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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES ESERJOSE,

Appellant.

ON DIRECT REVIEW FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Kitsap County Superior Court No. 08-1-00972-4

BRIEF OF RESPONDENT

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DATED May 11, 2009, Port Orchard, WA

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iv

CASES..... iv

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

 A. PROCEDURAL HISTORY.....2

 B. FACTS.....2

III. ARGUMENT.....8

 A. THE TRIAL COURT DID NOT ERR IN DENYING
 ESERJOSE’S MOTION TO SUPPRESS BECAUSE
 IN NEW YORK V. HARRIS THE UNITED STATES
 SUPREME COURT APPLIED THE PRINCIPLE
 THAT A COURT MUST FOCUS ON THE LINK
 BETWEEN THE UNLAWFUL ACTION AND THE
 EVIDENCE THAT THE DEFENDANT SOUGHT
 TO SUPPRESS. THE COURT THUS HELD THAT
 THE ADMISSION OF A DEFENDANT’S
 CONFESSION MADE AFTER THE POLICE
 UNLAWFULLY ARRESTED THE DEFENDANT
 FROM HIS HOME DOES NOT VIOLATE THE
 FOURTH AMENDMENT WHERE THE POLICE
 HAVE PROBABLE CAUSE TO ARREST THE
 DEFENDANT AND WHEN THE STATEMENT
 WAS MADE OUTSIDE OF THE DEFENDANT’S
 HOME.....11

 B. THIS COURT SHOULD DECLINE TO FIND THAT
 THE TRIAL COURT ERRED IN THE PRESENT
 CASE BECAUSE: (1) ESERJOSE HAS FAILED TO
 SHOW THAT AN INDEPENDENT STATE
 CONSTITUTIONAL ANALYSIS IS WARRANTED;
 AND (2) ESERJOSE HAS FAILED TO SHOW
 THAT ARTICLE I, SECTION 7 PRECLUDES A
 COURT FROM FOCUSING ON THE LINK

BETWEEN THE UNLAWFUL ACTION AND THE EVIDENCE THAT A DEFENDANT SEEKS TO SUPPRESS. THUS, AS IN HARRIS, THIS COURT SHOULD FIND THAT A DEFENDANT'S CONFESSION (MADE AFTER THE POLICE UNLAWFULLY ARRESTED THE DEFENDANT FROM HIS HOME) DOES NOT VIOLATE ARTICLE I, SECTION 7 WHERE THE POLICE HAVE PROBABLE CAUSE TO ARREST THE DEFENDANT AND WHEN THE STATEMENT WAS MADE OUTSIDE OF THE DEFENDANT'S HOME.....16

1. This Court should decline to undertake an independent state constitutional analysis because Eserjose has failed to provide a meaningful Gunwall analysis on the scope of the exclusionary rule under the Washington Constitution.17

2. Even if this court were to determine that an independent state constitutional analysis were appropriate despite Eserjose's failure to fully brief the issue, Eserjose's argument that exclusion was required in the present case would still be without merit because his contention that pre-existing state law demonstrates an unwaivering rejection of any exception to the exclusionary rule is incorrect.....19

3. Other Pre-existing Washington cases weigh against Eserjose's argument that the Harris exception to the exclusionary rule should not apply under article I, section 7.....24

4. The practical implications of the Harris exception further demonstrate that the exception should be held to be consistent with article I, section 7.26

5. The Supreme Court of Arizona has previously addressed the Harris exception and found that it complied with the Arizona Constitution art. 2, § 8 which is identical to article I, section 7 of the Washington Constitution.29

C. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL FINDER OF FACT COULD HAVE FOUND EACH ELEMENT OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT32

IV. CONCLUSION.....36

TABLE OF AUTHORITIES

CASES

<i>City of Seattle v. Mighty Movers, Inc.</i> , 152 Wn. 2d 343, 96 P.3d 979 (2004).....	30
<i>Commonwealth v. Dana</i> , 43 Mass. 329 (1941)	8
<i>Ker v. California</i> , 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963).....	9
<i>Mapp v. Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).....	9
<i>New York v. Harris</i> , 495 U.S. 14, 110 S. CT. 1640, 109 L. Ed. 2d 13 (1990).....	7, 10-15, 23, 27
<i>Payton v. New York</i> , 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).....	7, 12
<i>In re Pers. Restraint of Gronquist</i> , 138 Wn. 2d 388, 978 P.2d 1083 (1999).....	19
<i>State v. Armenta</i> , 134 Wn. 2d 1, 948 P.2d 1280 (1997).....	25
<i>State v. Boland</i> , 115 Wn. 2d 571, 800 P.2d 1112 (1990).....	17
<i>State v. Byers</i> , 88 Wn. 2d 1, 559 P.2d 1334 (1977).....	25
<i>State v. Camarillo</i> , 115 Wn. 2d 60, 794 P.2d 850 (1990).....	33
<i>State v. Canez</i> , 42 P.3d 564 (2002).....	30, 31
<i>State v. Chenoweth</i> , 160 Wn. 2d 454, 158 P.3d 595 (2007).....	26, 29, 30

<i>State v. Clark,</i> 68 Wn. App. 592, 844 P.2d 1029 (1993).....	19
<i>State v. Cotten,</i> 75 Wn. App. 669, 879 P.2d 971 (1994).....	34
<i>State v. Counts,</i> 99 Wn. 2d 54, 659 P.2d 1087 (1983).....	23
<i>State v. Delmarter,</i> 94 Wn. 2d 634, 618 P.2d 99 (1980).....	33
<i>State v. Gaines,</i> 154 Wn. 2d 711, 116 P.3d 993 (2005).....	20-22, 24
<i>State v. Gonzales,</i> 46 Wn. App. 388, 731 P.2d 1101 (1986).....	25
<i>State v. Green,</i> 94 Wn. 2d 216, 616 P.2d 628 (1980).....	33
<i>State v. Jensen,</i> 44 Wn. App. 485, 723 P.2d 443 (1986).....	25
<i>State v. Ladson,</i> 138 Wn. 2d 343, 979 P.2d 833 (1999).....	18
<i>State v. Le,</i> 103 Wn. App. 354, 12 P.3d 653 (2000).....	25
<i>State v. Mathe,</i> 102 Wn. 2d 537, 688 P.2d (1984).	22
<i>State v. McCaughey,</i> 14 Wn. App. 326, 541 P.2d 998 (1975).....	34
<i>State v. Mendez,</i> 137 Wn. 2d 208, 970 P.2d 722 (1999).....	12
<i>State v. Moles,</i> 130 Wn. App. 461, 123 P.3d 132 (2005).....	33

