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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER L. SMITH,

Petitioner.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY

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I. THE ATTENUATION DOCTRINE IS INCOMPATIBLE WITH ARTICLE I, SECTION 7

A. A CATEGORICAL REJECTION OF ATTENUATION COMPORTS WITH THE UNDERLYING PURPOSE OF WASHINGTON'S EXCLUSIONARY RULE

One might inquire, as Justice James Johnson did in his dissent in the Ibarra-Cisneros case, why attenuation under article I, section 7 of the Washington constitution is even a question before the Court. After all, “[t]here has never been a need to explicitly adopt the doctrine under article I, section 7 because there has never been a concern about its propriety. Instead, we have consistently adhered to the federal attenuation doctrine... .” State v. Ibarra-Cisneros, 172 Wn.2d 880, 909 (2011)(Johnson, J. dissenting).¹

In State v. Eserjose, 171 Wn.2d 907, n. 13 (2011), Justice Alexander, writing for a plurality of three justices, wrote that “**there is no justification** for applying the ‘fruit of the poisonous tree’ doctrine differently under article I, section 7 than under the Fourth Amendment.” (emph. added).

¹ This Court has never affirmatively held that the attenuation doctrine, a legal appendage to Fourth Amendment jurisprudence, is valid in Washington separately under article I, section 7. As the State v. Eserjose plurality stated, “[a]lthough we have not explicitly adopted the attenuation doctrine, we have employed it time and again...” 171 Wn.2d at 919.

The historical practice of this Court in confronting the question of attenuation has been to decide cases solely on federal constitutional grounds. This has relieved courts from having to consider the question under article I, section 7. See, e.g., State v. Armenta, 134 Wn.2d 1, 4 (1997) (“We conclude that... petitioners... were detained in violation of the Fourth Amendment.”); State v. Warner, 125 Wn.2d 876, 888 (1995) (“There are two exceptions to the [fruit of the poisonous tree] doctrine that are relevant here. First, if the ‘fruit’ is sufficiently attenuated from the original illegality, then it may be admitted. Nardone v. United States”); State v. Byers, 88 Wn.2d 1, 8 (1977) (“Under such circumstances [of an illegal arrest], the Fourth Amendment forbids that their confessions be admitted. Wong Sun v. U.S.”) *overruled on other grds.*, State v. Williams, 102 Wn.2d 733 (1984).

However, as very recent history has reinforced, there are strong justifications for treating the protections of the Washington Constitution differently from those of the U.S. Constitution. It has long since been established that article I, section 7 of Washington's constitution is more solicitous of individual privacy than is the Fourth Amendment to the U.S. Constitution. State v. Ladson, 138 Wn.2d 343 (1999); State v. Gunwall, 106 Wn.2d 54 (1986); State v. Myrick, 102 Wn.2d 506, 510 (1984) ("In a recent series of cases we have recognized that the unique language of Const. art. 1, 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally. ... While we may turn to the Supreme Court's interpretation of the United States Constitution for guidance... we rely, in the final analysis, upon our own legal foundations in determining its scope and effect.") (cit. omit.). As a result of this increased focus on individual privacy (as opposed to the "reasonableness of governmental conduct" as with the Fourth Amendment), the protections of the state exclusionary rule also reach farther than those of the Fourth Amendment's exclusionary rule. In fact, the "paramount concern" of art. I, sec. 7's exclusionary rule "is protecting an individual's right of privacy." State v. Afana, 169 Wn.2d 169, 180 (2010).

As the four dissenters in the Eserjose case recounted, this Court had no problems recognizing the differences between the underlying state and federal interests, and protecting individual privacy interests, by refusing to accept the good faith exception to the exclusionary rule in Afana, or by

holding that the inevitable discovery doctrine violated the Washington constitution where it was “necessarily speculative and [would] not disregard illegally obtained evidence.” State v. Winterstein, 167 Wn.2d 620, 634 (2009). 171 Wn.2d at 938-39 (Johnson, C., dissenting). Judge Armstrong, dissenting in the Court of Appeals below, agreed with Justice Charles Johnson’s analysis as well. “I agree with the Eserjose dissenters that the attenuation doctrine is incompatible with our ‘nearly categorical’ exclusionary rule and our Supreme Court’s express disapproval of exceptions that admit illegally obtained evidence.” State v. Smith, 165 Wn.App. 296, 329 (2011). As one noted commentator has observed, the attenuation doctrine suffers from problems of vagueness and arbitrariness: “As a part of attenuation analysis, the Court considers many sometimes imponderable questions and sometimes its rationale is not completely clear.” John Wesley Hall Jr., 1 Search and Seizure, (3d. Ed. 2000), sec. 7.1 at 416.

