SUPREME COURT NO. 95632-4

NO. 48800-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN MAYFIELD,

Petitioner.

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

The Honorable Stephen Warning, Judge
The Honorable Michael Sullivan, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner John Mayfield asks this Court to grant review of the court of appeals' unpublished decision in State v. Mayfield, No. 48800-1-II, filed January 4, 2018 (Appendix A). The court of appeals denied Mayfield's motion for reconsideration on February 13, 2018 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

This case involves the attenuation doctrine. A police officer obtained Mayfield's consent to search his vehicle immediately after Mayfield was illegally seized. Three novel issues are presented here, one of which divided the court of appeals and each of which independently warrant this Court's review.

1. A majority of the court of appeals panel refused to consider Mayfield's article I, section 7 challenge to the search of his truck because he did not conduct an express Gunwall[1] analysis. A dissenting judge disagreed with the majority, reasoning a Gunwall analysis is no longer required in this context.

a. Is this Court's review warranted under RAP 13.4(b)(1), (b)(2), and (b)(3) to resolve conflict among decisions by this Court and the court of appeals as to whether a Gunwall analysis is necessary with every new article I, section 7 challenge?

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

b. Alternatively, is this Court's review also warranted under RAP 13.4(b)(1) because a Gunwall analysis is not necessary in the context of the attenuation doctrine?

2. Is this Court's review warranted under RAP 13.4(b)(3) and (b)(4) to decide once and for all whether the federal attenuation doctrine is compatible with article I, section 7—an issue that has ultimately evaded a definitive decision by this Court?

3. Is this Court's review further warranted under all the RAP 13.4(b) criteria to determine whether a voluntary consent to search, obtained with Ferrier[2] warnings, attenuates a search from an illegal seizure—a novel conclusion by the court of appeals' majority opinion that conflicts with State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), other court of appeals decisions, as well as analogous U.S. Supreme Court precedent holding that Miranda[3] warnings do not attenuate a confession from an illegal seizure?

C. STATEMENT OF THE CASE

Mayfield was convicted of one count of possession with intent to deliver methamphetamine. The basis for the conviction was police found methamphetamine in Mayfield's vehicle after he consented to a search of his

[2] State v. Ferrier, 136 Wn2d 103, 960 P.2d 927 (1998).

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

person and vehicle. Before trial, Mayfield moved to suppress all evidence discovered as a result of the searches. CP 7-15.

1. Substantive CrR 3.6 Evidence

Deputy Andrew Nunes testified he responded to a report by Derek Selte of an unknown vehicle parked in his driveway. RP 4-6. Nunes acknowledged the driveway was part of the church parking lot, so the driveway did not look like it belonged to the house. RP 18-19. Once on scene, Nunes called Sergeant Cory Huffine for backup. RP 10.

Selte told Nunes he arrived home to find a truck in his driveway, and a man, later identified as Mayfield, sleeping in the driver's seat. RP 6. After several attempts, Selte was able to wake Mayfield and told Mayfield to leave or he would call the police. RP 7. Mayfield attempted to put his vehicle in reverse, but the "engine would just rev but nothing would go." RP 7. Mayfield eventually exited the vehicle on the passenger side. RP 7.

When Nunes arrived shortly thereafter, Mayfield's truck was running and the passenger door open, so Nunes turned off the engine and closed the door. RP 8. Nunes did not notice anything suspicious inside the truck. RP 8. Nunes saw Mayfield walking towards him on the other side of the street, approached, and started talking with Mayfield. RP 8.

Nunes asked Mayfield why his vehicle was parked in Selte's driveway. RP 9. Mayfield initially said he stopped there because he needed

to go to the bathroom. RP 9. Later in the conversation Mayfield said he was also experiencing vehicle trouble. RP 9. Mayfield told Nunes he left his truck because he "was concerned that he was going to be assaulted by Mr. Selte." RP 10. Mayfield explained he went to a friend's house down the road, but his friend was not home. RP 10. Huffine arrived sometime during this conversation and stood "[r]ight next" to Mayfield. RP 28.

At this point, Nunes admitted he did not suspect Mayfield of "a specific crime, but the facts seemed strange for the circumstances, where the vehicle was at and kind of his explanation." RP 11. Nevertheless, Nunes asked Mayfield for his identification and confirmed Mayfield was the registered owner of the truck. RP 12, 20. Nunes also confirmed Mayfield did not have any outstanding warrants. RP 12. Nor did Nunes observe any signs that Mayfield was under the influence of drugs or alcohol. RP 23.

But Nunes did not end his contact with Mayfield there, explaining "[d]ispatch advised me he was a convicted felon and DOC-active" for a weapons incident with an incendiary device. RP 22. Nunes was not aware Mayfield had any prior drug offenses. RP 22. Nunes went back to his patrol car and checked to see if they "had any history" on Mayfield. RP 12. Nunes did so "[j]ust because of the strange circumstances of the contact. I kind of wanted to see who I was dealing with. I had never personally met Mr.

Mayfield, and with being a convicted felon and what was going on I wanted to see who he was." RP 12-13.

Nunes then asked Mayfield "if he had anything on him that was illegal or that [Nunes] should be concerned about," like drugs or weapons. RP 13, 23. Mayfield said he did not. RP 13. Nor did Mayfield make any furtive movements that gave Nunes cause to suspect he was armed. RP 23. Nunes also asked Mayfield if "he had ever used drugs," to which Mayfield responded "he had used three weeks ago." RP 15, 23.

Nunes next asked if Mayfield would consent to a search of his person and told Mayfield he did not have to consent. RP 13. Mayfield agreed. RP 13. Nunes admitted at that point he "did not suspect [Mayfield] of committing any specific crime." RP 23. Rather, Nunes wanted to search Mayfield "[b]ased on him being a convicted felon and active DOC supervision and that history that I had looked at in our record system indicated that there may be a drug aspect to this." RP 13-14.