<i>State v. Murray</i> , 110 Wn. 2d 706, 757 P.2d 487 (1988).....	29
<i>State v. Neslund</i> , 50 Wn. App. 531, 749 P.2d 725 (1988).....	34
<i>State v. Pirtle</i> , 127 Wn. 2d 628, 904 P.2d 245 (1995).....	33
<i>State v. Rothenberger</i> , 73 Wn. 2d 596, 440 P.2d 184 (1968).....	27, 28
<i>State v. Scoby</i> , 117 Wn. 2d 55, 810 P.2d 1358 (1991).....	33
<i>State v. Traub</i> , 151 Conn. 246, 196 A.2d 755 (1963).....	25
<i>State v. Vangen</i> , 72 Wn. 2d 548, 433 P.2d 691 (1967).....	24
<i>State v. Walker</i> , 157 Wn. 2d 307, 138 P.3d 113 (2006).....	26
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	33
<i>State v. Wethered</i> , 110 Wn. 2d 466, 755 P.2d 797 (1988).....	19
<i>State v. White</i> , 135 Wn. 2d 761, 958 P.2d 982 (1998).....	17, 18
<i>United States v. Crews</i> , 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)...	13, 14, 27
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....	9, 10

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Eserjose's motion to suppress when the United States Supreme Court in *New York v. Harris* applied the principle that a court must focus on the link between the unlawful action and the evidence that the defendant sought to suppress, and when the Court thus held that the admission of a defendant's confession made after the police unlawfully arrested the defendant from his home does not violate the Fourth Amendment where the police have probable cause to arrest the defendant and when the statement was made outside of the defendant's home?

2. Whether this Court should decline to find that the trial court erred in the present case when: (1) Eserjose has failed to show that an independent state constitutional analysis is warranted; and (2) Eserjose has failed to show that article I, section 7 precludes a court from focusing on the link between the unlawful action and the evidence that a defendant seeks to suppress, and thus, whether, as in *Harris*, this court should find that a defendant's confession (made after the police unlawfully arrested the defendant from his home) does not violate article I, section 7 where the police have probable cause to arrest the defendant and when the statement was made outside of the defendant's home?

3. Whether, viewing the evidence in a light most favorable to the State, a rational finder of fact could have found each element of the charged offenses beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Eserjose was charged by information filed in Kitsap County Superior Court with one count of burglary in the second degree. CP 1. The trial court found Eserjose guilty following a stipulated facts trial and imposed a standard range sentence. CP 33-61, 62. This appeal followed.

B. FACTS

On August 29, 2008, a latte stand named "Latte On Your Way" was burglarized and approximately \$400 was taken. CP 33, 36. Deputy Wright of the Kitsap County Sheriff's Office investigated and found that one of windows had been broken out. CP 39. The inside of the business was mostly undisturbed except that the cash register drawer was open as were the doors of a refrigerator and freezer. CP 39. The manager of the business arrived at the scene and found that the only thing that appeared to be missing was some money that had been stored in the refrigerator. CP 39-40.

The next night a witness named James Kordell met with Deputy Wright and provided information that the burglary had been committed by Joseph Paragone and the Defendant, James Eserjose. CP 36. Kordell

explained that Paragone and Eserjose had come to his house after the burglary and showed him the money that had been taken and explained how they had broken a window, set off an alarm, and had taken money out of the freezer. CP 36. Paragone specifically told Kordell that after breaking the window he had jumped back in his car and started it in case they needed to make a quick getaway and that Eserjose went inside the stand and grabbed the money from the freezer. CP 47. Kordell stated the Eserjose was in the room while Paragone described the burglary to Kordell, although Paragone did most of the talking. RP 13-14.

Kordell also stated that Paragone showed him the money and offered him some of the money for keeping quiet. CP 47. Eserjose also offered Kordell money if he would keep quiet about the burglary. CP 36, 47.

Kordell also told Deputy Wright that Paragone and Eserjose were living together at Eserjose's parents home and Kordell gave the address and information about Eserjose's car to Deputy Wright. CP 46-47. Deputy Wright then contacted Sergeant Clithero and asked for his assistance in arresting Paragone and Eserjose. CP 89.

Several deputies then went to the residence described by Kordell and arrested Eserjose and Paragone from inside the home (the lawfulness of this arrest was the subject of a 3.6 hearing as discussed below). CP 89. Eserjose

was then taken outside to a patrol car where he was advised of his Miranda rights. CP 89. Although advised of his Miranda rights, Eserjose was not questioned about the burglary either inside the home or inside the patrol car; rather, Eserjose was transported to a sheriff's station in Silverdale. CP 89. At the station Eserjose was again advised of his Miranda warnings and signed a written acknowledgment of these rights. CP 89-90. After initially denying any involvement in the burglary, Eserjose eventually admitted confessed that he had committed the burglary and had broken the window and entered the latte stand and had taken three to four hundred dollars from the freezer in the stand. CP 37, 48, 50, 90. The Deputies also found \$21 of the stolen money in Paragone's wallet and \$6 of the stolen money in Eserjose's wallet. CP 48.

The Arrest

The circumstances surrounding the arrest of Eserjose was the subject of a 3.6 hearing below. See RP 1-128. After the hearing, the trial court entered findings of fact, and neither party has challenged those findings on appeal. Those findings outlined the circumstances of the arrest as follows:

VI.

That Deputy Wright contacted Sgt Clithero of KCSO and asked for his assistance in arresting Mr. Paragone and Mr. Eserjose. Sgt Clithero, along with Deputy Sapp and Swayze, and possibly another KCSO deputy then went to the Eserjose home at approximately 1:30 AM. Sgt Clithero, Deputy Sapp and Deputy Swayze went to the front door, knocked, and defendant James Eserjose answered the door. The defendant was asked if Mr. Paragone was at home and Mr. Eserjose said

Mr. Paragone was upstairs sleeping and he would go upstairs to get Mr. Paragone, at which point the defendant left the door open and went upstairs.

