prior information from the occupants that they could not always

[9] Seagull left the holding of Daugherty intact. Seagull, 95 Wn.2d at 906.

[10] For context, the officer walked through an open yard rather than hugging the house. Seagull, 95 Wn.2d at 901.

hear knocking at the front door) was arguably "open to challenge." Id. at 901, 905; see also Myers, 117 Wn.2d at 345.

The deputies' actions in this case do not survive the Seagull analysis. Here, the deputies, their "police business" to contact an occupant, approached the house in the dark, deviated from the normal access route to contact an occupant, created an artificial vantage point, and then deliberately peered into a car. Under Seagull, and certainly under Jardines, the deputies' actions must be considered an unlawful search.

In summary, the deputies' foray to front of the car was not a reasonable deviation from the path to the house. It was, under Daugherty, an invalid warrantless search. Under Seagull, it constituted a "particularly intrusive method of viewing." 95 Wn.2d. at 903. Under Jardines, the deputies exceeded the implied license granted to visitors. This Court should grant review under RAP 13.4(b)(1) and (3).

F. CONCLUSION

This Court should accept review and reverse the Court of Appeals.

DATED this 22nd day of January, 2018.

Respectfully submitted,

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHANE R. JACKMAN, Appellant.	No. 48742-0-II UNPUBLISHED OPINION

SUTTON, J. — Shane R. Jackman appeals his convictions for two counts of possession of a stolen motor vehicle, one count of theft of a motor vehicle, and one count of possession of stolen property in the third degree. Jackman argues that because the search of his curtilage was unlawful, all of his convictions should be dismissed. He also argues that the charging document for the two counts of possession of a stolen motor vehicle was deficient. We hold that the officer's search was lawful, that Jackman's statement of additional grounds (SAG) claims have no merit, and that the charging document for both counts of possession of a stolen motor vehicle was insufficient. Thus, we affirm his convictions for theft of a motor vehicle and possession of stolen property in the third degree. However, we reverse and remand to the trial court to dismiss both convictions of possession of a stolen motor vehicle without prejudice because the charging document was constitutionally deficient.

FACTS

Sgt. Pernsteiner and Deputy Newman from the Jefferson County Sheriff's Office received a report of a stolen phone, which had been in an Acura Integra that had been stolen. The owner used a software application to track the phone to Jackman's property. Sgt. Pernsteiner and Deputy Newman went to Jackman's property to contact him about the stolen phone, and discovered a stolen vehicle along with the stolen phone.[1] They spoke with Jackman, who confessed to them that he stole the vehicle, the phone, and other property. Jackman was charged with two counts of possession of a stolen motor vehicle, one count of theft of a motor vehicle, and one count of possession of stolen property in the third degree.

Jackman moved to suppress all the evidence and his statements to Sgt. Pernsteiner and Deputy Newman, asserting that Sgt. Pernsteiner conducted an unlawful and warrantless search of his property.

After conducting a CrR 3.6 hearing, the trial court entered the following relevant findings of fact:

> 7. The residence at 304694 US 101 [Jackman's residence] has a circular gravel driveway that forks shortly before connecting with US 101. As seen from US 101, the driveway continues up straight to the main residence. This part of the driveway is steep. The driveway also branches to the south (which is left as seen from the highway). The driveway travels in front of the garage/ADU [Accessory Dwelling Unit] before circling around behind the garage/ADU to connect with the part of the drive that heads straight to the house. The part of the driveway that heads south is less steep and branches again near a parking area in front of the garage to service another residence behind 304694 US 101.

[1] After speaking with Jackman, Sgt. Pernsteiner and Deputy Newman asked to search the property and Jackman consented. During this search, Sgt. Pernsteiner and Deputy Newman found another stolen vehicle.

8. Deputy Newman has been to this residence numerous times. Based on his prior observations, the typical traffic flow is for cars to pull into the driveway and then turn south so that the circular driveway is traversed in a clockwise fashion.

. . . .

10. As the deputies approached the garage/ADU, they noticed one car parked along the portion of the driveway that heads south and two additional cars in a parking area in front of the garage door. One of the cars was an Acura Integra, similar to the car that was reported stolen. The other car was a green Honda Accord.

11. The garage door on the ADU faces south and the sliding glass door faces east toward US 101.

. . . .