Nunes found around $464 in cash in Mayfield's front pocket, "crumpled up in several different wads," which Nunes thought was unusual because Mayfield's wallet was in his back pocket. RP 14. Nunes explained that based on his "history of dealing with investigating drug crimes," the money was "consistent for people either purchasing or selling drugs." RP

14. Nunes examined the items in front of Mayfield and questioned him about them. RP 24.

Nunes returned Mayfield's wallet and cash, but said his attention shifted to Mayfield's truck because he suspected drugs were involved. RP 15. Nunes asked Mayfield if he "had anything illegal in his vehicle," which Mayfield denied. RP 15. Nunes then requested to search Mayfield's vehicle. RP 16. Nunes gave Mayfield Ferrier warnings: "that he had the right to refuse the search, he could restrict the search, and he could revoke the search at any time." RP 16. Mayfield consented to the search. RP 16. Nunes did not inform Mayfield of his Miranda rights. RP 25. Nunes then stationed Sergeant Huffine next to Mayfield during the search. RP 17. He found methamphetamine and baggies inside the vehicle. RP 17, 197.

Mayfield testified he had parked in the driveway because he was tired. RP 26-27. He awoke to Selte "cussing at me, telling me to get the heck of their property, they were calling the police." RP 27. Mayfield was startled and afraid of a physical confrontation, so he "ended up running out the other door." RP 27. Mayfield walked back to his truck when he saw a police officer there and felt it was safe to return. RP 27.

When Nunes began asking him questions and Huffine stood next to him, Mayfield did not feel free to leave and believed they were investigating him for a crime. RP 29, 31. Mayfield did not feel any realistic ability to

refuse consent to the search of his person or his truck, believing "they were going to do it anyway." RP 30-31. Mayfield felt scared throughout the encounter because "they were questioning [him] a lot" and acting like he "did something wrong." RP 30-31.

2. CrR 3.6 Arguments and Trial Court's Ruling

Mayfield argued Nunes's initial contact with him transformed into an illegal seizure once Nunes started questioning him about drugs and weapons absent any suspicion he had committed a crime. RP 47. Mayfield asserted his consent to search was not attenuated from that illegal seizure because they were contemporaneous, with no intervening circumstances. RP 50. Mayfield further asserted there was no valid purpose in continuing to detain him, only a fishing expedition, and he was never read his Miranda rights. RP 50-51, 58-59.

The State agreed the seizure and consent to search were close in time and there were no significant intervening circumstances. RP 56. The State acknowledged the officers did not inform Mayfield of his Miranda rights, but claimed "[t]he case law holds that Ferrier warnings in this case are just as important as Miranda warnings." RP 57. The State argued the Ferrier warnings "dispel[led] any illegally in terms of the consent." RP 57.

The trial court found Mayfield was illegally seized when Nunes began asking him questions about drugs and weapons absent reasonable

articulable suspicion. RP 60-61. The court found the seizure and the consent were close in time; there were no intervening circumstances; and Nunes acted purposefully in pursuing a drug investigation. RP 61-62. However, the court denied the motion to suppress, concluding the Ferrier warnings attenuated the search from the illegal seizure. RP 62.

The court entered the following pertinent written conclusions of law:

> 2. The defendant was seized when Deputy Nunes began asking questions about the defendant's drug use, whether he would have anything illegal on his person, and when he sought permission to conduct a pat-down search of the defendant's person.
>
> 3. The seizure of the defendant was illegal. Deputy Nunes did not have reasonable and articulable suspicion that the defendant was engaged in criminal activity.
>
> 4. The temporal proximity of the defendant's detention and his subsequent consent to search his truck were very close together.
>
> 5. There were no significant intervening circumstances between the defendant's detention and his subsequent consent to search his truck.
>
> 6. The purpose of Deputy Nunes' conduct was to determine why the defendant has been parked at Mr. S[e]lte's residence. However, Deputy Nunes' contact became a drug investigation that was not based upon any reasonable and articulable suspicion of actual criminal conduct.
>
> 7. Deputy Nunes provided the defendant with his Ferrier warnings prior to receiving consent to search his truck. The giving of Ferrier warnings under these circumstances sufficiently attenuates search from any illegal detention.

CP 20. Mayfield was subsequently found guilty by a jury of possession with intent to deliver. CP 52; RP 358-62.

3. Appellate Arguments

Mayfield, the State, and the court of appeals all agreed Mayfield was illegally seized when Nunes began asking him about his drug use absent reasonable, articulable suspicion. Br. of Appellant, 13-20; Br. of Resp't, 8-9; Majority, 9-10 (acknowledging "there was an illegal seizure").

Mayfield argued the evidence should have been suppressed under our state constitution because the federal attenuation doctrine is incompatible with article I, section 7. Though Mayfield did not conduct an express Gunwall analysis, he discussed at length the differences in the text, history, and purpose of the Fourth Amendment compared to article I, section 7. Br. of Appellant, 21-32.

For instance, the Fourth Amendment protections turn on the reasonableness of government action, while article I, section 7 recognizes an individual right to privacy with no express limitations. Br. of Appellant, 23. The goal of the Fourth Amendment is to deter police misconduct. Br. of Appellant, 23-25. The attenuation doctrine is heavily rooted in that goal, with its primary focus on the purpose and flagrancy of the police misconduct. Br. of Appellant, 23-24. By contrast, article I, section 7 "is

constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful government intrusions." Br. of Appellant, 29 (quoting State v. Chenoweth, 160 Wn.2d 454, 472 n.14, 158 P.3d 595 (2007)).

The State did not argue a Gunwall analysis was necessary for the court of appeals to reach the article I, section 7 issue.

Mayfield argued, in the alternative, that the evidence should have been suppressed under the attenuation doctrine. He emphasized this Court's decision in Armenta, which held Armenta's voluntary consent to a search of his vehicle was tainted by the immediately preceding illegal detention. Br. of Appellant, 33-34. Mayfield further emphasized U.S. Supreme Court precedent holding Miranda warnings do not attenuate a confession from an illegal seizure, analogous to the Ferrier warnings and consent to search in his case. Br. of Appellant, 37-41.

4. Court of Appeals Decision and Motion to Reconsider

A majority of the court of appeals panel refused to consider Mayfield's state constitutional challenge because he did not conduct an express Gunwall analysis. Majority, 4-7. The majority recognized this Court has stated a Gunwall analysis is no longer necessary under article I, section 7, but emphasized this Court undertook one in its recent decision, Blomstrom v. Tripp, 189 Wn.2d 379, 402 P.3d 831 (2017). Majority, 5-6.