VII.

That the defendant's father then came to the front door and invited the deputies to come into his house. Mr. Fruen asked the deputies inside saying he wanted to close the door to keep the cold air out. No meaningful conversation took place between the deputies and the defendant's father in the entryway. The stairs connect to the front entryway, and from the entry way a portion of the upstairs hallway can be seen. After a short wait, probably between 30 seconds to a minute, the deputies talked between themselves about the delay and the decision was voiced to go upstairs and find the suspects to make an arrest. The defendant's father told the deputies to be aware of a dog that he had upstairs because he did not wish the dog to surprise the officers or for the officers to harm the dog. This was the father's only comment to the officers about going upstairs.

VIII.

That the deputies arrested Mr. Paragone in the hallway, and then arrested the defendant Mr. Eserjose in the hallway upstairs immediately outside his bedroom. The two were then taken outside to patrol cars where they were Mirandized and the defendant acknowledged that he understood his rights. Although advised of his rights at the patrol car the defendant was not questioned about the burglary either inside the house or at the patrol car.

IX.

That the defendant was transported to the KCSO precinct building in Silverdale where he was put in detention until Deputy Wright arrived. After Deputy Wright arrived the defendant was again advised of his Miranda rights in writing and signed the form acknowledging that he understood his rights. The defendant did not appear to be under the influence of any intoxicants, was not threatened, and no promises were made to him. Initially the defendant denied any involvement in the burglaries, but after being advised that Mr. Paragone had admitted his involvement in the burglary the defendant gave a statement admitting his own involvement in the burglary.

CP 89-90.

At the 3.6 hearing, Eserjose acknowledged that the deputies did have consent to enter the home, but Eserjose argued that the consent only allowed the deputies to come into the entryway of the home. RP 102-04. Eserjose then argued that the deputies exceeded the scope of the consent when they went upstairs and left the downstairs which contained the “living” areas of the home. RP 103-04.

The State argued that the relevant inquiry was whether the officers remained in the “common areas of the home,” and that the hallway landing area at the top of the stairs was a common area of the home. RP 114. The State therefore asked the court to find that the arrest was lawful because the officers entered the home with consent and never went beyond the common area of the home. RP 113-16.

The State also argued that even if the court were to find that the deputies had unlawfully exceeded the scope of the consent, and that the arrest, therefore was unlawful, the court should not suppress the confession that Eserjose ultimately later made at the police station. RP 116-19. In support of this argument the State cited *New York v. Harris*. RP 116-18.

Eserjose argued that *New York v. Harris* should not apply in Washington and that Washington Supreme Court had previously refused to

apply exceptions to the exclusionary rule and would likely reject *Harris* and “say that there are no exceptions to the exclusionary rule.” RP 109-10.

The trial court ultimately denied Eserjose’s motion to dismiss and entered written conclusions of law stating, inter alia,

III.

That the KCSO deputies did have consent to enter the home of the defendant, but that they did not have consent to go upstairs in the home to the upper hallway, and that the upper hallway would be consider a private area, not normally open to guests. This is not an area an occupant would assume a risk that a co-occupant would give consent to another to enter. Therefore the arrest of the defendant in the upper hallway, made without an arrest warrant and in an area which the deputies did not have consent to enter, was an unlawful arrest under the rule of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), but it was an arrest based upon probable cause.

IV.

That the statements made by the defendant to law enforcement at the police station are admissible in the state’s case in chief under the reasoning of *New York v. Harris*, 495 U.S. 14, 110 S. CT. 1640, 109 L. Ed. 2d 13 (1990), as the arrest was based upon probable cause and the remedy of exclusion is not warranted as no statement was obtained, or sought to be admitted, from inside the protected zone of the residence, but all statements were the result of a knowing and voluntary Miranda waiver made outside of the home, at the patrol car, and then later after another knowing and voluntary waiver at the police station. The defendant was only questioned at the police station, and was not questioned inside his home or at the patrol car.

V.

That the defendant’s desire to use a *Gunwall* analysis to expand the protections of the state constitution to this situation are not warranted and that the protections afforded persons under the Fourth Amendment and Article I, Section 7 of the state constitution are adequately protected under the

reasoning of the *New York v. Harris* case. Therefore the statements of the defendant to law enforcement are admissible in the state's case in chief and the defendant's motion to suppress those statements are denied.

CP 90-91.¹

III. ARGUMENT

The modern exclusionary rule that prohibits the State from using the fruits of an unconstitutional search or seizure against a defendant did not initially exist under the common law in part because courts used to turn a blind eye to the circumstances under which evidence was gathered.² In the twentieth century the concept of the exclusionary rule evolved over time, and in the early 1960's the United States Supreme Court decided *Mapp v. Ohio*,

¹ Several of the arguments raised by the parties below have not been raised on appeal. For instance, the Defendant argued below that the deputies did not have probable cause to arrest him for the burglary. On appeal, however, the Defendant is not contesting the trial court's contrary conclusion. App.'s Br at page 3, n. 1. Similarly, the State has not assigned error to (or otherwise contested) the trial court's conclusion that the upper hallway was a "private area, not normally open to guests" and that the deputies, therefore, did not have consent to enter this area of the home. CP 90. While the State does not agree with the trial court's conclusion, the State recognizes that the issue essentially involved a factual inquiry and that trial courts have considerably discretion in making such determinations. Although the State disagrees with the court's conclusion, the factual nature of the analysis prevents any meaningful argument that the trial court abused its considerable discretion in this regard.

² See, e.g., *Commonwealth v. Dana*, 43 Mass. 329 (1941) ("If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt v. Tolvervey*, 14 East, 302, and *Jordan v. Lewis*, 14 East, 306, note; and we are entirely satisfied that the principle on which these cases were decided is sound and well established").

367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) and *Ker v. California*, 374 U.S. 23, 33, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), which made Fourth Amendment protections applicable to the states through the through the Fourteenth Amendment's Due Process Clause and applied the federal exclusionary rule to the states for the first time. After this point, it was beyond dispute that courts could no longer turn a blind eye to the circumstances concerning the constitutionality of the methods used by the state in collecting evidence.