17. The garage that the cars were parked in front of had a security light activated by motion sensor. Immediately beneath the light was a "No Trespassing" sign.

18. The deputies activated the security light as they approached the vehicles. Neither deputy observed a "No Trespassing" sign.

19. The front of the Honda Accord was facing the garage.

20. SGT Pernsteiner walked from the shared driveway up the length of the Honda Accord until he could view the Vehicle Identification Number (VIN) through the windshield using the light provided by the security light

21. SGT Pernsteiner wrote down the VIN and then reported it [to] dispatch. Dispatch informed SGT Pernsteiner that the VIN belonged to a car that had been reported stolen.

22. SGT Pernsteiner turned around and walked back down the shared driveway to a small set of stairs that led to the sliding glass door on the ADU.

. . . .

27. SGT Pernsteiner asked the Defendant if he would step outside so he could talk to him. The Defendant complied and spoke to SGT Pernsteiner about [the] cars in the parking area in front of the garage door. The Defendant was cooperative, admitted that the car was stolen, and informed the deputies of some other stolen items that were on the premises. The Defendant was then placed under arrest.

> 28. The deputies indicated that they intended to go to the garage/ADU to inquire about the phone regardless of whether or not any vehicle had been present in the driveway.

Clerk's Papers (CP) at 136-140

Based on its findings of fact, the trial court concluded that the search was lawful and denied Jackman's motion to suppress the evidence. Jackman waived his right to a jury trial and the parties stipulated to the facts for a bench trial. The trial court found Jackman guilty on all charges. Jackman appeals his convictions.

ANALYSIS

Jackman challenges the trial court's conclusion that Sgt. Pernsteiner's viewing of the VIN through the windshield was not a substantial and unreasonable departure from a non-intrusive area. Jackman argues that the trial court erred when it denied his motion to suppress the evidence because the search of the home's curtilage was unlawful.[2] The State argues that Sgt. Pernsteiner and Deputy Newman accessed Jackman's home as would a reasonable, respectful citizen and did not make a substantial or unreasonable departure from an open public access route. We agree with the State. However, because neither party adequately briefed whether a *Gunwall*[3] analysis was required, we address below this threshold issue.

A. WASHINGTON STATE CONSTITUTION

Gunwall held that there are six, nonexclusive criteria to determine whether our state constitution affords broader rights to its citizens in a particular context than does the United States

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[2] Jackman raises identical issues in his SAG.

[3] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Constitution.[4] Jackman's failure to argue, sufficiently cite to authority, and brief these criteria means that the parties have not sufficiently argued the matter, and thus, we may not consider it. *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988).

> "Whether the Washington Constitution provides a level of protection different from the federal constitution *in a given case* is determined by reference to the six nonexclusive *Gunwall* factors." (Italics ours.) *State v. Young,* 123 Wn.2d 173, 179, 867 P.2d 593 (1994). Where the *Gunwall* factors are not adequately briefed by the parties, this court will not consider whether the state constitution provides greater protection than that provided by the federal constitution under the circumstances presented.

State v. Cantrell, 124 Wn.2d 183, 190 n.19, 875 P.2d 1208 (1994) (citations omitted). "A determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context." *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) (citing *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990)).

This historical rule has been repeatedly iterated and reaffirmed recently in *Blomstrom v. Tripp*, ___ Wn.2d ___, 402 P.3d 831 (Oct. 5, 2017).

> Generally speaking, "[i]t is . . . axiomatic that article 1, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (plurality opinion); *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) ("It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment."). Unlike our state constitution, the Fourth Amendment does not explicitly protect a citizen's "private affairs." *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); *McCready*, 123 Wn.2d at 267. *But this enhanced protection depends on the context in question.*

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[4] The six criteria are: "(1) the textual language, (2) differences in the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern." *Gunwall*, 106 Wn.2d at 58.

Blomstrom v. Tripp, 402 P.3d at 842 ¶ 47 (emphasis added) (some citations omitted).

The issue in *Blomstrom* was, "whether the petitioners' urinalysis testing requirements violate either article I, section 7 of the Washington Constitution or the Fourth Amendment to the United States Constitution. The parties also ask[ed] that we determine whether Washington Constitution article I, section 7 is more protective than—and should be interpreted separately from—the Fourth Amendment *in this context*." *Blomstrom*, 402 P.3d at 841-42 ¶ 46 (emphasis added). The parties were required to and did brief and analyze the *Gunwall* factors.

