

SUPREME COURT NO. 86951-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SMITH,

Petitioner.

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

The Honorable Linda C.J. Lee, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUE STATEMENTS

1. Whether the federal attenuation doctrine violates article 1, section 7 of the Washington Constitution.

2. Whether the State waived reliance on the doctrine by failing to litigate it in the trial court?

3. Whether the Court of Appeals erred in relying on the independent source doctrine where the State affirmatively waived reliance on the doctrine and the available evidence reveals there was no independent source.

4. Even if the State could demonstrate some of its evidence was properly admitted, whether it can prove the erroneous admission of its remaining evidence was harmless beyond a reasonable doubt.

5. Whether the Court of Appeals erred when it concluded that convictions for Rape in the First Degree and Rape of a Child in the Second Degree, based on the same act, do not violate double jeopardy protections.

B. SUPPLEMENTAL STATEMENT OF THE CASE

In 2006, the Golden Lion Motel participated in the "Crime Free Motel Program," in which the motel provided the Lakewood Police Department with a list of its registered guests so that officers could determine whether guests had any outstanding warrants. RP 46-49. On

October 22, 2006, Officer Austin Lee employed this procedure and determined that Christopher Smith had a warrant. RP 50-51, 82-83.

Once backup officers arrived, Lee knocked on the door of the room in which Smith was staying. When Smith opened the door, he was placed under arrest. RP 52-53. From the doorway to the room, officers could see there were others in the room, including a woman holding a towel stained with blood from a wound to her head. Officers entered. RP 24-27, 37-40, 101-103, 109. Inside, they found three people: Quianna Quabner, her 12-year-old daughter (L.S.), and L.S.'s two-year-old brother. RP 65, 108, 129. Quabner claimed that Smith had tied her up and assaulted her. She also claimed that Smith had sexually assaulted L.S. RP 62, 65-66.

It is undisputed that had Officer Lee not obtained Smith's name from the motel registry, there was no other reason to contact Smith in his room. There had been no distress calls about or from the room, and police did not know Smith was staying there. RP 31, 42, 84-89, 112, 119.

Prior to trial, the defense moved to suppress evidence of the crimes. Citing State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), the defense argued the warrantless search of the guest registry tainted all subsequent evidence, and that the inevitable discovery doctrine was

invalid under the Washington Constitution.¹ RP 89-97, 196-210; RP 168-184.

The State conceded a constitutional violation under Jorden. RP 154. But based on Quabner's testimony at the hearing on the motion to suppress, that she eventually would have called 911, the State argued that most of the evidence discovered following the constitutional violation, including the testimony of its witnesses, was admissible under the inevitable discovery doctrine. RP 130-134, 154-168, 184-185.

The prosecutor told the court that if it found inevitable discovery did not apply, "then, the court is faced with some, frankly, rather complicated questions," including whether the victims and officers could still testify to their observations. RP 156. The prosecutor did not address these questions, however, instead indicating, "I don't pretend to know the answers to those questions, and I'm not aware that case law has ever addressed them specifically." RP 156.

To clarify what was not at issue, defense counsel noted the prosecutor's agreement that this was not an "independent source" case. Defense counsel placed on the record a telephone call from the deputy prosecutor during which the prosecutor said, "We need to be clear that I'm

¹ State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009), had not yet been decided.

not arguing this is an independent source case.” RP 176. The prosecutor was present when this discussion was placed on the record.

With a few exceptions, the trial court found the State’s evidence admissible under the inevitable discovery doctrine. RP 190-198; CP 492-493. At trial, Quabner and L.S. testified to events in the motel room. The prosecution also called two police officers, a property and evidence supervisor from the Lakewood Police Department, a pediatric nurse who treated L.S., a paramedic who treated Quabner, a detective, and Quabner’s sister. The State also admitted physical evidence collected at the motel. See Petition for Review, at 6-9.

A jury found Smith guilty of (count 1) Rape in the First Degree; (count 2) Rape of a Child in the Second Degree; (count 3) Kidnapping in the First Degree; (count 4) Kidnapping in the First Degree; (count 5) Assault in the First Degree; (count 6) Felony Harassment; and (count 7) Felony Harassment. Quabner was the named victim in counts 3, 5 and 6. L.S. was the named victim in the remaining counts. The jury made a deadly weapon finding for each crime. CP 281, 283-286, 289-290, 293-295, 298-304.