Subsequent decades saw the courts further develop and refine the exclusionary rule with a continued focus on the particularities of the state's action and the connection between a particular piece of evidence and any unconstitutional actions. For example, in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), the Supreme Court discussed the now famous concept of "fruit of the poisonous tree" and extended the exclusionary rule to evidence that was the product or "fruit" of unlawful police conduct. The Court, however, again focused on the particularities of the state action and focused on the connection between the item of evidence and the constitutional violation, noting that,

We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is

made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun, 371 U.S. at 487-488, 83 S. Ct., at 417.

More recently, in *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640 (1990) the Court again examined the link between the evidence (a confession) and the unlawful action and held that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home even though the statement was taken after an unlawful arrest made in the home. The Court reasoned that because the police had probable cause to arrest, the fact that the arrest was made in an unlawful manner did not somehow render the continued custody of the defendant unlawful. Statements made inside the home, therefore, were connected to the unlawful action and would be suppressed, but statements made at the police station were not connected to the unlawful action and thus were properly admitted at trial. *Harris*, therefore, continued the modern line of cases requiring the courts to examine the link between the unlawful action and the evidence that a defendant seeks to suppress.

In the present appeal, Eserjose asks this Court to reject *Harris* and find that it should not apply under article I, section 7 of the Washington Constitution. Eserjose's request, at its core, invites this Court to hold that

courts should again turn a blind eye to the actual circumstances under which evidence was collected and ignore the link between the unlawful action and the evidence that a defendant seeks to suppress, no matter how attenuated that link might be. This Court should decline Eserjose's invitation.

- A. THE TRIAL COURT DID NOT ERR IN DENYING ESERJOSE'S MOTION TO SUPPRESS BECAUSE IN NEW YORK V. HARRIS THE UNITED STATES SUPREME COURT APPLIED THE PRINCIPLE THAT A COURT MUST FOCUS ON THE LINK BETWEEN THE UNLAWFUL ACTION AND THE EVIDENCE THAT THE DEFENDANT SOUGHT TO SUPPRESS. THE COURT THUS HELD THAT THE ADMISSION OF A DEFENDANT'S CONFESSION MADE AFTER THE POLICE UNLAWFULLY ARRESTED THE DEFENDANT FROM HIS HOME DOES NOT VIOLATE THE FOURTH AMENDMENT WHERE THE POLICE HAVE PROBABLE CAUSE TO ARREST THE DEFENDANT AND WHEN THE STATEMENT WAS MADE OUTSIDE OF THE DEFENDANT'S HOME.**

Eserjose argues that the trial court erred in failing to suppress his statements made at the police station following his arrest. App.'s Br. at 1,8. This claim is without merit because the United States Supreme Court held in *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640 (1990) that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in

violation of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980).

An appellate court reviews findings of fact on a motion to suppress under the substantial evidence standard, and conclusions of law in an order pertaining to suppression of evidence de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, bars the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. *Payton*, 445 U.S. at 576, 100 S. Ct. 1371. Further, under the exclusionary rule, the fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality. *New York v. Harris*, 495 U.S. 14, 19, 110 S. Ct. 1640, 1643 (1990), citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The United States Supreme Court, however, has emphasized that attenuation analysis is only appropriate where, as a threshold matter, courts determine that "the challenged evidence is in some sense the product of illegal governmental activity." *Harris*, 495 U.S. at 19, 110 S. Ct. at 1643, citing *United States v. Crews*, 445 U.S. 463, 471, 100 S. Ct. 1244, 1250, 63 L. Ed. 2d 537 (1980).

In *Harris* the police had probable cause to arrest Harris for the crime

of murder, and as a result three officers went to Harris' apartment to arrest him, but the officers did not first obtain an arrest warrant. *Harris*, 495 U.S. at 15-17, 110 S. Ct. at 1642. The officers then entered Harris' home without his consent and arrested him, which, in light of *Payton*, the Court found was a violation of the Fourth Amendment. *Harris*, 495 U.S. at 17, 110 S. Ct. at 1642. Once inside, the officers advised Harris of his *Miranda* rights and Harris then admitted that he had committed the murder. *Harris*, 495 U.S. at 16, 110 S. Ct. at 1642. Harris was arrested, taken to the station house and again informed of his *Miranda* rights, and he then signed a written inculpatory statement. *Id.* The trial court suppressed Harris' first statement and the State did not challenge that ruling. *Id.* The issue, therefore, was whether Harris' written statement made at the station house should have been suppressed due to the *Payton* violation. *Id.* The Harris court then discussed *Payton* and stated,

Nothing in the reasoning of [the *Payton*] case suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest. *United States v. Crews*, 445 U.S. 463, 474, 100 S. Ct. 1244, 1251, 63 L. Ed. 2d 537 (1980). Nor is there any claim that the warrantless arrest required the police to release Harris or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and

allowed to talk. For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible.

Harris, 495 U.S. at 18, 110 S. Ct. at 1643. The Court also concluded that Harris' statement at the police station was not the product of being in unlawful custody nor was it the fruit of been arrested in the home rather than someplace else. *Harris*, 495 U.S. at 19, 110 S. Ct. at 1644. Rather, because the police had a justification to question Harris prior to his arrest, his subsequent statement was not an exploitation of the illegal entry and, thus, it was not necessary to inquire whether the "taint" of the Fourth Amendment violation was sufficiently attenuated. *Id.*, citing *Crews*, 445 U.S. at 471, 100 S. Ct. at 1250. The *Harris* court thus held that the station house statement was admissible because Harris was in legal custody and because the statement, "while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Harris*, 495 U.S. at 20, 110 S. Ct. at 1644. The court then concluded by stating,

We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even

though the statement is taken after an arrest made in the home in violation of *Payton*.

Harris, 495 U.S. at 21, 110 S. Ct. at 1644-45.

The facts of the present case fit squarely under the analysis outlined in *Harris*. In addition, the police action in present case does not even rise to the level of the unlawful police action in *Harris*. For instance, in the present case the deputies' initial entry into the house was lawful as it was made with consent. The *Payton* violation only occurred when the officers exceeded the scope of the consent by entering a private area of the home. Secondly, unlike the defendant in *Harris*, the Defendant in the present case was not questioned inside the home nor did he make any inculcating statements in the home. Rather, the Defendant in the present case was questioned for the first time only after he had been taken to the station and advised of his *Miranda* warnings. Thus, the Defendant in the present case has an even weaker argument than the defendant in *Harris* that his statement was somehow an exploitation of the illegal entry, as the defendant in *Harris* could at least argue that his first statement made at the house (which was suppressed) made his second statement at the station inevitable or, at the least, more likely to occur because the "cat was out of the bag." This fact, of course, is absent from the present case where the Defendant was never questioned (nor did he make any statements) in the house.