We agree with the dissent here that the law is well settled, however, we depart with the dissent in how the law should be applied to the facts of this case. The dissent fails to recognize this long line of cases and even cites to *State v. Jorgenson*[5] to support its position. However, *Joregenson* performed a *Gunwall* analysis. The dissent also cites to *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007). However, although the court stated that a *Gunwall* analysis was not necessary, the court nonetheless undertook one. In determining the protections of article I, section 7 in a particular context, "the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compels a particular result." *McCready,* 123 Wn.2d at 267. "This involves an examination of the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." *Chenoweth*, 160 Wn. 2d at 463.

[5] 179 Wn.2d 145, 148, 312 P.3d 960 (2013) (right to bear arms).

Here, Jackman fails to provide any analysis of why our state constitution should be treated differently from the federal constitution in the context of search and seizure and the open view doctrine. The dissent says it would threaten "mischief to this State's tradition of strong independent constitutional adjudication," yet it provides no reasoning for this bold statement and little historical support. Dissent at 18. In fact, the principles of stare decisis are well established in our jurisprudence and should not be abandoned absent a showing that an established rule is incorrect and harmful. "'Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change.'" *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

Jackman fails to cite sufficient authority showing why we should treat our state constitution *in this context* differently from the United States Constitution. Thus, in accord with *Gunwall* and its progeny, and because he fails to adequately brief this issue, he waives any argument under article 1, section 7, and we consider his claim only under the Fourth Amendment. RAP 10.3(a)(6);[6] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We also note that Jackman and the dissent primarily rely almost exclusively on cases analyzed under the Fourth Amendment.

[6] Appellant's brief should contain "[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."

B. UNITED STATES CONSTITUTION

Jackman argues that the officers' search did not meet any exception to the search warrant requirement under the Fourth Amendment of the United States Constitution and article 1, section 7 of our state constitution. He primarily relies on cases interpreting the Fourth Amendment, including *Florida v. Jardines,*[7] *State v. Seagull,*[8] and *State v. Daugherty.*[9] Under both the Fourth Amendment[10] and article 1, section 7 of our state constitution,[11] a warrantless search is per se unconstitutional unless the search falls within a well-recognized exception to the search warrant requirement. *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). "This constitutional protection is at its apex 'where invasion of a person's home is involved.'" *Eisfeldt*, 163 Wn.2d at 635 (quoting *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007)). Because exceptions to the warrant requirement are narrowly drawn, the State bears a heavy burden of establishing the validity of a warrantless search. *Eisfeldt*, 163 Wn.2d at 635. Whether the particular vantage point breaches the privacy expectation of the resident is a factual determination. *State v. Seagull*, 95 Wn.2d at 903.

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[7] *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

[8] *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981).

[9] *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980), overruled on other grounds by *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

[10] The Fourth Amendment provides in relevant part: "The right of the people to be secure in their . . . houses . . . against unreasonable searches . . . shall not be violated . . . ."

[11] Article 1, section 7 of our state constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Our Washington Supreme Court recently addressed the constitutional protections of the Fourth Amendment and article 1, section 7 in the specific context of bodily functions and pretrial release conditions. The court held,

> Generally speaking, "[i]t is . . . axiomatic that article 1, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (plurality opinion); *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) ("It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment."). Unlike our state constitution, the Fourth Amendment does not explicitly protect a citizen's "private affairs." *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); *McCready*, 123 Wn.2d at 267. But this enhanced protection depends on the context in question.

Blomstrom, 402 P.3d 831, ¶ 47 (alteration in original).

Under the "open view" exception to the warrant requirement, an observation by law enforcement must take place from a non-intrusive vantage point. *State v. Barnes*, 158 Wn. App. 602, 612, 243 P.3d 165 (2010). Our Supreme Court in *Seagull* held that under the Fourth Amendment "a substantial and unreasonable departure from such an [impliedly open] area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy." *Seagull*, 95 Wn.2d at 902-03.[12]

[12] In *Seagull*, the officer was canvassing the neighborhood for information about an abandoned vehicle, and stopped near the defendant's residence, less than a mile from the abandoned vehicle. 95 Wn.2d at 900. The court held that the officer's limited deviation from the most direct route by walking between the two doors of the residence was not unreasonable under the Fourth Amendment protection under the United States Constitution. 95 Wn.2d at 905.