The majority claimed "Mayfield fail[ed] to provide any analysis of why our state constitution should be treated differently from the federal constitution in the context of the attenuation doctrine." Majority, 7.

Chief Judge Bjorgen dissented, emphasizing "[a] Gunwall analysis is not required every time article I, section 7 is applied in a new context." Dissent, 14. Judge Bjorgen pointed to several recent article I, section 7 decisions where this Court did not conduct a Gunwall analysis, as well as several statements by this Court that Gunwall is no longer necessary under article I, section 7. Dissent, 12-13. Most particularly, this Court in State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009), did not perform a Gunwall analysis in rejecting the inevitable discovery doctrine: "If a Gunwall analysis was not needed in Winterstein, it should not be required here." Dissent, 12. The majority opinion did not respond to the dissent's point on this or address Winterstein.

The majority opinion also rejected Mayfield's challenge to the search of his truck under the federal attenuation doctrine. Majority, 7-10. Without a single citation to authority, the majority reached the novel conclusion that Ferrier warnings constituted an "intervening circumstance" because they "ensured that Mayfield's consent was voluntary even though there was an illegal seizure." Majority, 9. The majority held: "When the intervening circumstances include giving Ferrier warnings, a search is sufficiently

attenuated from the illegal seizure." Majority, 4. The majority did not address Armenta or the analogous Miranda cases.

Mayfield moved to reconsider, emphasizing this Court's decision in Winterstein, along with the 11 pages of briefing he provided as to why the attenuation doctrine is inconsistent with article I, section 7. Motion, 1-9. He also conducted a complete Gunwall analysis. Motion, 9-15. Mayfield further pointed out the majority overlooked this Court's controlling decision in Armenta that a voluntary consent to search is insufficient for attenuation. Motion, 15-17. Finally, Mayfield emphasized the majority failed to address or distinguish the analogous U.S. Supreme Court cases. Motion, 17-18.

The majority denied Mayfield's motion for reconsideration, without calling for an answer form the State. Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT'S REVIEW IS NECESSARY TO PROVIDE DEFINITIVE GUIDANCE AS TO WHETHER A GUNWALL ANALYSIS IS STILL NECESSARY FOR EVERY NEW ARTICLE I, SECTION 7 CHALLENGE.

a. Is a *Gunwall* analysis required in every new article I, section 7 context?

The majority opinion held "Mayfield's failure to argue, sufficiently cite to authority, and brief [the Gunwall] criteria means that the parties have not sufficiently argued the matter, and thus, we may not consider it." Majority, 5. The two judges concluded the Gunwall requirement "has

been repeatedly iterated and reaffirmed recently in [Blomstrom.]" Majority, 5. The majority accordingly refused to consider Mayfield's article I, section 7 challenge. Majority, 7.

Judge Bjorgen dissented, emphasizing the majority's reading of Blomstrom was not warranted and "threatens mischief to this State's tradition of strong independent constitutional adjudication." Dissent, 11. Based on several decisions by this Court—Winterstein, Chenoweth, State v. Jorgenson, 179 Wn.2d 145, 312 P.3d 960 (2013), and State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013)—Judge Bjorgen reasoned:

> 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.

Dissent, at 14. Judge Bjorgen believed "the search of the truck should have been judged under article I, section 7." Dissent, at 15.

This Court conducted a brief Gunwall analysis in Blomstrom and concluded the six factors supported a separate analysis of article I, section 7 "in the context of urinalysis imposed as a pretrial release condition." Blomstrom, 189 Wn.2d at 401-02. As Judge Bjorgen pointed out, though, both parties in Blomstrom independently briefed and proposed their own Gunwall analysis. Dissent, 11. "None of the parties [in Blomstrom] raised

the issue whether a Gunwall analysis was in fact required in this context." Dissent, 11. Blomstrom does not support the majority's conclusion that Mayfield was required to perform a Gunwall analysis. Dissent, 11-12.

This Court has repeatedly stated a Gunwall analysis is no longer necessary in article I, section 7 cases. For instance, in 2003, this Court recognized "[i]t is now settled that article I, section 7 is more protective than the Fourth Amendment, and a Gunwall analysis is no longer necessary." State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). In 2007, this Court reiterated a Gunwall analysis "is unnecessary to establish that this court should undertake an independent state constitutional analysis" under article I, section 7. State v. Surge, 160 Wn.2d 65, 71, 156 P.3d 208 (2007); accord Chenoweth, 160 Wn.2d at 463 (same).

Instead, "[t]he only relevant question is whether article I, section 7 affords enhanced protection in the particular context." Surge, 160 Wn.2d at 71. "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.'" Chenoweth, 160 Wn.2d at 463 (quoting City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)).

The majority claimed "Mayfield fail[ed] to provide any analysis of why our state constitution should be treated differently from the federal

constitution in the context of the attenuation doctrine." Majority, 7. This is, quite simply, false.[4] Mayfield devoted 11 pages of analysis to examining why the attenuation doctrine runs afoul article I, section 7, just as required by this Court's jurisprudence. Br. of Appellant, 21-32. Mayfield pointed this out to the majority in his motion to reconsider, but to no avail. Motion, 6-9.

Either there is conflict among this Court's decisions or the court of appeals' majority opinion conflicts with this Court's decisions. The former warrants this Court's definitive guidance under RAP 13.4(b)(3), as it is causing confusion and dissent among the judges at the court of appeals. The latter warrants this Court's correction under RAP 13.4(b)(1), because at least two judges at the court of appeals are using Gunwall as a shield to avoid addressing criminal appellants' arguments on the merits. See also Jackman, 2018 WL 286809, at *3-*4.

b. Is a *Gunwall* analysis necessary in the context of the federal attenuation doctrine?

Even if a fresh Gunwall analysis will sometimes be necessary in a new article I, section 7 context, it was not necessary here. In Utah v. Strieff, __U.S.__, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016), the

[4] The same majority issued another unpublished opinion on the same day as Mayfield's case including similar language: "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." State v. Jackman, No. 48742-0-I, 2018 WL 286809, at *4 (Wn. Ct. App. Jan. 4, 2018). This, of course, raises a host of concerning questions. Jackman filed a petition for review on January 22, 2018, which this Court is set to consider on May 1, 2018. Mayfield cites Jackman only for this Court's reference.