Given these facts, the trial court in the present case did not err in denying the Defendant's suppression motion because the *Harris* decision clearly explained that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.

B. THIS COURT SHOULD DECLINE TO FIND THAT THE TRIAL COURT ERRED IN THE PRESENT CASE BECAUSE: (1) ESERJOSE HAS FAILED TO SHOW THAT AN INDEPENDENT STATE CONSTITUTIONAL ANALYSIS IS WARRANTED; AND (2) ESERJOSE HAS FAILED TO SHOW THAT ARTICLE I, SECTION 7 PRECLUDES A COURT FROM FOCUSING ON THE LINK BETWEEN THE UNLAWFUL ACTION AND THE EVIDENCE THAT A DEFENDANT SEEKS TO SUPPRESS. THUS, AS IN HARRIS, THIS COURT SHOULD FIND THAT A DEFENDANT'S CONFESSION (MADE AFTER THE POLICE UNLAWFULLY ARRESTED THE DEFENDANT FROM HIS HOME) DOES NOT VIOLATE ARTICLE I, SECTION 7 WHERE THE POLICE HAVE PROBABLE CAUSE TO ARREST THE DEFENDANT AND WHEN THE STATEMENT WAS MADE OUTSIDE OF THE DEFENDANT'S HOME.

Eserjose next claims that the trial court erred in denying his motion to suppress because article I, section 7 of the Washington State Constitution required dismissal. This claim is without merit because Eserjose has failed to

show that an independent state constitutional analysis is warranted or that the article I, section 7, precludes a court from applying the well recognized principle that a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress .

1. This Court should decline to undertake an independent state constitutional analysis because Eserjose has failed to provide a meaningful Gunwall analysis on the scope of the exclusionary rule under the Washington Constitution.

Although Eserjose acknowledges that the when courts are called upon to decide whether Article 1, section 7 is more protective than the Fourth Amendment the courts are to apply the *Gunwall* test, Eserjose nevertheless claims that he is not required to provide argument on five of the six *Gunwall* factors. App.'s Br. at 10.

It is true that this Court has stated that argument on the *Gunwall* factors is not needed when prior cases have held that article 1, section 7 differs than the Fourth Amendment regarding the specific legal issue before the court. *See, e.g., State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). However, this Court has also stated that 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. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990). Furthermore, a “*Gunwall* analysis is nevertheless required in cases where the legal principles

are not firmly established, and certainly a *Gunwall* analysis is helpful in determining the scope of the broader protections provided in other contexts.” *White*, 135 Wn.2d at 769, n. 7. Similarly, this Court has said that, “absent controlling precedent, a party asserting that a provision of the state constitution offers more protection than a similar provision in the federal constitution must persuade the court this is so by means of the analysis set forth in *State v. Gunwall*.” *State v. Ladson*, 138 Wn.2d 343, 347, 979 P.2d 833 (1999).

While the State concedes that article 1, section 7 has been held to provide broader protections than the Fourth Amendment, the issue before this court is not whether the arrest in the present case was unlawful (since the trial court’s finding that the arrest was unlawful is not being challenged), nor is the question in the present case simply whether article I, section 7 has been found to provide broader protections than the Fourth Amendment in other contexts such as searches and seizures in general. Rather, the unique issue before this Court is the breadth of the exclusionary rule and whether it applies to a statement made at the police station after an earlier unlawful arrest. That issue, which requires an examination of the extent and construction of the exclusionary rule, should require a *Gunwall* analysis. *Eserjose*, however, has failed to provide a meaningful *Gunwall* analysis on the scope of the exclusionary rule under the Washington Constitution. Given *Eserjose*’s

failure to provide a meaningful *Gunwall* analysis, this Court should decline to undertake an independent state constitutional analysis. *See, State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988); *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 406 n. 12, 978 P.2d 1083 (1999); *State v. Clark*, 68 Wn. App. 592, 844 P.2d 1029 (1993) (refusing to undertake independent state constitutional analysis for failure to adequately brief the issue of whether article I, section 7 demands a departure from the Franks standard), *aff'd* 124 Wn.2d 90, 875 P.2d 613 (1994).

2. ***Even if this court were to determine that an independent state constitutional analysis were appropriate despite Eserjose's failure to fully brief the issue, Eserjose's argument that exclusion was required in the present case would still be without merit because his contention that pre-existing state law demonstrates an unwaivering rejection of any exception to the exclusionary rule is incorrect.***

Even if this Court were to engage in an independent state constitutional analysis, Eserjose's argument would still fail because he has failed to show that the exception to the exclusionary rule outlined in *New York v. Harris* violates article 1, section 7. Eserjose's sole argument with respect to article 1, section 7 is his contention that this court has, at every opportunity, rejected the application of any exceptions to the exclusionary rule. *See App.'s Br.* at 11-12.³ Eserjose also claims that there are three

³ Specifically, the Defendant claims that, "At every opportunity where this court has been asked to erode the exclusionary rule, this Court has declined." *App.'s Br* at 11.

exceptions to the exclusionary rule that have been adopted by the United States Supreme Court (the inevitable discovery rule, the good faith rule, and the rule of *Harris*) and that this Court has previously declined to apply the first two of these, and thus, should decline to apply *Harris*. App.'s Br. at 12. Eserjose's brief thus contends (or at a minimum, strongly implies) that this Court has never recognized an exception to the exclusionary rule. This contention, however, is incorrect.

For instance, in 2005 this Court held in a unanimous opinion that the "independent source exception" to the exclusionary rule complied with article I, section 7 of the Washington Constitution. *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005).