When reviewing a trial court's denial of a motion to suppress, we determine whether the findings of fact support the conclusions of law. *State v. Ague-Masters*, 138 Wn. App. 86, 97, 156 P.3d 265 (2007). Unchallenged findings of fact are verities on appeal. *Eisfeldt*, 163 Wn.2d at 634. We review conclusions of law de novo. *State v. Budd*, 185 Wn.2d 566, 572, 374 P.3d 137 (2016).

In determining whether an officer exceeded the scope of "open view," we consider whether the officer: "(1) spied into the house, (2) acted secretly, (3) approached the house in daylight, (4) used the normal, most direct access route to the house, (5) attempted to talk with the resident, (6) created an artificial vantage point, and (7) made the discovery accidentally." *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991) (citing *Seagull*, 95 Wn.2d at 905).

In the instant case, Sgt. Pernsteiner and Deputy Newman did not spy into the residence, act secretly, nor create an artificial vantage point.[13] Sgt. Pernsteiner looked into the vehicle which was visible from the driveway, while travelling up the most direct access to the house. The discovery was accidental, in that they did not go to the home for the purpose of discovering two stolen vehicles, but entered the curtilage of Jackman's residence for the lawful purpose of going to the garage/ADU to inquire about the stolen phone. Although they did approach at night, they took what they knew to be the most direct access route to the house and did nothing to obscure their presence.

[13] As they approached the vehicles, the officers activated the security light, but did not observe the "No Trespassing" sign. CP at 138 (FF 18). A "No Trespassing" sign does not necessarily create a legitimate expectation of privacy, especially without additional indicators such as fences, gates, cameras, or dogs. *Ague-Masters*, 138 Wn. App. at 98. Thus, since neither officer saw the sign and no additional indicators were present, this fact does not change our analysis.

The only action that is potentially open to challenge is that Sgt. Pernsteiner strayed slightly from the most direct route, by walking up the side of the vehicle before going straight to the door. Here, Sgt. Pernsteiner was engaged in legitimate police business but minimally departed from the normal path to the residence. The court in *Seagull* stated that "[i]t would be unreasonable to require, in every case, that police officers walk a tightrope while on private property engaging in legitimate police business." 95 Wn.2d at 905. Therefore, Sgt. Pernsteiner's limited deviation, was not a "substantial and unreasonable departure" from the path that a reasonably respectful citizen would take. *Seagull*, 95 Wn.2d at 903. Thus, the officer's search did not exceed the scope of open view.

Jackman also argues that this case is analogous to *State v. Daughterty*,[14] where the court held that the officer's deviation from the path of travel to the house crossed the line from "plain view" to an illegal search under the Fourth Amendment. Br. of Appellant at 18. However, *Seagull* made clear that *Daugherty* is not an open view situation but a plain view situation.[15] *Seagull*, 95 Wn.2d at 906. Thus, *Daugherty* is not legally analogous to the case at bar.

Here, because Sgt. Pernsteiner's method of viewing into the car was from a non-intrusive vantage point and his path was not a substantial and unreasonable departure from the path a reasonably respectful citizen would take, the State has met its burden to establish that the

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[14] 94 Wn.2d 263, 616 P.2d 649 (1980).

[15] The *Seagull* court noted, "'In the plain view situation, the view takes places *after* an intrusion into activities or areas as to which there is a reasonable expectation of privacy. The officer has already intruded, and, if his intrusion is justified the objects in plain view, sighted inadvertently, will be admissible.'" 95 Wn.2d at 901-02 (internal citations and quotation marks omitted) (quoting *State of Hawaii v. Kaaheena*, 59 Haw. 23, 575 P.2d 462, 466-467 (1978)).

warrantless search was lawful under the Fourth Amendment. *See Eisfeldt*, 163 Wn.2d at 635. Therefore, we hold that the search was lawful and the trial court did not err in denying Jackman's motion to suppress the evidence.

C. CHARGING DOCUMENT

Jackman next argues that the charging document for the two counts of possession of a stolen motor vehicle omitted an essential element of the crime of possession of a stolen motor vehicle—knowledge that the vehicle was stolen. The State concedes the charging document omitted an essential element. We accept the State's concession.