U.S. Supreme Court recognized a specific subset of exceptions to the exclusionary rule: those that "involve the causal relationship between the unconstitutional act and the discovery of evidence." The Court noted three examples: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. Id.

Within this subset, this Court has considered whether the independent source and inevitable discovery doctrines are compatible with article I, section 7. In State v. Gaines, 154 Wn.2d 711, 717-22, 116 P.3d 993 (2005), this Court considered for the first time whether the independent source exception complies with article I, section 7, and concluded that it does. No Gunwall analysis was conducted.

In Winterstein, 167 Wn.2d at 631-36, this Court considered for the first time whether the inevitable discovery exception complies with article I, section 7. The court did not conduct a Gunwall analysis in concluding the doctrine "is at odds with the plain language of article I, section 7, which we have emphasized guarantees privacy rights with no express limitations." Id. at 635.

Mayfield discussed Winterstein in his briefing and again at oral argument before the court of appeals. Br. of Appellant, 22, 31; Oral Argument, 5:08-6:30. Judge Bjorgen recognized in his dissent that "[i]f a Gunwall analysis was not needed in Winterstein, it should not be required

here." Dissent, 12. The majority did not address Winterstein or respond to the dissent on this point. The majority opinion conflicts with Winterstein, warranting review under RAP 13.4(b)(1).

In a similar context, this Court held the good faith exception to the federal exclusionary rule is incompatible with article I, section 7 in State v. Afana, 169 Wn.2d 169, 179-84, 233 P.3d 879 (2010). Again, this Court did not conduct a Gunwall analysis.

The independent source doctrine, inevitable discovery doctrine, good faith exception, and attenuation doctrine are all similar subsets of the exclusionary rule. They consider whether, despite illegal police conduct, evidence should nevertheless be admissible. State v. Eserjose, 171 Wn.2d 907, 939-40, 259 P.3d 172 (2011) (C. Johnson, J., dissenting) ("Just like the inevitable discovery exception rejected in Winterstein and the good faith exception rejected in Afana, this attenuation exception allows illegally obtained evidence to be admitted."). This Court has considered whether three of these four federal exceptions are compatible with article I, section 7, but at no point conducted a Gunwall analysis. Consideration of the fourth and final doctrine—attenuation—should not require a Gunwall analysis, either.[5]

[5] Consistent with this, neither the three-justice plurality nor the four-justice dissent in Eserjose conducted a Gunwall analysis in considering whether the attenuation doctrine is

The only remaining analysis is whether the attenuation doctrine is compatible with article I, section 7. Gaines, Winterstein, and Afana answer this question. The independent source doctrine "recognizes that probable cause may still exist based on legally obtained information after the illegally obtained information is excluded." Afana, 169 Wn.2d at 181 (emphasis added). Thus, the tainted evidence is suppressed and so the independent source doctrine does not run afoul of Washington's "nearly categorical exclusionary rule." Id. By contrast, the inevitably discovery doctrine and good faith exception do not "disregard illegally obtained evidence." Afana, 169 Wn.2d at 181; Winterstein, 167 Wn.2d at 634. Both are therefore incompatible with article I, section 7. The attenuation likewise does not disregard the illegally obtained evidence.

This is not a case where the court must determine whether individuals have a privacy interest in a particular matter never before considered in Washington, like their curbside garbage in State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990), or pretrial defendants' urine in Blomstrom. Rather, this case, like Gaines, Winterstein, and Afana, presents the question of whether evidence is admissible despite illegal police conduct. A Gunwall analysis is no longer necessary *in this context*, as these three

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compatible with article I, section 7. 171 Wn.2d at 926-29 (plurality opinion); id. at 939-40 (C. Johnson, J., dissenting).

cases demonstrate. This Court's review is warranted under RAP 13.4(b)(1) because the court of appeals' majority opinion conflicts with these cases.

2. THIS COURT'S REVIEW IS NECESSARY TO FINALLY DECIDE WHETHER THE FEDERAL ATTENUATION DOCTRINE IS COMPATIBLE WITH ARTICLE I, SECTION 7.

A majority of this Court has never decided whether the federal attenuation doctrine is compatible with article I, section 7. In Eserjose, three justices applied the attenuation doctrine to Eserjose's confession following an unlawful arrest. 171 Wn.2d at 923-24 (Alexander, J., lead opinion). One justice concurred in the result only. Id. at 925 (Fairhurst, J., concurring in result only). Another justice concurred in the result, but believed the lead opinion erroneously applied an attenuation inquiry. Id. at 934 (Madsen, C.J., concurring). Four justices dissented on the basis that "[a]n attenuation exception, as articulated by the lead opinion, is fundamentally at odds with our article I, section 7 protection." Id. at 939 (C. Johnson, J., dissenting).

More recently, in State v. Smith, 177 Wn.2d 533, 303 P.3d 1047 (2013), several justices emphasized the attenuation doctrine has never been expressly adopted by this Court. Id. at 552 (Madsen, C.J., concurring in the result) ("The concurrence's use of the attenuation doctrine is equally concerning because we have not explicitly adopted it under article I,

section 7."); id. at 553 (González, J., concurring in the result) ("I recognize this court has shown some recent reluctance to adopt the attenuation doctrine."); id. at 559 (Chambers, J., dissenting) ("This court has never adopted the attenuation doctrine and, in my view, it has no place under article I, section 7.").

This case squarely presents the issue left undecided in Eserjose and Smith. A definitive decision from this Court would provide guidance to courts and practitioners across the state, warranting review under both RAP 13.4(b)(3) and (b)(4).

Mayfield asks this Court to consider the Gunwall analysis provided below, which he also provided to the court of appeals in his motion for reconsider. See RAP 1.2(a); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983), rev'd on other grounds by State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989) (considering constitutional issue raised for the first time in petition for review); Conner v. Universal Utils., 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (considering issue raised for the first time in a motion for reconsideration).