The proposed attenuation doctrine is violative of the Washington constitution not simply because it is incompatible with the privacy rights protected under art. I, sec. 7. Attenuation, like good-faith and inevitable discovery, is also necessarily speculative and specifically does not disregard illegally obtained evidence. “[A]pplication of the exception would necessarily be speculative, a departure from our otherwise nearly categorical exclusionary rule.” Eserjose, 171 Wn.2d at 940 (Johnson, C., dissenting). In fact, the entire purpose of the doctrine of attenuation is to determine at what point is it acceptable to admit evidence that was obtained as a direct or

indirect result of some illegality by the police. The doctrine subverts the requirement that police act with “authority of law” by absolving any illegal actions that lead to evidence where that evidence is “sufficiently distinguishable” from the illegality. Attenuation attempts to place an artificial break somewhere along the line of causality. It is inherently ad hoc, such that reasonable minds can and will disagree as to the point where subsequent evidence is “untainted” enough to be admitted. Adoption of the attenuation doctrine will create far more uncertainty than the simple, understandable and nearly categorical exclusionary rule currently in place. See Part B, infra.

It makes no sense to strike down two analogous exceptions to the exclusionary rule under Afana and Winterstein on the twin bases that such exceptions are speculative and allow admission of illegally obtained evidence, and then contrarily permit the attenuation doctrine which is just as (or more) speculative and clearly allows illegally obtained evidence to be admitted in court.

Because the Washington constitution is primarily concerned with individual privacy instead of solely deterring governmental misconduct, because article I, section 7 “recognizes an individual’s right to privacy with no express limitations,” Eserjose, 171 Wn.2d at 934 (Johnson, C., dissenting) (quoting Winterstein, 167 Wn.2d at 631), because attenuation necessarily is speculative and allows introduction of evidence obtained without “authority of law” (like the struck down good-faith and inevitable discovery exceptions

in Afana and Winterstein) and because Washington's exclusionary rule is "nearly categorical" where the only explicit exception to the fruit of the poisonous tree rule is "when evidence is acquired from an independent source with the requisite authority of law," the attenuation doctrine should be held incompatible with article I, section 7. Eserjose, 171 Wn.2d at 940 (citing State v. Gaines, 154 Wn.2d 711 (2005)). There is no sound reason why the Washington constitution, as in the analogous examples of the good faith and the inevitable discovery exceptions decided in Afana and Winterstein, cannot and should not likewise extend greater and proper protection to the "fruit of the poisonous tree" doctrine by eliminating the exception of attenuation.

**B. THE BUT-FOR TEST IS THE BEST METHOD
TO ANALYZE FRUIT OF THE POISONOUS TREE
CASES, WHERE THE STATE IS ALLOWED
THE OPPORTUNITY TO PROVE AN
INDEPENDENT SOURCE**

The plurality opinion in Eserjose, in rejecting a "but-for" rule of exclusion, stated:

"When a court determines that evidence is not the 'fruit of the poisonous tree,' a defendant's privacy rights are respected, the deterrent value of suppressing the evidence is minimal, and the dignity of the judiciary is not offended by its admission. An alternative 'but for' principle would make it virtually impossible to rehabilitate an investigation once misconduct has occurred, granting suspected criminals a permanent immunity unless, by chance, other law enforcement officers initiate an independent investigation."