Following Smith’s convictions, this Court decided Winterstein, finding the inevitable discovery doctrine incompatible with article 1,

section 7. On appeal, Smith argued that in light of Winterstein, the trial court erred when it found the State's evidence admissible under that doctrine. See Brief of Appellant, at 11-15.

In response – and for the very first time in the case – the State argued the testimony of Quabner and L.S. was admissible under the independent source and attenuation doctrines. See Brief of Respondent, at 18-39. It also argued the admission of its other trial evidence was harmless error. Id. at 40-41. In reply, Smith argued the State had waived these arguments by failing to make them below and failing to make the evidentiary record necessary to support them. He also challenged the State's assertion that any error was harmless. See Reply Brief of Appellant, at 1-11.

Judges Johanson and Quinn-Brintnall agreed with the State, finding the testimony of Quabner and L.S. admissible under the independent source and attenuation doctrines. State v. Smith, 165 Wn. App. 296, 300-317, 266 P.3d 250 (2011). They also rejected Smith's argument that his rape and child rape convictions – based on the same act – violated double jeopardy. Id. at 317-325. In a dissenting opinion, Judge Armstrong found the attenuation doctrine incompatible with article 1,

section 7, that the State had waived reliance on the doctrine in any event, and that there was no independent source. Id. at 325-332.

C. ARGUMENT

1. THE ATTENUATION DOCTRINE VIOLATES ARTICLE 1, SECTION 7.

When police have engaged in an unconstitutional search or seizure in violation of article 1, section 7, “all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” State v. Ladsen, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). This strict rule applies not only to evidence seized during the unlawful search or seizure, but also to evidence derived therefrom, and “saves article 1, section 7 from becoming a meaningless promise.” State v. Gaines, 154 Wn.2d 711, 717-718, 116 P.3d 993 (2005); Ladsen, 138 Wn.2d at 359 (citation omitted).

This Court recently reaffirmed that, unlike the federal exclusionary rule, Washington’s rule is “nearly categorical,” rejecting both the federal “good faith” and “inevitable discovery” exceptions to our rule. State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) (“good faith”); Winterstein, 167 Wn.2d at 636 (“inevitable discovery”). The question now before this Court is whether the federal “attenuation” exception also runs afoul of article 1, section 7.

“In determining the protections of article 1, section 7 in a particular context, ‘the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.’” State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007) (quoting City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)).² As discussed below, the federal and state exclusionary rules are based on different concerns and aimed at achieving very different goals. While the federal attenuation doctrine (like the “good faith” and “inevitable discovery” doctrines) serves its intended goals under the Fourth Amendment, it is wholly inconsistent with article 1, section 7’s unique purpose and history.

The Fourth Amendment to the United States Constitution provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” In contrast, article 1, section 7 of the Washington Constitution provides, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

² Because it is well established that article 1, section 7 is qualitatively different than the Fourth Amendment, and often more protective of individual rights, a discussion under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is no longer necessary for an independent state constitutional analysis. Chenoweth, 160 Wn.2d at 462-463.

Article 1, section 7's greater privacy protections are well established. State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). Whereas Fourth Amendment protections turn on the reasonableness of government action, article 1, section 7 "clearly recognizes an individual's right to privacy with no express limitations." State v. White, 97 Wn.2d 92, 104-105, 110, 640 P.2d 1061 (1982).

This difference in purpose impacts the remedy available for any violation. With its focus on the reasonableness of officers' actions, the primary justification for excluding evidence under the Fourth Amendment is deterrence of police misconduct.³ Herring v. United States, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979); Stone v. Powell, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); Wong Sun v. United States, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). "The [federal] rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive

³ An additional, albeit more limited, justification for the exclusion of evidence under the Fourth Amendment is maintaining the integrity of the federal courts. Powell, 428 U.S. at 485-486; Wong Sun, 371 U.S. at 486.

to disregard it.” Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

As a creature of the federal exclusionary rule, the “attenuation doctrine” is heavily rooted in this same goal of deterring police misconduct. The doctrine requires federal courts to examine the admissibility of evidence “in light of the distinct policies and interests of the Fourth Amendment.” Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

Thus, in Brown, the United States Supreme Court refused to apply a “but for” rule of exclusion and, instead, adopted a case-by-case balancing approach for determining when the causal connection between a Fourth Amendment violation and subsequently-discovered evidence is sufficiently attenuated. Id. at 603. Factors to consider under the Fourth Amendment are (1) temporal proximity of the unlawful arrest and confession, (2) intervening circumstances, (3) “and, particularly, the purpose and flagrancy of the official misconduct.” Id. at 603-604. Where the subsequent evidence is the defendant’s confession, a fourth factor is whether Miranda⁴ warnings were given after the initial illegality. Id.