(4) Preexisting state law.[6] The Fourth Amendment was incorporated to the states in 1961. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct.

[6] The first, second, third, and fifth Gunwall factors "are uniform in any analysis of article I, section 7, and generally support analyzing our State constitution independently from

1684, 6 L. Ed. 2d 1081 (1961). The attenuation doctrine stems from Wong Sun v. United States, where the U.S. Supreme Court held the connection between Wong Sun's illegal arrest and voluntary confession several days later "'had become so attenuated as to dissipate the taint.'" 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (quoting Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)). In 1975, the Court developed the four factors relevant in considering attenuation: (1) temporal proximity of the unlawful detention and discovery of evidence, (2) the presence of intervening circumstances, (3) the purpose and flagrancy of police misconduct, and (4) the giving of Miranda warnings after the initial illegality. Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

Despite the attenuation doctrine existing under federal law for more than 50 years, no Washington court has ever expressly adopted it under article I, section 7. Several former and current justices on this Court have sharply criticized it. See, e.g., Smith, 177 Wn.2d at 552 (Madsen, J., concurring); Eserjose, 171 Wn.2d at 937 (C. Johnson, J., dissenting).

While Fourth Amendment protections turn on the reasonableness of government action, article 1, section 7 "'clearly recognizes an individual's right to privacy with no express limitations." Afana, 169

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the Fourth Amendment." Blomstrom, 189 Wn.2d at 401. Mayfield therefore analyzes only the fourth and sixth Gunwall factors.

Wn.2d at 180 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). The primary justification for excluding evidence under the Fourth Amendment is to deter police misconduct. Herring v. United States, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). Consistent with this, the most important factor of the attenuation doctrine is "the purpose and flagrancy of the official misconduct." Brown, 422 U.S. at 604. But this factor is largely irrelevant under article 1, section 7, given its primary concern with protecting individual privacy rights. Under our state provision, the purpose and flagrancy of the constitutional violation matters little. What matters is that there was a violation at all.

The attenuation also requires speculation and a balancing of factors, which this Court rejected as inconsistent with article I, section 7 in Winterstein. The Winterstein court found the inevitable discovery doctrine "necessarily speculative." 167 Wn.2d at 634. Inevitable discovery rests on the State's ability to prove that, despite unlawful police conduct, the evidence in question would necessarily have been discovered through proper means. Id. at 634-35.

Attenuation is similar, in that it rests on the State's ability to prove, despite unlawful police conduct, the individual would have confessed or the evidence would have been discovered anyway. See Eserjose, 171 Wn.2d at 942 (Alexander, J., lead opinion) (positing Eserjose maintained

his innocence until his accomplice confessed, "which suggests that it was this information, not the illegal arrest, that induced the confession"). In short, both doctrines call for a speculative hindsight examination of the same question: "What if the police had not acted unlawfully?" See United States v. Ceccolini, 435 U.S. 268, 283, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978) (Burger, C.J., concurring) (emphasizing the "scholastic hindsight" inherent in the attenuation doctrine).

The attenuation doctrine further requires courts to balance the defendant's free will to confess or consent to a search and the deterrent effect of the exclusionary rule. The Winterstein court held that, under article I, section 7, "the balancing of interests should not be carried out when evidence is obtained in violation of a defendant's constitutional rights." 167 Wn.2d at 632. It would be inconsistent with this Court's analysis in Winterstein to adopt the attenuation doctrine while rejecting the inevitable discovery doctrine.

This preexisting state law demonstrates Washington courts reject exceptions to the federal exclusionary rule that are speculative and allow for admission of illegally obtained evidence. The fourth Gunwall factor therefore weighs in favor of rejecting the attenuation doctrine under article I, section 7.

(6) Matters of particular state or local concern. Mayfield has recognized privacy interests in his vehicle and his person. State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012); Robinson v. City of Seattle, 102 Wn. App. 795, 810, 819, 10 P.3d 452 (2000). "[P]rivacy matters are of particular state interest and local concern." State v. Johnson, 128 Wn.2d 431, 446, 909 P.2d 293 (1996).

This reality is reflected in the very text of article I, section 7, which focuses on the individual's private affairs, rather than the Fourth Amendment's focus on the reasonableness of searches and seizures. It is therefore a matter of particular state concern to protect Washingtonians from police intrusion into their private affairs without authority of law—here, the request to search Mayfield's person and truck absent reasonable, articulable suspicion.

Nor is there any "need for national uniformity" as to the application of the attenuation doctrine. Robinson, 102 Wn. App. at 819. Washington courts can and frequently do depart from Fourth Amendment jurisprudence. See, e.g., Snapp, 174 Wn.2d at 187 (rejecting a federal vehicle-search-incident-to-arrest exception); Boland, 115 Wn.2d at 576 (holding Washingtonians have a privacy interest in their curbside garbage). For example, numerous states have disagreed with the holding of Boland under their own state constitutions, but it remains good law in

our state. Washington has a long and proud history of independent analysis under article I, section 7. White, 97 Wn.2d at 109-10.

Consistent with Mayfield's original briefing, this Gunwall analysis demonstrates the real issue with the attenuation doctrine is its primary focus on the reasonableness of the police conduct, which is irrelevant under our state constitution. "As we have so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law." Snapp, 174 Wn.2d at 194. Attenuation is therefore inconsistent with article I, section 7. Mayfield asks this Court to grant review, consider his Gunwall analysis, and decide once and for all whether the attenuation doctrine is compatible with article I, section 7.

3. FINALLY, THIS COURT SHOULD DECIDE WHETHER FERRIER WARNINGS ALONE ATTENUATE A SEARCH FROM AN ILLEGAL SEIZURE.

Voluntary consent is an exception to the general rule that warrantless searches are per se unreasonable. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). However, "[a] consent to search obtained through exploitation of a prior illegality may be invalid even if voluntarily given." State v. Soto-Garcia, 68 Wn. App. 20, 27, 841 P.2d 1271 (1992).

In Armenta, the two defendants, Armenta and Cruz, were illegally seized when a police officer placed their money in his patrol car absent

reasonable, articulable suspicion that they were engaged in criminal activity. Armenta, 134 Wn.2d at 16. The officer then asked Armenta if he could search the vehicle and told Armenta he did not have to consent. Id. at 6. Armenta "freely and voluntarily consented to a search of his vehicle," where the officer found 260 grams of cocaine. Id. at 6-7, 16-17.