"If the State fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice." *State v. Porter*, 186 Wn.2d 85, 89-90, 375 P.3d 664 (2016). "[T]he knowledge element of possession of stolen property is an essential element." *Porter*, 186 Wn.2d at 93 (citing *State v. Moavenzadeh*, 135 Wn.2d 359, 363-64, 956 P.2d 1097 (1998)). Here, the charging document alleging two counts of possession of a stolen motor vehicle lacked the essential element that Jackman had knowledge that the vehicle was stolen. Therefore, the State's concession is proper. We reverse and dismiss without prejudice the two counts of possession of a stolen motor vehicle.

CONCLUSION

The trial court did not err in denying Jackman's CrR 3.6 motion to suppress because Sgt. Pernsteiner's search was lawful; consequently, Jackman's SAG claims also fail. Thus, we affirm his convictions for theft of a motor vehicle and possession of stolen property in the third degree. We reverse and remand without prejudice to the trial court to dismiss both convictions of

possession of a stolen motor vehicle because the charging document was constitutionally deficient.[16]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

I concur:

Melnick, J.
MELNICK, J.

[16] Jackman also requests that we decline to impose appellate costs. We refer the issue of appellate costs to a commissioner or clerk of this court under RAP 14.2. Accordingly, a commissioner of this court will consider whether to award appellate costs if the State files a cost bill and the defendant objects to it.

BJORGEN, C.J. (dissenting) — The issue presented is whether the law enforcement officers unconstitutionally intruded into the curtilage of Shane Jackman's residence by walking along the driveway past the door of the residence and looking into a vehicle parked at the side of the residence to obtain its vehicle identification number (VIN). I part with the majority opinion in two ways. First, because the vehicle was not in an area impliedly open to the public, the search, I would hold, violated the Fourth Amendment to the United States Constitution under the well-established case law set out below. Second, the court's failure to consider the more protective article I, section 7 of the Washington Constitution on the basis of *Blomstrom v. Tripp*, ___ Wn.2d ___, 402 P.3d 831 (2017), contradicts the case law and is not warranted by *Blomstrom*.

A. The Search at Issue Violated the Fourth Amendment

Under both the Fourth Amendment and article I, section 7, a warrantless search is generally per se unreasonable unless it falls within a recognized exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Both the Fourth Amendment and article I, section 7 provide strict privacy protections where invasion of a person's home is involved. *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007). "We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" *Florida v. Jardines*, 569 U.S. 1, 5-6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 176, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)). The curtilage is "'intimately linked to the home, both physically and psychologically,' and is where 'privacy

expectations are most heightened.'" *Jardines*, 569 U.S. at 7 (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)).

A warrantless intrusion into the curtilage of a residence, however, is not automatically an unconstitutional invasion of privacy:

> It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. An officer is permitted the same license to intrude as a reasonably respectful citizen. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

State v. Seagull, 95 Wn.2d 898, 902-03, 632 P.2d 44 (1981) (footnote omitted) (internal citations omitted).[17] In addition, our Supreme Court in *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991)[18] (quoting *Seagull*, 95 Wn.2d at 905), set out criteria for determining whether an officer exceeded the scope of a permissible "'open view.'" Of those considerations, discussed below, the one most pertinent to this appeal is the fourth, whether the officers "used the normal, most direct access route to the house." *See Myers*, 117 Wn.2d at 345.

To a reasonably respectful citizen, access to the curtilage that is impliedly open would include normal access to the front door or other entrance where one could reasonably expect to contact the resident. In may also include a driveway such as the one here. However, absent permission, an emergency, or other circumstances suggesting the contrary, a reasonably respectful citizen would not view the implied invitation to access the curtilage of a residence as a

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[17] *Seagull* examined the challenged search under the Fourth Amendment. 95 Wn.2d at 902.

[18] *Myers* examined the challenged search under both the Fourth Amendment and article I, section 7. 117 Wn.2d at 336-37.

license, say, to search along the side or rear walls of the house or to peer into the owner's vehicles parked next to the residence.

Although another door existed on the back side of the residence facing west, Sergeant Andrew Pernsteiner used the sliding glass door and entry steps on its east side to contact Jackman. Before doing that, however, the officers walked past the sliding glass door and entry steps, the obvious entry to the house, and followed the driveway around the south end of the house, which contained two garage doors as depicted in the photograph at exhibit 4. They observed two cars in a parking area in front of the two doors. A "No Trespassing" sign was posted between the garage doors just below a security lamp, although the officers did not see it. The Honda Accord was parked with its nose very close to the garage door. Sergeant Pernsteiner then left the driveway and walked along the length of the Honda Accord until he could view the VIN through the windshield in the light of the security lamp which had been activated by the officers' presence.