171 Wn.2d at 922.

Without citation to any authority, this conclusory statement that "a defendant's privacy rights are respected" rings hollow. When a court arbitrarily holds that certain evidence happened upon because of an illegal

violation of privacy is nevertheless admissible in court, it *disrespects* privacy rights of individuals, creates a disincentive for law enforcement to conduct investigations properly and also offends the judiciary, where tainted evidence is knowingly proffered before the court. In Washington, the most important of these concerns is the violation of individual privacy, where people whose rights have been violated have no recourse. “Disturbingly, the lead opinion does not tell us why the rule requiring some remedy is being abandoned. ... This judicial determination [that admitted evidence is not fruit of the poisonous tree] will likely provide little comfort to persons who have been illegally arrested within their most sacred space, their home.” Eserjose, 171 Wn.2d at 940, n. 22 (Johnson, C. dissenting).

In fact, a “but-for” rule of exclusion that would suppress all evidence directly or indirectly acquired due to the initial illegality is more straightforward in application than a balancing attenuation inquiry. It is more straightforward in application because it is easier to identify what evidence has been tainted by the illegality than to determine whether and when the taint has been “purged.”

A but-for rule is also more fair to all parties. While it is true, the result of government overreaching is to suppress any evidence uncovered as a result, both government and citizenry can be put on notice that the protection of privacy rights is the “paramount concern” in Washington. Afana, 169 Wn.2d at 180. The simplicity of the rule and the severity of its potential consequences will serve as a strong incentive to law enforcement

to respect the privacy of individuals and refrain from taking shortcuts. Rejection of attenuation and adoption of a but-for rule signals a statement, in harmony with recent decisions rejecting good-faith and inevitable discovery, that the ends of acquiring a conviction do not justify the means in trampling privacy rights to achieve those ends. “An attenuation exception... is fundamentally at odds with our article I, section 7 protection.” Eserjose, 171 Wn.2d at 939 (Johnson, C. dissenting).

The Eserjose plurality complained that adoption of the but-for rule might damage entire investigations unless an independent source for evidence were introduced. 171 Wn.2d at 922. However, the possible severity of the sanction for the government’s illegality should not factor in this Court’s calculus. After all, this Court struck down would-be exceptions to the exclusionary rule despite the potential magnitude of future suppressions, as it was the proper thing to do to serve the underlying interests of art. I, sec. 7. Afana; Winterstein. This case is no different. In fact, there is a built in safety valve to the but-for rule that was noted, if skeptically, by the Eserjose plurality: the independent source doctrine.

In State v. Gaines, this Court held that art. I, sec. 7 allows the admission of evidence, even if that evidence is tainted by some police illegality, where a subsequent search or seizure is based on untainted information obtained independently from an initial unlawful search and the state’s decision to seek a warrant is not motivated by discoveries made during the initial unlawful search. Independent source is a way for the state to

rehabilitate an investigation sidetracked by unlawful conduct. It is, perhaps, a more common phenomenon than Eserjose gives it credit. See, e.g., State v. Moore, 29 Wn.App. 354 (1981) (independent source allows admission of evidence from two searches of suitcase, the first search unlawful and the second performed without knowledge of the first); State v. Warner, 125 Wn.2d at 888 (“In this case... there are essentially two sources for the witness testimony... .”); State v. O’Bremski, 70 Wn.2d 425, 430 (1967) (“Therefore, as knowledge of the girl was gained from independent sources, her testimony was not a derivative product of an unlawful search.”).

II. WHEN AN OTHERWISE UNKNOWN WITNESS IS IDENTIFIED AS A DIRECT OR INDIRECT FRUIT OF AN ILLEGAL SEARCH OR SEIZURE UNDER ART. I, SEC. 7, THE REMEDY IS *PER SE* EXCLUSION

It must be kept in mind that the illegal arrest of Mr. Smith and subsequent warrantless entry into his motel room was a violation *only* of Art. I, sec. 7. State v. Smith, 165 Wn.App. at 302-03, 306, citing State v. Jorden, 160 Wn.2d 121, 131(2007).² Therefore, whatever the analysis or remedy may be for an analogous Fourth Amendment transgression it is not dispositive for Art. I, sec. 7 purposes. It must also be kept in mind that the different exclusionary rules are grounded in different policy concerns which frequently results in different outcomes. As this Court recently stated, the “protections guaranteed by article I, section 7 are qualitatively different from

² Compare State v. Jorden, 160 Wn.2d at 131 (Art. I, sec. 7 prohibits warrantless view of motel registry) with United States v. Cormier, 220 F.3d 1103, 1108 (9th Cir. 2000) (Fourth Amendment allows warrantless view of motel registry).

those under the Fourth Amendment.” State v. Snapp, 174 Wn.2d 177, 187 (April 5, 2012).