This Court held the defendants' "consent to the search of their vehicle, because it occurred immediately after the detention and without the benefit of Miranda warnings, did not remove the taint of the prior illegal detention." Id. at 17-18. The court emphasized "there were essentially no intervening circumstances." Id. at 17. The court felt "certain" the officer was not acting maliciously, but believed it was "apparent that he was 'fishing' for evidence of illegal drug trafficking." Id. The court therefore held "Armenta's consent, although voluntary, was tainted by the prior illegal detention." Id.

Similarly, in State v. Tijerina, 61 Wn. App. 626, 630, 811 P.2d 241 (1991), Division Three of the court of appeals held the defendant's voluntary consent to search his vehicle was not an intervening circumstance and was insufficient for attenuation.

Despite Mayfield's reliance on Armenta and Tijerina below, the majority reached the following conclusion:

> [T]here was an intervening circumstance. Deputy Nunes explicitly gave Ferrier warnings, even though not required in vehicle searches, before obtaining Mayfield's consent to search his truck. The Ferrier warnings that Deputy Nunes gave informed Mayfield that he had the right to refuse consent, had the right to limit the scope of consent, and had the right to revoke consent at any time. By giving Mayfield Ferrier warnings, the deputy ensured that Mayfield's consent was voluntary even though there was an illegal seizure.

Majority, 9; Br. of Appellant, 33-36. Put another way: "When the intervening circumstances include giving Ferrier warnings, a search is sufficiently attenuated from the illegal seizure." Majority, 4. The majority cited no legal authority in reaching this novel conclusion. Majority, 7-10.

Armenta should control the outcome of this case. Like Armenta, Mayfield's consent to search was voluntary. Also like Armenta, however, Mayfield's consent to search followed immediately after the illegal seizure, with no Miranda warnings given. There was also a quality of purposefulness to Nunes's actions, who acknowledged he "did not suspect [Mayfield] of committing any specific crime," yet persisted with the investigation. RP 23.

Armenta holds a voluntary consent to search does not constitute an intervening circumstance and is insufficient for attenuation. The majority opinion is in direct conflict with Armenta, warranting review under RAP 13.4(b)(1). The majority opinion also creates conflict among the court of

appeals, given the clear holding of Tijerina, warranting review under RAP 13.4(b)(2).

The majority opinion further warrants this Court's review under RAP 13.4(b)(3) because the U.S. Supreme Court has held Miranda warnings are not an intervening circumstance and do not attenuate a confession from an illegal seizure. For instance, Brown was arrested without probable cause, read his Miranda rights, and confessed less than two hours later. Brown, 422 U.S. at 592-95, 604. The Court held "there was no intervening event of significance whatsoever" between the illegal arrest and Brown's confession, despite the Miranda warnings. Id. at 604. The Court rejected a rule that Miranda warnings alone purge the taint of an illegal detention, because the warnings "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." Id. at 603.

Similarly, Taylor was arrested without probable cause, read his Miranda rights three times, and confessed six hours later. Taylor v. Alabama, 457 U.S. 687, 688-91, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982). The Court concluded his confession should have been excluded at trial because there was no "meaningful intervening event" between the unlawful arrest and Taylor's confession. Id. at 691. The Court again recognized the fact that Miranda warnings are given and understood "is not by itself sufficient to purge the taint of the illegal arrest." Id. at 690.

Miranda warnings are meant to ensure that a confession is knowingly and voluntarily given. Ferrier is a corollary to Miranda: Ferrier warnings are meant to ensure that a consent to search is knowingly and voluntarily given. Brown and Taylor held a voluntary confession following Miranda warnings is insufficient for attenuation. There is no basis to hold, as the majority did here, that a voluntary consent to search following Ferrier warnings is enough for attenuation.[7]

Proper Miranda or Ferrier warnings ensure only that a confession or consent to search is "voluntarily given." Soto-Garcia, 68 Wn. App. at 27. Voluntariness is a prerequisite for any consent to search or confession to be valid. It is not dispositive in the attenuation inquiry. Armenta, 134 Wn.2d at 16-17. Rather, in order for the causal chain to be broken after an illegal seizure, not only must the voluntariness standard be met, the confession or consent to search must also be "'"sufficiently an act of free will to purge the primary taint.'" Brown, 422 U.S. at 602 (quoting Wong Sun, 371 U.S. 471). The majority incorrectly conflated voluntariness and attenuation.

Mayfield was illegally seized when Deputy Nunes began asking him about his drug use, whether he had any illegal items on his person, and then requested to frisk Mayfield. Nunes obtained Mayfield's consent to search his vehicle. Nunes then immediately searched Mayfield's truck at the scene.

[7] Indeed, Washington courts have repeatedly applied Brown and Taylor in consent to search cases. See, e.g., Tijerina, 61 Wn. App. at 811; Soto-Garcia, 68 Wn. App. at 27.

The seizure, request to search, and consent all happened in the same location within the span of a few moments. Nothing interrupted the fast-moving chain of events. In Brown and Taylor, even a gap of several hours constituted close temporal proximity.

Mayfield's consent to search his vehicle after Ferrier warnings established only that his consent was voluntary. It did not attenuate the search from the illegal seizure, as the majority concluded. Rather, the causal chain between the seizure and the search was short and unbroken. There was no great—or even minor—lapse of time or noteworthy intervening event between the seizure and the search.

Like Armenta, the majority opinion did not address Brown and Taylor or make any attempt to distinguish them. This Court's review is warranted under RAP 13.4(b)(3) to determine whether Ferrier warnings are distinguishable from Miranda warnings in the attenuation context.