Assuming that the driveway was impliedly open to the officers, nothing would further imply to a reasonably respectful citizen a license to leave that driveway, walk to within two or three feet of the residence, after dark, in a location with no relation to obtaining access or contacting the owner, and peer into a vehicle to obtain information. Under the legal principles above, this was an unconstitutional intrusion into the curtilage.

As noted above, the court in *Seagull* also asked whether any departure from the area of implied invitation was "a substantial and unreasonable departure from such an area." *Seagull*, 95 Wn.2d at 903. In addressing that question, the court stated that "[w]hat is reasonable cannot be determined by a fixed formula. It must be based on the facts and circumstances of each case."

Id. (citing *Ker v. California*, 374 U.S. 23, 33, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963)). To answer this question, the *Seagull* court then surveyed cases from other jurisdictions and in its analysis of them focused on the circumstances that later were used in *Myers*, 117 Wn.2d at 345, as elements of a permissible open view. *Seagull*, 95 Wn.2d at 903.

Although the case law may blend somewhat the inquiries into the scope of the area of implied invitation and whether a departure from that area is reasonable, *Seagull*'s use of those criteria is not obscure. The court focused on whether the officer was on a normal access route to a door of the house, whether his actions were part of an honest attempt to contact the occupants, whether he got as close as he could to the structure in which he saw the contraband, whether he spied into a house, whether he created an artificial vantage point, whether the events occurred in daylight, and whether he went to the residence with the purpose of looking for contraband. *Id.* at 905.

With the exception of the last listed consideration, these taken together counsel that leaving the driveway and looking into the Honda next to the house was a substantial and unreasonable departure from the area of implied invitation. The officer was not on a normal access route to a door, his look into the car was not part of an attempt to contact the occupant or to find a door to the house, he got as close to the Honda as possible, the intrusion occurred after dark, and although the officer did not look into the house, he did look into the vehicle.

The officer, rather, left the area of implied invitation and looked into the Honda because he had good reason to believe it was stolen. Under the case law above, that warrantless entry violated the Fourth Amendment. With that, it is unnecessary to examine the more protective article I, section 7 of the Washington Constitution.

B. *Blomstrom* Should Not Be Read to Require a *Gunwall*[19] Analysis Before Article I, Section 7 Can Be Applied to These Circumstances

The majority upholds the search under the Fourth Amendment. It also declines to decide whether the search violated article I, section 7 because a *Gunwall* analysis was not carried out, relying on *Blomstrom*. However, to read *Blomstrom* to require a fresh *Gunwall* analysis for each new context in which a state constitutional provision is independently applied is not warranted by *Blomstrom* and threatens mischief to this state's tradition of strong independent constitutional adjudication. Weakening that tradition in turn weakens the counterbalance of healthy state constitutional protections in our federal system: a balance that our times have shown to be indispensable.

The issue in *Blomstrom* was whether either article I, section 7 of the Washington Constitution or the Fourth Amendment to the United States Constitution prohibited the requirement that defendants charged with driving under the influence and released before trial submit to random urinalysis testing. 402 P.3d at 835, 841. The court noted that it had "not determined if Washington's Constitution provides broader protection in the specific context of bodily functions and pretrial release conditions" and proceeded to a *Gunwall* analysis as part of its examination of the state constitutional provision. *Id.* at 842-43.

The Petitioners, though, had requested the court to perform a *Gunwall* analysis and briefed their view of it. The Respondents in turn proposed their own *Gunwall* analysis. None of the parties raised the issue of whether a *Gunwall* analysis was in fact required in this context.

[19] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Thus, the majority opinion relies on a dictum to suggest a rule of decision that was neither briefed by the parties nor analyzed by the court. Proper judicial restraint counsels that we not rest a potentially consequential pronouncement on such slight support.

More to the point, reading *Blomstrom* to require a new *Gunwall* analysis for every new context in which a state constitutional provision is independently applied contradicts the approach of the case law. For example, the issue in *State v. Winterstein*, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009), was whether the inevitable discovery rule is consistent with article I, section 7. After noting that "[i]t is well-established that article I, section 7 provides greater protection of privacy rights than the Fourth Amendment," 167 Wn.2d at 631, the court analyzed the case law, concluding that

> [c]onsistent with this precedent, we reject the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7.