The question of what remedy applies to an Art. I, sec. 7 violation resulting in discovery of an otherwise unknown witness appears to be an issue of first impression in this Court. Other courts confronted with a similar issue have recognized it to be a “profound” question. People v. Albea, 118 N.E.2d 277, 279 (Ill.Sup.Ct.1954) (“The question presented here is much too profound to be brushed aside ... It is our duty to preserve unto the people the guarantees proclaimed in the State and Federal constitutions against unreasonable search and seizure.”); State v. Rogers, 198 N.E.2d 796, 797 (Ohio Com. Pleas 1963) (same). Thus, the analysis in cases discussing Fourth Amendment violations leading to the discovery of previously unknown witnesses is only relevant insofar as the Court finds it persuasive.

There are three possible answers to the question presented. First, the testimony of witnesses whose identity was discovered as a result of an unlawful search or seizure might always be admissible irrespective of the illegality. Second, the testimony of witnesses whose identity was discovered as a result of an unlawful search or seizure might always be *inadmissible*, as with any other kind of tainted evidence, *unless* the identity was known to the state by an independent source. Third, the question could be decided on a case by case basis depending on the balancing of pertinent factors.

A. THERE IS NO *PER SE* EXCEPTION PERMITTING WITNESSES, INCLUDING VICTIM-WITNESSES, TO ALWAYS TESTIFY REGARDLESS OF ILLEGALITY

Federal Constitution. In the leading Fourth Amendment case, the government argued that in every case, regardless of the illegality leading to the discovery of an otherwise unknown witness, such witness ought to be able to testify because of the perceived difference between live witness evidence and inanimate evidence. A single justice of the United States Supreme Court was persuaded. United States v. Ceccolini, 435 U.S. 268, 280-85 (1978) (conurrence by Burger, C.J.) (“I perceive this distinction to be so fundamental ... I would ... resolve the case of a living witness on a *per se* basis, holding that such testimony is always admissible”) The remainder of the Court disagreed holding instead either that the admissibility of the tainted witness’ testimony should be evaluated on a case-by-case basis (majority opinion at pp. 274-75) or that a witness should be treated as any other fruit of the poisonous tree (dissent at p. 285, Marshall with Brennan, JJ.).

Eleven years prior to Ceccolini, this Court had occasion to consider this issue in a related context in State v. O’Bremski, 70 Wn.2d 425 (1967). In O’Bremski, the police made a warrantless nonconsensual entry into defendant’s apartment searching for a 14-year-old female runaway whom they located in the residence. The defendant argued the discovery of the young lady was the fruit of the unlawful entry and search and consequently “the testimony of the girl was inadmissible.” 70 Wn.2d at 428.

In evaluating this claim, the Court did not pause or hesitate because

the evidence to be suppressed was the testimony of a putative victim-witness. The Court made no mention of any special rule or limitation to the exclusionary rule due to the status of the evidence. On the contrary, the O'Bremski Court cited with apparent approval out of state cases, including People v. Albea and State v. Rogers, *supra*, for the proposition that “[s]everal courts have ... held that testimony of a witness discovered as a result of an illegal search is not admissible in a criminal prosecution.” *Id.* The Court gave every indication it would have followed this authority and reversed for erroneous admission of the young lady’s tainted testimony except for the fact the Court found determinative that the police had previously known the identity of the witness from other independent sources. 70 Wn.2d at 429-30.

Hence, to the extent O'Bremski was based on the Fourth Amendment, it is consistent with Ceccolini’s repudiation of the government’s posture that if the tainted evidence consists of witness testimony, it is *per se* admissible. The Court of Appeals below, however, appears to fully embrace the rejected *per se* admissible position of Chief Justice Burger. *See State v. Smith*, 165 Wn.App. at 315 (categorically stating “both federal courts and Washington courts have held that witness testimonies are not subject to suppression because of the constitutional violation,” citing State v. Hilton, 164 Wn.App. 81, 90 (2011), *rev. den.*, 277 P.3d 669 (April 27, 2012) (also categorically stating “Washington courts have likewise recognized that the testimony of a witness discovered through a constitutional

violation is not subject to suppression,” citing, among other cases, State v. O’Bremski).