Finally, this Court's review is warranted under RAP 13.4(b)(4) because this case involves an issue of substantial public interest. The Brown court explained the reason for rejecting a categorical rule that Miranda warnings alone purge the taint of an illegal seizure:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or

> without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expendent of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

422 U.S. at 602-03 (footnote omitted) (citation omitted) (quoting Mapp, 367 U.S. at 648).

As it stands, the majority opinion essentially sanctions police fishing expeditions so long as Ferrier warnings are given. Police could conceivably approach random individuals on the street or knock on their front door, without cause, and ask to search their person, car, or home, without repercussion, so long as they were informed of their right to refuse consent. The U.S. Supreme Court has already condemned such a result, and so must this Court. The citizens of Washington state are entitled to be free from police intrusion into their private lives unless there is reasonable, articulable suspicion that they have engaged in criminal activity.

E. CONCLUSION

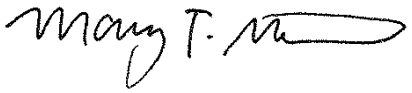
This case meets all four of the criteria for review under RAP 13.4(b). Acceptance of review and a definitive decision from this Court would provide necessary guidance to Washington state courts, attorneys, police

officers, and citizens. Mayfield respectfully asks this Court to grant review, reverse the court of appeals, and dismiss his conviction with prejudice.

DATED this 5th day of March, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN DOUGLAS MAYFIELD, Appellant.	No. 48800-1-II UNPUBLISHED OPINION

Sutton, J. — John D. Mayfield appeals his conviction for one count of possession of a controlled substance (methamphetamine) with intent to deliver. Mayfield argues that the trial court erred by denying his motion to suppress the evidence found in his truck because his consent to search was tainted by an illegal seizure. We hold that the trial court did not err in denying the motion to suppress the evidence found in Mayfield's truck. Accordingly, we affirm his conviction.

FACTS

The State charged Mayfield with one count of possession of a controlled substance (methamphetamine) with intent to deliver.[1] Mayfield filed a CrR 3.6 motion to suppress any and all evidence discovered as a result of the search of Mayfield's vehicle. Deputy Andrew Nunes of the Cowlitz County Sheriff's Office testified at the hearing on the motion to suppress evidence.

The trial court made findings of fact based on Deputy Nunes's testimony. On January 3, 2015, Derek Salte called the Cowlitz County Sheriff's Office to report a suspicious vehicle parked

[1] RCW 69.50.401(1), .401(2)(b).

in his driveway. Deputy Nunes responded to the call. When Deputy Nunes arrived he observed a truck in the driveway. The truck was still running, the passenger side door was open, and the windshield wipers were running. Deputy Nunes closed the door and turned off the truck.

Deputy Nunes contacted Salte. Salte told Deputy Nunes that when he arrived home he found an unfamiliar truck blocking his driveway. Salte observed a male who appeared to be sleeping in the vehicle. Salte was able to wake up the occupant of the vehicle and tell him to move the vehicle. The occupant exited the vehicle from the passenger side and ran down the street. While Deputy Nunes was talking to Salte he observed a male walking toward them on the opposite side of the street. Salte identified the male as the occupant of the vehicle.

Deputy Nunes approached the male and asked him if he was the owner of the truck. The male gave multiple explanations for parking the vehicle in the driveway and for running away from the vehicle. Deputy Nunes asked for the male's identification. Deputy Nunes identified the male as Mayfield, the registered owner of the truck. While Deputy Nunes was confirming Mayfield's identity, a Cowlitz County Sheriff's Office Sergeant arrived. Deputy Nunes learned that Mayfield was a convicted felon on active supervision by the Department of Corrections.

Deputy Nunes asked Mayfield if he had recently used any controlled substances. Mayfield responded that he had last used methamphetamine three weeks earlier. Deputy Nunes requested Mayfield's consent to search him and informed Mayfield that he did not have to consent to the search. Mayfield consented to the search. Deputy Nunes found $464.00, which was bundled in a way indicating that the cash may have been the result of drug transactions.

Deputy Nunes then requested consent to search Mayfield's truck. Deputy Nunes gave Mayfield *Ferrier*[2] warnings by informing Mayfield that he had the right not to consent to the search, he had the right to limit the scope of the search at any time, and he had the right to revoke consent at any time. Mayfield granted consent to search his truck. Mayfield did not revoke or limit his consent at any time. Deputy Nunes located a large bag that contained methamphetamine. Deputy Nunes also located several small plastic baggies containing methamphetamine residue.

Based on its findings of fact, the trial court concluded that Mayfield was not seized during the initial contact during which Deputy Nunes was attempting to discover the circumstances regarding the vehicle. However, the trial court concluded that Mayfield was seized when Deputy Nunes began asking Mayfield about his drug use. The trial court concluded that the seizure was illegal because "Deputy Nunes did not have a reasonable and articulable suspicion that the defendant was engaged in criminal activity." Clerk's Papers (CP) at 20. The trial court also concluded that there "were no significant intervening circumstances between [Mayfield's] detention and his subsequent consent to search his truck." CP at 20. But, the trial court also concluded "Deputy Nunes provided [Mayfield] with his *Ferrier* warnings prior to receiving consent to search his truck. The giving of *Ferrier* warnings under these circumstances sufficiently attenuates search (sic) from any illegal detention." CP at 20. Based on its conclusions of law, the trial court denied Mayfield's motion to suppress the evidence.

A jury found Mayfield guilty of possession of a controlled substance with intent to deliver. The trial court imposed a standard range sentence. Mayfield appeals.

[2] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

ANALYSIS

Mayfield argues that the trial court erred by applying the federal attenuation doctrine and by denying his motion to suppress the evidence found in this truck because his consent to search was tainted by an illegal seizure in violation of the Fourth Amendment of the United States Constitution and article 1, section 7 of our state constitution.

The issue before us is whether the exclusionary rule requires suppressing the evidence found in Mayfield's truck. The trial court concluded that the search was sufficiently attenuated from the illegal seizure to justify admitting the evidence found in Mayfield's truck. We review a trial court's legal conclusions on a motion to suppress de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The trial court relied on the federal attenuation doctrine as an exception to the exclusionary rule. The United States Supreme Court has recognized the attenuation doctrine as an exception to the exclusionary rule under the Fourth Amendment. *Utah v. Strieff*, ___, U.S. ___, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). When the intervening circumstances include giving *Ferrier* warnings, a search is sufficiently attenuated from the illegal seizure. Accordingly, we hold that the trial court did not err by denying Mayfield's motion to suppress the evidence found in his truck, and thus, we affirm his conviction. We address below our state constitution and then address the United States Constitution.