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

In his concurring opinion in Brown, Justice Powell elaborated on the connection between these factors and the distinct interests of the Fourth Amendment:

strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. . . .

Brown, 422 U.S. at 609 (Powell, J., concurring). Justice Powell continued, "[t]he basic purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests." Id. at 610. "[T]he Wong Sun inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." Id. at 612.

In short, the federal "attenuation doctrine" concedes a connection between the illegality and the evidence in question but, rather than automatically exclude the evidence, aims to determine whether deterrence of police misconduct requires that result. See New York v. Harris, 495 U.S. 14, 19, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (attenuation analysis "appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.'")(quoting United States v. Crews, 445 U.S. 463, 471, 100 S. Ct.

1244, 63 L. Ed. 2d 537 (1980)); see also Nardone v. United States, 308 U.S. 338, 340-341, 60 S. Ct. 266, 84 L. Ed. 307 (1939) (“Sophisticated argument may prove a causal connection between information obtained [illegally] and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint”; exclusion “must be justified by an over-riding public policy expressed in the Constitution”).

The Supreme Court also focused on this goal of deterrence in another seminal attenuation case, United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). In Ceccolini, the Court examined the admissibility of a witness’s trial testimony where that witness’s information was discovered as a consequence of an unlawful search. Noting the federal rule’s “broad deterrent purpose,” the Ceccolini Court emphasized ““application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”” Ceccolini, 435 U.S. at 275 (quoting United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)).

As in Brown, the Ceccolini Court refused to adopt a per se rule. Concerning admissibility of a witness’s live testimony at trial, it identified factors to mark the point at which the detrimental consequences of illegal

police action become so attenuated the deterrent effect of excluding the testimony, on balance, no longer justifies its cost. Ceccolini, 435 U.S. at 274-276. Those factors are: (1) the length of the road between the unlawful conduct, initial contact with the witness, and the decision to testify (2) the willingness of the witness to freely testify, and (3) the fact exclusion would perpetually disable a witness from testifying regardless of the relationship between that testimony and the original illegality or the evidence discovered at that time. Ceccolini, 435 U.S. at 274-280.

In Ceccolini, substantial periods of time had passed between the unlawful search, contact with the witness, and the witness's testimony; police already knew about the witness prior to the unlawful search; and there was no evidence the offending officer intended the violation. Id. at 279-280. The Court held that the cost of excluding the witness's testimony in that particular case was "too great . . . to secure such a speculative and very likely negligible deterrent effect." Id. at 280.

The Washington Supreme Court has never explicitly adopted the federal attenuation doctrine under article 1, section 7. State v. Eserjose, 171 Wn.2d 907, 919, 259 P.3d 172 (2011). And while this Court has employed or mentioned the doctrine in several cases, critically, in none of these cases did the appellant specifically challenge its compatibility with

article 1, section 7 in light of our provision's greater privacy protections. See, e.g., State v. Armenta, 134 Wn.2d 1, 10 n.7, 17, 948 P.2d 1280 (1997); State v. Warner, 125 Wn.2d 876, 888-889, 889 P.2d 479 (1995); State v. Rothenberger, 73 Wn.2d 596, 600-601, 440 P.2d 184 (1968); State v. Vangen, 72 Wn.2d 548, 554-555, 433 P.2d 691 (1967); State v. O'Bremski, 70 Wn.2d 425, 428-429, 423 P.2d 530 (1967).⁵

Article 1, section 7's exclusionary rule is not tethered to the Fourth Amendment. Indeed, not until 1961 did the United States Supreme Court hold that the Fourteenth Amendment compelled the extension of Fourth Amendment protections to defendants in state prosecutions. See Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). By that time, Washington had applied a rule of automatic exclusion to violations of article 1, section 7 for more than 40 years, frequently rejecting attempts to weaken the rule. See Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash.L.Rev. 459, 473-485 (1986).