In *Gaines*, an officer arrested two people from a car and then opened the locked trunk of the vehicle, noticed the barrel of an assault rifle, and then immediately closed the trunk. *Gaines*, 154 Wn.2d at 714. The following day the police obtained a search warrant for the car, and the affidavit in support of the warrant included the officer's observation of the assault rifle along with other independent evidence supporting the issuance of the warrant. *Gaines*, 154 Wn.2d at 714-15, 718. On appeal, all parties agreed that the initial glance into the trunk was unlawful. *Gaines*, 154 Wn.2d at 717. This Court held that, despite the unlawful search, the items ultimately found in the trunk were admissible under the independent source exception to the exclusionary

rule and that the exception complied with article I, section 7. *Gaines*, 154 Wn.2d at 722. In addition, this Court rejected the defendants' argument that exclusion of the trunk's contents was mandatory and that allowing a later warrant to authorize introduction of evidence first discovered by the police as a result of an illegal act would vitiate constitutional protections. *Gaines*, 154 Wn.2d at 720. Rather, this Court discussed prior analysis of article I, section 7, and held that,

Assuming application of some exclusionary remedy is appropriate, such remedy was provided here by striking all references to the initial, illegal search of the trunk from the warrant affidavit when assessing whether probable cause existed to issue the warrant. *See Maxwell*, 114 Wn.2d at 769, 791 P.2d 223; *Coates*, 107 Wn.2d at 887, 735 P.2d 64. This remedy finely balances the rights of the accused with society's interest in prosecuting criminal activity and ensures that the State is placed in neither better nor worse position as a result of the officers' improper actions.

Gaines, 154 Wn.2d at 720. Ultimately, this court concluded that evidence at issue was admissible pursuant to the independent source exception to the exclusionary rule and that the exception complied with article I, section 7 of the Washington Constitution. *Gaines*, 154 Wn.2d at 722.

Gaines is relevant to the present case for two reasons. First, *Gaines* unquestionably refutes Eserjose's argument that this Court has never held that an exception to the exclusionary rule complies with article I, section 7. Secondly, the *Gaines* case outlined that the remedy should match the

constitutional violation, and that the principle that a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress is alive and well in Washington.⁴ In *Gaines*, this principle meant that the appropriate remedy was to strike the reference to the initial unlawful search of the trunk from the warrant affidavit when assessing whether probable cause existed to issue the warrant. *Gaines*, 154 Wn.2d at 720.

⁴ See also, *State v. Mathe*, 102 Wn.2d 537, 688 P.2d (1984). In *Mathe*, the officers were investigating a robbery and had been told by an informant that the defendant that two men had committed the crime. *Mathe*, 102 Wn.2d at 539. Officers then went to the defendant's home and eventually entered the defendant's bedroom without consent and arrested the defendant. *Id.* at 539. The officers then took the defendant to the living room where they photographed the defendant, and this photograph was then placed into a photo montage that was shown to a witness from the robbery. *Id.* at 539-40. Prior to trial the defendant sought to suppress any identification derived from the arrest. *Id.* at 540. The Court held that the search was unlawful, but held that neither the Fourth Amendment nor the state constitution required suppression, stating,

Where, as here, each witness was known to the police prior to the illegal search, it makes little sense to view the witnesses as a fruit of the search. Further, each witness made an in-court identification which was based on her initial view of petitioner. This, too, cannot be properly seen as a tainted "fruit," when each witness had ample opportunity to observe the defendant. Ms. Mark's identification, for instance, was based on extended observations of the defendant. She saw him first when he came to the door of the store. She observed him while admitting him, while he asked for drugs, and while she showed him out. Also, Ms. Mark's observations of petitioner were not under duress. Until petitioner displayed his gun, Ms. Mark had no reason to fear him.

Likewise, the second conviction is supported by testimony of three witnesses, who each had sufficient time to develop independent mental impressions by which to identify petitioner. Ms. Nagel, like Ms. Mark, first observed petitioner in a non-stressful situation, because he approached her as if he were a customer. Likewise, the other witnesses were in a non-threatening situation. One of these first noticed petitioner loitering in front of the jewelry store and next observed him running from the store some 5 minutes later.

Despite these clear identifications, petitioner would have us exclude the in-court identifications of the witness, thus, thwarting his prosecution. Neither the Fourth Amendment nor our state constitution requires such a result.

Id. at 546-47. *Mathe*, therefore, represents another instance where this Court has applied the principle that a court should focus on the link between the unlawful action and the evidence

In the present case, the appropriate remedy for the deputies' unlawful intrusion up the stairs of Eserjose's home would be to suppress evidence found during that intrusion or, as in *Harris*, to suppress any statements made in the home itself.⁵ As the deputies in the present case had independently developed probable cause to arrest prior to their entry into the home, the Defendant's later confession at the sheriff's station should not be suppressed since the deputies should not be placed in a worse position as a result of the improper action. As in *Harris*, the Defendant's "statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else." *Harris*, 495 U.S. at 19, 110 S. Ct. at 1644.

In short, in *Gaines* this Court unanimously the same principle outlined in *Harris*: namely, that when examining whether the exclusionary rule should apply, a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress. In applying this analysis to the facts in *Gaines*, this Court found that the evidence at issue was admissible

that a defendant seeks to suppress.

⁵ Eserjose also argues that *State v. Counts*, 99 Wn.2d 54, 659 P.2d 1087 (1983) supports his claim that exclusion is required and that *Harris* should not apply under the Washington Constitution. App.'s Br. at 10. *Counts*, however, is entirely consistent with *Harris*, because in *Counts* the court never held that statements made outside the house were required to be excluded after an unlawful entry by the police. Rather, the Court excluded evidence regarding actions or statements made inside the house. See, *Counts*, 99 Wn.2d at 59, 62-63. Under *Harris*, the Court also excluded the statement made inside since that statement was linked to the unlawful police action. A statement made outside the house, was not

under the independent source exception to the exclusionary rule and that the exception complied with article I, section 7. *Gaines*, 154 Wn.2d at 722. Eserjose's contention that pre-existing state law demonstrates an unwavering rejection of any exception to the exclusionary rule, therefore, is without merit.