A. WASHINGTON STATE CONSTITUTION

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 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 Constitution.[3] Mayfield'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);

[3] 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.

> *McCready*, 123 Wn.2d at 267. *But this enhanced protection depends on the context in question.*

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*[4] 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.

[4] 179 Wn.2d 145, 148, 312 P.3d 960 (2013) (right to bear arms).

Here, Mayfield fails to provide any analysis of why our state constitution should be treated differently from the federal constitution in the context of the attenuation 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 11. 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)).

Mayfield fails to cite 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);[5] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We also note that Mayfield and the dissent rely almost exclusively on cases analyzed under the Fourth Amendment.

B. UNITED STATES CONSTITUTION

The attenuation doctrine is a well-established exception to the exclusionary rule under the Fourth Amendment. *Strieff*, 136 S. Ct. at 2061. "The Fourth Amendment protects '[t]he right of

[5] 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."

the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Strieff*, 136 S. Ct. at 2060 (alteration in original). The exclusionary rule is the primary judicial remedy for Fourth Amendment violations. *Strieff*, 136 S. Ct. at 2061. Under the Fourth Amendment, the exclusionary rule requires suppression of evidence obtained as a direct result of an illegal search or seizure. *Strieff*, 136 S. Ct. at 2061. The exclusionary rule also requires suppression of "'evidence later discovered and found to be derivative of an illegality.'" *Strieff*, 126 S. Ct. at 2061 (quoting *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)). This rule is known as the "'fruit of the poisonous tree doctrine.'" *Strieff*, 126 S. Ct. at 2061 (quoting *Segura*, 468 U.S. at 804).

However, suppression of evidence is a last resort and the United States Supreme Court has recognized several exceptions to the exclusionary rule. *Strieff*, 126 S. Ct. at 2061. The attenuation doctrine is a recognized exception to the exclusionary rule that addresses the causal relationship between the illegal act and the discovery of subsequent evidence. *Strieff*, 126 S. Ct. at 2061.

Under the attenuation doctrine, "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Strieff*, 126 S. Ct. at 2061 (quoting *Hudson v. Michigan*, 547 U.S. 586, 593, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)). Courts apply three factors to determine whether a sufficient intervening event breaks the causal chain. *Strieff*, 126 S. Ct. at 2061-62 (citing *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)). The three factors are: (1) the temporal proximity between the

unconstitutional act and the subsequent discovery of evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the misconduct. *Strieff*, 126 S. Ct. at 2062.

Mayfield argues that the search of his truck was not sufficiently attenuated from the illegal seizure. We disagree.

The first factor, temporal proximity, weighs in favor of concluding that the search was not attenuated from the illegal seizure. However, the other two factors support the trial court's conclusion that the search was sufficiently attenuated from the illegal seizure.

First, there was an intervening circumstance. Deputy Nunes explicitly gave *Ferrier* warnings, even though not required in vehicle searches, before obtaining Mayfield's consent to search his truck. The *Ferrier* warnings that Deputy Nunes gave informed Mayfield that he had the right to refuse consent, had the right to limit the scope of consent, and had the right to revoke consent at any time. By giving Mayfield *Ferrier* warnings, the deputy ensured that Mayfield's consent was voluntary even though there was an illegal seizure.

And the extent of the illegal seizure further supports the conclusion that Mayfield's consent to search the truck was voluntary. Although the seizure was illegal because Deputy Nunes did not have a reasonable, articulable suspicion, Deputy Nunes did not place Mayfield under arrest. Mayfield was not physically restrained and Deputy Nunes did not hold his identification or any of the money found on his person.

Second, there was no purposeful or flagrant misconduct. Here, the illegal seizure resulted from a legitimate contact regarding Mayfield's abandoned vehicle. Due to the suspicious circumstances, Deputy Nunes continued trying to ascertain the situation. And the illegality here

was not flagrant or purposeful. In this case, there was a fine line between the legitimate social contact resulting from the inquiry into Mayfield's abandoned truck and the illegal seizure.

Because *Ferrier* warnings were an intervening circumstance and there was not purposeful or flagrant police misconduct, we hold that the trial court did not err by concluding that the search was sufficiently attenuated from the illegal seizure. Accordingly, we hold that the trial court did not err by denying Mayfield's motion to suppress the evidence found in his truck.

CONCLUSION

We affirm.

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.

BJORGEN, C.J., (dissenting) — The majority cites the recent state Supreme Court decision in *Blomstrom v. Tripp*, 189 Wn.2d 379, 402 P.3d 831 (2017), for the proposition that a fresh *Gunwall*[6] analysis is required for each new context in which a state constitutional provision is independently applied. This reading is not warranted by *Blomstrom* and threatens mischief to this State's tradition of strong independent constitutional adjudication. Weakening that tradition in turn erodes the counterbalance of healthy state constitutional protections in our federal system: a balance that our times have shown to be indispensable. Therefore, I dissent.

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. *Blomstrom*, 189 Wn.2d at 388, 397-98. 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. *Blomstrom*, 189 Wn.2d at 399-402.

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 whether a *Gunwall* analysis was in fact required in this context. Thus, the majority opinion relies on a dictum to suggest a rule of decision that was neither briefed by

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

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. Like the inevitable discovery doctrine, the attenuation doctrine here at issue modifies the reach of the exclusionary rule. If a *Gunwall* analysis was not needed in *Winterstein*, it should not be required here.

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 "[a]rticle 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." *Id*. 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 Wash.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 Wash.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 Wash.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 Wash.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 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*, [136 Wn.2d 103, 960 P.2d 927] 1998; *State v. Parker*, [139 Wn.2d 486, 987 P.2d 73] 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* analysis 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 did not even analyze the issue falls well short of what constitutional adjudication deserves. Because the search of the truck should have been judged under article I, section 7, I dissent.

Bjorgen, C.J.

BJORGEN, C.J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

February 13, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN DOUGLAS MAYFIELD Appellant.	No. 48800-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's January 4, 2018 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Melnick, Sutton

FOR THE COURT:

Sutton, J.
JUDGE

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

March 05, 2018 - 2:10 PM

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