Id. at 636. The court did not conduct a *Gunwall* analysis.

The Supreme Court has followed this approach to *Gunwall* in other decisions. In *State v. Jorgenson*, 179 Wn.2d 145, 148, 312 P.3d 960 (2013), the Supreme Court carried out a *Gunwall* analysis to determine that article I, section 24, the right to bear arms, is interpreted independently of the Second Amendment, but then left *Gunwall* and turned to a straight case law review to determine what article I section 24 in fact means and requires. *Jorgenson,* thus, is squarely within the approach of *Winterstein*: a *Gunwall* analysis is required to determine whether a state constitutional provision is interpreted independently or is more protective than its federal counterpart. However, once that is established, a new *Gunwall* analysis is not required to apply that state constitutional provision to each new set of factual circumstances. Similarly, in *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013), the court considered a challenge under both the

Fourth Amendment and article I, section 7 to the search of a purse incident to arrest. The court noted that "article I, section 7 is more protective of individual privacy than the Fourth Amendment, and we turn to it first when both provisions are at issue." *Byrd*, 178 Wn.2d at 616. The court then turned to a case law analysis of the issue under both constitutional provisions. *Byrd*, 178 Wn.2d at 616-20. It did not perform a *Gunwall* analysis.

Finally, in *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007), the court decided whether a warrant is valid under article I, section 7 when a warrant affiant negligently fails to disclose facts that would have negated probable cause. The court began its analysis by stating:

> It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). Thus, a *Gunwall* analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis. *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).
>
> In determining the protections of article I, section 7 in a particular context, "the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result." *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994). This involves an examination of the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest. *State v. Walker*, 157 Wn.2d 307, 317, 138 P.3d 113 (2006).

Chenoweth, 160 Wn.2d at 462-63 (footnotes omitted).

The majority attempts to avoid the force of *Chenoweth* by pointing out that the Court in fact carried out a *Gunwall* analysis. This, however, takes nothing away from the Court's message in the excerpt from *Chenoweth* immediately above: once it is established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protection, an additional *Gunwall* analysis is not necessary to apply article I, section 7 to each new set of

circumstances. Instead, the reviewing court carries out the sort of conventional analysis noted in *Chenoweth*. *Id.* at 462-63. This approach conforms to that taken in *Winterstein*, *Jorgensen* and *Byrd,* each discussed above.

The approach of these cases is plain. A *Gunwall* analysis is not required every time article I, section 7 is applied in a new context. Instead, the court acknowledges that article I, section 7 generally is more protective and then engages in a conventional legal analysis to determine its scope and effect in the circumstances presented. This approach to state constitutional adjudication is also consistent with the historical view of the principal academic authority on the subject:

> After *State v. Gunwall*[, 106 Wn.2d 54] (1986), the Washington Supreme Court for a period required that litigants seeking to rely on the state constitution use six criteria to contrast the cited provision with the equivalent provision of the U.S. Constitution. It gradually became well settled that Article I, Section 7 ... provides greater protection to individual rights than the Fourth Amendment. . . . As a result, for this section, the court no longer requires the extensive analysis called for in *Gunwall* (*State v. Ferrier*, 1998; *State v. Parker*, 1999).

Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION, at 32 (2d ed. 2013).

To assume that *Blomstrom* requires a new *Gunwall* analysis in every new context contradicts the approach of *Winterstein*, *Jorgenson*, *Byrd*, and *Chenoweth* on the basis of a statement in *Blomstrom* that was not necessary to its analysis and that was not briefed or analyzed. The majority's approach runs counter to these four cases and thus ignores the same principles of stare decisis on which it presume to lecture. The need for *Gunwall* analyses is an important and potentially subtle matter that warrants thorough argument and treatment. Abandoning past case law on the basis of a dictum in a case that didn't even analyze the issue

falls well short of what constitutional adjudication deserves. Article I, section 7 should have been considered in this appeal.

The search at issue violated the Fourth Amendment. If as the majority holds, it did not offend the Fourth Amendment, then the search should have been judged under article I, section 7. For these reasons, I dissent.

Bridgewater, C.J.

FORREST, C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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