3. ***Other Pre-existing Washington cases weigh against Eserjose's argument that the Harris exception to the exclusionary rule should not apply under article I, section 7.***

In addition to *Gaines*, other Washington cases demonstrate the continued vitality of the principle that a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress. For instance, in *State v. Vangen*, 72 Wn.2d 548, 433 P.2d 691 (1967) this Court held that a confession made at the jail following an illegal arrest was properly admitted. In so doing the Court noted that and "illegal arrest does not ipso facto make a confession involuntary," and that,

Even though a detention is illegal, if the confession is truly voluntary and the causation factor of the illegal detention is so weak, or has been so attenuated, as not to have been an operative factor in causing or bringing about the confession, then the connection between any illegality of detention and the confession may be found so lacking in force or intensity that the confession would not be the fruit of the illegal detention.

Vangen, 72 Wn.2d at 555, citing *Wong Sun v. United States*, 371 U.S. 471,

sufficiently linked to the unlawful action.

488, 83 S. Ct. 407, 9 L. Ed. 441 (1963); *State v. Traub*, 151 Conn. 246, 196 A.2d 755 (1963).

Similarly, other Washington courts have consistently cited *Wong Sun* for the proposition that if a statement following an illegal arrest is obtained “by means sufficiently distinguishable to be purged of the primary taint” and not through “exploitation of that illegality,” it is admissible. *See, e.g., State v. Le*, 103 Wn. App. 354, 360-61, 12 P.3d 653 (2000); *State v. Gonzales*, 46 Wn. App. 388, 398, 731 P.2d 1101 (1986); *State v. Byers*, 88 Wn.2d 1, 7-8, 559 P.2d 1334 (1977). Washington courts have also stated that in order to determine whether a prior illegal arrest taints a confession or consent a court is to consider: (1) temporal proximity of the arrest (although time alone is not dispositive)⁶, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda* warnings. *See, e.g., State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997); *Gonzales*, 46 Wn. App. at 398; *State v. Jensen*, 44 Wn. App. 485, 490, 723 P.2d 443 (1986)).

The fact that Washington court have consistently cited *Wong Sun* for the proposition that the taint associated with the illegal arrest can be purged (and a defendant’s statement may be admissible despite a previous unlawful

⁶ *Gonzales*, 46 Wn.App. at 398, citing *U.S. v. Berry*, 670 F.2d 583, 605 (5th Cir.1982); *State v. Jensen*, 44 Wn. App. 485, 490, 723 P.2d 443 (1986).

act by the police as long as the statement is not obtained through an exploitation of the illegality) further demonstrate the continued vitality of the principle that a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress.

4. *The practical implications of the Harris exception further demonstrate that the exception should be held to be consistent with article I, section 7.*

In addition to the reasons outlined above, an examination of the practical effects of the exception to the exclusionary rule outlined in *Harris* further demonstrates why this Court should continue to apply the principle that a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress.

In determining the protections of article I, section 7 in a particular context, this Court has stated that “the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result,” and that this involves the “current implications of recognizing or not recognizing an interest.” *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007), citing *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994); *State v. Walker*, 157 Wn.2d 307, 317, 138 P.3d 113 (2006). In addition, courts have previously discussed the “current implications” involved in cases such as the one presently before this Court.

For instance, in *Harris*, the United States Supreme Court discussed *Payton* and outlined that the practical effects of the unlawful arrest was indistinguishable from other situations where exclusion would not be warranted,

Nothing in the reasoning of [*Payton*] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest. *United States v. Crews*, 445 U.S. 463, 474, 100 S. Ct. 1244, 1251, 63 L. Ed. 2d 537 (1980). Nor is there any claim that the warrantless arrest required the police to release Harris or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given Miranda warnings, and allowed to talk. For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible.

Harris, 495 U.S. at 18, 110 S. Ct. at 1643.

This Court also made a similar point in *State v. Rothenberger*, 73 Wn.2d 596, 599, 440 P.2d 184 (1968). In *Rothenberger*, the defendants argued that they had their car had been unlawfully stopped and that as a result, the officer learned their names which he otherwise would not have

known. *Rothenberger*, 73 Wn.2d at 597-98. After the unlawful traffic stop was completed and the defendants were allowed to leave, the officer learned that the defendants were wanted on a felony charge, so the officer radioed ahead and had a road block set up and the defendants were then arrested. *Rothenberger*, 73 Wn.2d at 597. On appeal the defendants claimed that their identities would not have been known nor would the road block have been set up but for the illegal stop, and that the information acquired concerning their identity and their car was of such a character that it could not be used to cause them to be apprehended after the arresting officer learned from an independent source that they were wanted on a felony charge. *Rothenberger*, 73 Wn.2d at 598. This Court rejected this argument as “indescribably silly” and stated,

To illustrate just how ridiculous the appellants' contention is, let us assume that while detaining the appellants on an unlawful arrest, word had come over the radio that Rothenberger and Pernar were wanted for a burglary in Seattle. On appellants' theory, the officer supposedly had no alternative but to touch his hat and say, “Gentlemen, be on your way. I am sorry to have unlawfully detained you.” We find neither reason nor judicial precedent for such a change in the rules of the long continued game of “Cops and Robbers.”

Rothenberger, 73 Wn.2d 599. While colorful, this language expresses the same reasoning described in *Harris*. Namely, that if an officer independently has probable cause to arrest a defendant, the officer is not required to release

the defendant merely because there was a previous unlawful arrest. At its core, Eserjose's proposed rule that there can be no exceptions to the exclusionary rule would require courts to turn a blind eye to the actual circumstances under which evidence was collected and would prevent courts from examining the link between the unlawful action and the evidence that a defendant seeks to suppress. The practical implications of such a rule would lead to the exclusion of evidence despite the absence of any link between the evidence and the unlawful act, and would lead to absurd results whereby a defendant would receive a windfall and be placed in a better position than he or she would have been absent the violation. This Court should reject Eserjose's invitation to require such a rule. Rather, this court should reaffirm the principle that a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress.

5. *The Supreme Court of Arizona has previously addressed the Harris exception and found that it complied with the Arizona Constitution art. 2, § 8 which is identical to article I, section 7 of the Washington Constitution.*

Finally, in resolving a question of first impression concerning the scope of article I, section 7, this Court may consider well-reasoned precedents from federal courts and sister jurisdictions. *Chenoweth*, 160 Wn.2d at 470-71, citing *State v. Murray*, 110 Wn.2d 706, 709, 757 P.2d 487 (1988). Although not binding on this court, such precedents may provide persuasive

authority. *Chenoweth*, 160 Wn.2d at 471, citing *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 356, 96 P.3d 979 (2004).