The simplistic – and erroneous – pronouncements of the Court of Appeals reveal that court has not only failed to read Ceccolini and O’Bremski correctly (they stand for a quite different proposition) but also has failed to heed Professor LaFave’s admonition in this regard:

“Especially because Ceccolini rests upon a rather shaky foundation, it should be carefully interpreted and applied by the lower courts. If applied in a loose and unthinking fashion, the result could be – in effect – the per se rule which the majority rejected.”

LaFave, 6 Search and Seizure (4th ed. 2004), sec. 11.4(i) at p. 368.³

Washington Constitution. Of course, the Court of Appeals majority in Smith below is guilty of an even more fundamental mistake: the failure to recognize that an *Art. I, sec. 7* violation requires analysis of the proper *Art I, sec. 7* remedy, which can hardly be satisfied by mere reference to *Fourth Amendment* authority, much less erroneous reference. Post-State v. Gunwall, 106 Wn. 2d 54 (1986), “the only relevant question is what protection is provided in a particular context.” State v. Snapp, *supra*, 174 Wn.2d at 193-94, n. 9. The Smith majority fails to address, let alone attempt to answer, the relevant question.

The state, on the other hand, suggests a novel end run on this question seeking to arrive at Chief Justice Burger’s position under the

³ Quoted with approval in United States v. Ramirez-Sandoval, 872 F.2d 1392, 1397, n. 5 (9th Cir. 1989), citing LaFave 4 Search and Seizure (2d ed. 1987), sec. 11.4(i) at 452.

guise of the Washington Constitution. *See* Brief of Respondent at 30-31. Relying on Art. I, sec. 35 (adopted 1989), the state implies the provision conditionally protecting certain rights of crime victims should be extended to create a right of victim-witnesses to testify in criminal trials (“given the express grant of rights to crime victims in the Washington constitution, the status of a voluntarily testifying victim should be accorded greater deference as an independent action than it is under federal law).” While there may be sympathetic appeal in such an argument, the problem is that it is not only not supported by the text of the provision but Art. I, sec. 35 contains its own refutation of the argument. First, the amendment contains no language explicitly or implicitly supporting the *right* of victims to testify on their own behalf in criminal trials. Second, the only trial participatory right mentioned is the *post-trial* opportunity to make an unsworn “statement at sentencing.” Third, and most significantly, victims’ *rights* are qualified in every case by the provision they are “subject to the discretion of the individual presiding over the trial or court proceedings.” When a trial judge suppresses evidence, including victim-witness testimony, as constitutionally required under section 7 of the same article, the judge is necessarily exercising discretion which constitutionally trumps any conditional rights.

When the identity of an otherwise unknown witness is gained by exploiting a constitutional violation, the status of witness, including victim-witness, does not justify *per se* admission of the witness’ testimony under either the federal or state constitutions.

B. WITNESS TESTIMONY DERIVED SOLELY FROM AN ART. I, SEC. 7 VIOLATION IS *PER SE* INADMISSIBLE AS WITH ANY OTHER FRUIT OF THE POISONOUS TREE

State v. O'Bremski, *supra*, relied on Art. I, sec. 7 as well as the Fourth Amendment. 70 Wn.2d at 428. While it obviously pre-dates Gunwall, its reasoning is still eminently valid and supports a holding that a witness tainted by an illegal search or seizure is excludable as fruit of the poisonous tree unless the identity of the witness was known to the authorities prior to the illegality by an independent source.

O'Bremski presents the fact pattern where, although an illegal search or seizure lead to the physical securing of a victim-witness, the *identity* of the witness was already known through independent sources. This clearly distinguishes the situation in Smith where the identity of the two victim-witnesses was not previously known to the state.

State v. Childress, 35 Wn.App. 314 (1983) presents the latter fact pattern. The defendant Childress resided in California when local police illegally searched his residence. "As a result of the illegal search, the police took from the defendant's wallet a photograph of two nude girls, a Washington driver's license and a bank check showing an Everett address." 35 Wn.App. at 315. The Everett police used the address on the check to canvass the area around the address and showed one of the photos to a couple who identified their daughter in the photo. Prior to identifying the girl via the illegally obtained California evidence, the Everett police had no knowledge of the victim-witness.