One other State, Arizona has a constitutional provision identical to Washington's article I, section 7. See, Arizona Constitution, art. 2, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law"). The Supreme Court of Arizona has previously address the *Harris* exception and found that it complied with the Arizona Constitution under facts similar to the present case.

In *State v. Canez*, 42 P.3d 564 (2002), the police went to the defendant's home to arrest, but they did not have a warrant. *Canez*, 42 P.3d at 581. The defendant's wife answered the door and the officers asked to see the defendant. *Id* at 582. When the defendant did not appear promptly, two officers followed the defendant's wife into the house without her objection or express permission. *Id*. Upon finding the defendant, the officers told him that he needed to come outside and talk with them. Once outside, the officers formally arrested the defendant. *Id*. The State did not obtain any evidence from inside the home and the defendant later made a voluntary statement at the police station that was admitted at trial. *Id* at 583.

On appeal, the defendant argued that his arrest was illegal and that his subsequent statement should not have been admitted. *Canez*, 42 P.3d at 582.

Citing both the Arizona and the Federal Constitution, the Arizona court held that the officer unlawfully entered the home and that any evidence obtained thereby was subject to suppression. *Id.* at 582. The Arizona court, however, then cited *Harris* and its holding that where the police have probable cause to arrest but violate the defendant's rights by doing so in his home without a warrant, subsequent statements made "at the station house" are not fruits of the illegal arrest. *Id.* at 583, *citing Harris*, 495 U.S. at 20, 110 S. Ct. 1640. The Arizona court thus concluded that because the state did not obtain incriminating evidence as a result of the arrest being made illegally in the defendant's home rather than legally elsewhere, and because the defendant's statement was made subsequently and voluntarily at the police station "it was not tainted by the illegal entry and arrest." *Id.* at 583.

In conclusion, the United States Supreme Court's holding in *Harris* was consistent with modern federal and Washington cases requiring the courts to examine the link between the unlawful action and the evidence that a defendant seeks to suppress. Eserjose, however, asks this Court to reject *Harris* and find that it should not apply under article I, section 7 of the Washington Constitution. His argument is based on the notion that this Court has never recognized an exception to the exclusionary rule and that article I, section 7, requires a court to turn a blind eye to the actual circumstances under which evidence was collected and ignore the link between the unlawful

action and the evidence that a defendant seeks to suppress. This Court, however, specifically held in *Gaines* that the independent source exception to the exclusionary rule was consistent with article I, section 7. In addition, numerous other cases from this Court, other Washington courts, and other federal and state courts demonstrate the continued vitality of the principle that a court should focus on the link between the unlawful action and the evidence that a defendant seeks to suppress. This Court, therefore, should reject Eserjose's contention that article I, section 7 requires a court to turn a blind eye to the actual circumstances under which evidence was collected and ignore the link between the unlawful action and the evidence that a defendant seeks to suppress, no matter how attenuated that link might be.

C. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL FINDER OF FACT COULD HAVE FOUND EACH ELEMENT OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT.

Eserjose next claims that there was insufficient evidence to convict him if his statements to law enforcement are suppressed. App.'s Br. at 15. For the reasons outlined above, the trial court did not err in denying Eserjose's motion to suppress. Furthermore, even without Eserjose's confession the evidence was sufficient because, a rational finder of fact could have found each element of the charged offenses beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

To convict Eserjose of the second degree burglary, the State had to prove that he entered or remained unlawfully in a building other than a vehicle or dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1).

A party's adoption of a statement may be either expressed or inferred from his or her conduct after hearing the statement. *State v. McCaughey*, 14 Wn. App. 326, 328, 541 P.2d 998 (1975). An adoptive statement is attributed to the defendant and becomes his or her own words. *State v. Cotten*, 75 Wn. App. 669, 689, 879 P.2d 971 (1994) (citing *State v. Neslund*, 50 Wn. App. 531, 554-57, 749 P.2d 725 (1988)). A party-opponent can manifest adoption of a statement by words, gestures, or complete silence. *State v. Neslund*, 50 Wn. App. 531, 550-51, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988). Silence will only constitute an adoptive admission if the party-opponent heard the statement, was able to respond, and the circumstances surrounding the statement were such that it is reasonable to conclude that the party-opponent would have responded "had there been no intention to acquiesce." *Neslund*, 50 Wn. App. at 551, 749 P.2d 725. An adoptive admission is attributed to the defendant and becomes the defendant's own words. *Neslund*, 50 Wn. App. at 554-57, 749 P.2d 725.

In the present case, Eserjose stipulated that the latte stand named "Latte On Your Way" was burglarized and that approximately \$400 was

taken. CP 33, 36. One of the stand's windows had been broken out and some money that had been stored in the refrigerator was taken. CP 39-40.

A witness named James Kordell informed deputies that Joseph Paragone and Eserjose had come to his house after the burglary and showed him the money that had been taken and explained how they had broken a window, set off an alarm, and had taken money out of the freezer. CP 36. Paragone specifically told Kordell that after breaking the window he had jumped back in his car and started it in case they needed to make a quick getaway and that Eserjose went inside the stand and grabbed the money from the freezer. CP 47. Eserjose was in the room standing next to Paragone while Paragone described the burglary to Kordell. RP 13-14. Kordell also stated that Paragone showed him the money and offered him some of the money for keeping quiet. CP 47. Although Paragone was the one who did most of the talking describing the events of the burglary to Kordell, Eserjose also offered Kordell money if he would keep quiet about the burglary. CP 36, 47.

Viewing this evidence in a light most favorable to the State, the evidence was sufficient to allow a rational jury to find each element of the crime beyond a reasonable doubt. Eserjose's claim that the evidence was insufficient, therefore, must fail.

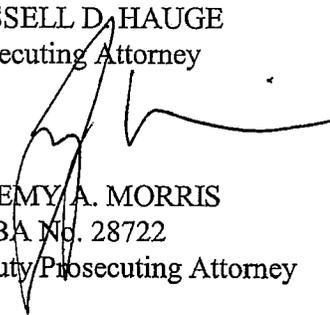
IV. CONCLUSION

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

DATED May 11, 2009.

Respectfully submitted,

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