The Court of Appeals elected to ignore the reasoning of O'Bremski as it suggested the correct result under Art. I, sec. 7 and instead proceeded to decide the case under the Fourth Amendment by weighing the Ceccolini factors. By doing so, the Childress court necessarily evaded consideration of the key deciding factor: the presence of independent source in O'Bremski and the absence of independent source in Childress.

In analyzing fruit of the poisonous tree, Washington courts have generally followed a “but-for” methodology. State v. Chapin, 75 Wn.App. 460, 463 (1994) (“Under the derivative evidence doctrine we apply a but-for analysis.”); State v. Aranguren, 42 Wn.App. 452, 457 (1985) (same); *but see*, State v. Early, 36 Wn.App. 215, 220 (1983).⁴ The legal authorities cited by O'Bremski are instructive on this point. *See* People v. Albea, *supra*, 118 N.E.2d at 279 (referencing earlier decisions, “[o]ne could well say of [these] cases that but for the illegal search the names of the prosecuting witnesses would not have been obtained, and in this case but for the illegal search the witness ... would not have been discovered.”); State v. Rogers, *supra*, 198 N.E.2d at 806 (“the testimony of the occupant the officer would

⁴ While the United States Supreme Court generally requires a “but-for” cause to establish fruit of the poisonous tree, Segura v. United States, 468 U.S. 796, 815 (1984), the Court purports to accept a relaxed, more amorphous, application of “but-for” analysis for derivative evidence. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); United States v. Ceccolini, 435 U.S. 268, 276 (1978).

not have questioned about defendant's possession of the gun but for the discovery of the gun in the course of the unauthorized search."); People v. Mickelson, 380 P.2d 658, 659 (Cal.Sup.Ct.1963) (accomplice's "arrest and his availability as a witness were direct results of the search that disclosed the physical evidence of the burglary. If that search was illegal, neither the physical evidence nor [accomplice's] testimony is competent to support the information."); People v. Grossman, 45 Misc.2d 557, 565 (N.Y.Sup.Ct.1965), citing with approval, United States v. Tane, 329 F.2d 848 (2d Cir.1964) (identity of witness would not have been discovered but-for unlawful wiretap).

Even though these cases are based on the Fourth Amendment pre-Ceccolini, the important principle they stand for that testimonial evidence derived closely in time to an illegal search or seizure is contaminated fruit of the poisonous tree and is subject to suppression survives Ceccolini.

Although the Ceccolini majority retreated from the view in Wong Sun that "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence," 435 U.S. at 275, quoting as modified, Wong Sun, 371 U.S. at 486, nevertheless the majority in Ceccolini stated:

"We also reaffirm the holding of Wong Sun [371 U.S. at 485] that 'verbal evidence which derives so immediately from an un-

lawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common fruits of the unwarranted intrusion."

This passage supports the view implicitly expressed by this Court in O'Bremski and explicitly stated in the cases cited in that decision that testimonial evidence should be treated the same as physical evidence. *See, e.g., People v. Albea, supra*, 118 N.E.2d at 279-280 (emph. ad.):

"[W]e cannot be unmindful of the principles established by long precedent which have sought to preserve the sanctity of the home and the right of privacy of the individual *merely because the evidence has changed from inanimate to animate form. ... We see no reason for a different rule in this case when the ends of justice sought to be maintained are the same.*"

Accordingly, the exclusionary rule of Art. I, sec. 7, designed for the purpose of insuring individual privacy and privacy of the home, should be applied to any evidence, live witness or physical, derived directly or indirectly from an illegal search or seizure which but-for the illegality would not otherwise be known. Under the facts of this case where the verbal evidence of two otherwise unknown witnesses was derived immediately from the unauthorized arrest of Mr. Smith, the witness testimony should have been excluded as being "no less the 'fruit' of official illegality than the more common tangible fruits of [an] unwarranted intrusion."

**C. THE *CECCOLINI* FACTORS ARE TOO AMORPHOUS
IN APPLICATION AND DO NOT SERVE THE PURPOSE
OF THE EXCLUSIONARY RULE UNDER ART. I, SEC.7
TO PROTECT PRIVACY**

This Court has not had occasion to consider the Ceccolini factors as delineated by the United States Supreme Court under the Fourth

Amendment although there are a number of Court of Appeals decisions which do. *See State v. Knighten*, 109 Wn.2d 896, 913 (1988) (“issue of the exclusion of witness testimony deriving from a Fourth Amendment violation of a defendant’s right has been examined by other courts,” citing *Ceccolini*, “[h]owever, this issue was not considered below, and any review must await consideration and findings of fact by a trial court.” dissenting opinion by Pearson, C.J. for four members of Court).

While courts vary in their enumeration of the *Ceccolini* factors, they can be stated as follows: 1) the length of the “road” between the illegality and identification of the witness; 2) the degree of “free will” exercised by the witness; 3) a witness would be perpetually disabled from testifying “regardless of how unrelated such testimony might be to the purpose of the originally illegal search,” 435 U.S. at 277; 4) is the rationale of the Fourth Amendment exclusionary rule served so that the “penalties visited upon the Government ... bear some relation to the purposes which the law is to serve,” 435 U.S. at 279.

The question presented here is: Should the *Ceccolini* factors be incorporated into the exclusionary rule of Art. I, sec. 7? The answer is no.

Arguably, the most important factor should be the length and/or directness of the road between the illegality and the discovery of the previously unknown witness. This is the teaching of *Wong Sun* (excluding “verbal evidence which derives so immediately from an unlawful entry and unauthorized arrest”). And, the majority in *Ceccolini* implies this should be

the case (“since the cost of excluding live-witness testimony often will be greater [than suppressing physical evidence], a closer, more direct link between the illegality and that kind of testimony is required”), 435 U.S. at 278. In reality, the most important factor has turned out to be the so-called “free will” factor.⁵ Citing philosophers from Wittgenstein to Sartre, Chief Justice Burger mocked this as other than a “coherent” factor in exclusionary rule analysis (“In the history of ideas many thinkers have maintained with persuasion that there is no such thing as ‘free will,’”) 435 U.S. at 281-82.

Introducing such an amorphous mix of esoteric factors into the application of the exclusionary rule under Art I, sec. 7 does nothing but add unnecessary confusion to a straightforward doctrine. There is a qualitative difference between Art. I, sec. 7's “no express limitations” and the Fourth Amendment exclusionary rule which:

“applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.”

State v. Chenoweth, 160 Wn.2d 454, 472 n.14 (2007), citing the seminal case of State v. White, 97 Wn.2d 92, 110 (1982). In the words of Justice Marshall: “I do not believe that the same tree, having its roots in an unconstitutional search or seizure, can bear two different kinds of fruit, with

⁵ For Washington Court of Appeals decisions giving dispositive weight to “free will,” for witness testimony derived from Miranda violations *see, e.g., State v. West*, 49 Wn. App. 166 (1987) (“free will” trumps absence of other factors); State v. Stone, 56 Wn.App. 153 (1989) (“This factor alone is sufficient ...”).

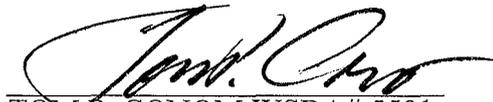
one kind less susceptible than the other of exclusion" 435 U.S. at 286.

CONCLUSION

The attenuation doctrine is incompatible with the near categorical status of the exclusionary rule under Art. I, sec. 7 and should be rejected. Under the "fruit of the poisonous tree" doctrine, when an otherwise unknown witness is identified as a direct or indirect byproduct of an illegal arrest or search, any testimonial evidence must be excluded unless there is an independent source for the witness' identity.

DATED THIS 3rd DAY OF AUGUST, 2012.


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IN THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Case No. 86951-1

Respondent,

CERTIFICATE OF SERVICE

vs.

CHRISTOPHER SMITH,

Appellant.

CERTIFICATION

I certify that on August 16, 2012, I served by email and by U.S. Mail, postage prepaid one copy of the Motion to File an Amicus Brief and WACDL's Amicus Brief on the following:

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