⁵ In Eserjose, Justice Alexander cited this line of cases in asserting this Court has "at least, implicitly adopted the attenuation doctrine." Eserjose, 171 Wn.2d at 920. However, "[g]eneral statements in every opinion are to be confined to the facts before the court, and limited in their application to the points actually involved." State ex rel. Wittler v. Yelle, 65 Wn.2d 660, 670, 399 P.2d 319 (1965). This Court's failure to ever consider the constitutionality of the attenuation doctrine under article 1, section 7 should not be deemed an implicit adoption.

In the years following Mapp, which compelled state's to apply – at a minimum – the federal exclusionary rule, the Washington Supreme Court was content to simply rely upon federal precedent when ordering exclusion under article 1, section 7. Id. at 486. “As long as the United States Supreme Court continued to require state courts to automatically apply the federal exclusionary remedy whenever they found a fourth amendment violation, the Washington court had little reason to independently apply the Washington exclusionary rule.” Id. at 487. That changed, however, in light of the Burger Court’s “retrenchment in the area of federally guaranteed civil liberties,” triggering an eventual return to independent application of the rule of automatic exclusion under article 1, section 7. Id. at 487-488.

In State v. White, this Court declared a statute making it a crime to “obstruct a public servant” unconstitutionally vague. White, 97 Wn.2d at 95-101. White was arrested for violating the statute and subsequently confessed to a burglary. At issue was whether White’s unlawful arrest required suppression of the confession. Id. at 101. In DeFillippo, the United States Supreme Court (Justice Burger writing for the majority) had upheld the defendant’s arrest, and use of the fruits of that arrest, for violating a similar obstruction statute under the federal good faith

exception to the Fourth Amendment exclusionary rule. White, 97 Wn.2d at 35-40.

In holding that article 1, section 7 required suppression, the White Court noted the difference in purpose behind the state and federal rules:

The result reached by the United States Supreme Court in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be served.⁶ This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable government intrusions. Const. art. 1, s 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

....

We think the language of our state constitutional provision constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions. This view toward protecting individual rights as a paramount concern is reflected in a line of Washington Supreme Court cases predating Mapp v. Ohio The important place of the right to privacy in Const. art. 1, s 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.

⁶ The White Court noted that deterrence of police misconduct was the federal rule's purpose. White, 97 Wn.2d at 110 n.8.

White, 97 Wn.2d at 109-110 (citations and footnotes omitted). The Court concluded that – apart from what the United States Supreme Court might do – article 1, section 7 mandated the exclusion of White’s confession.⁷ Id. at 112.

More recently, this Court once again highlighted the difference in purpose between the federal and state exclusionary rules:

The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It 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 government intrusions.

Chenoweth, 160 Wn.2d at 472 n.14 (citing cases, including White); see also In re Nichols, 171 Wn.2d 370, 375, 256 P.3d 1131 (2011) (“We have consistently rejected the sort of balancing test that federal courts apply[.]”).

⁷ Shortly after White, in State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831 (1983), this Court engaged in “a balancing of the costs and benefits of exclusion” akin to the federal approach in deciding if the defendant’s post-arrest confession should be suppressed. But it did so only where the arrest in question took place in Oregon and was unlawful under Oregon law, but not Washington law, and did not involve a violation of the Washington Constitution. Bonds, 98 Wn.2d at 7, 10-15. The Bonds Court made it clear, however, that a violation of article 1, section 7 would invalidate such an approach. Suppression of the subsequent confession would be required. Bonds, 98 Wn.2d at 10-11.

Given the material differences between the state and federal rules, it would be very odd indeed if Washington's exclusionary rule *were* tied to its Fourth Amendment counterpart. And examining the factors federal courts use to find the point at which the deterrent effect no longer justifies exclusion under the Fourth Amendment further highlights these differences.

Under the attenuation doctrine, the most important factor is "the purpose and flagrancy of the official misconduct." Brown, 422 U.S. at 604 (noting this factor "particularly"); see also Ceccolini, 435 U.S. at 279-280 ("not the slightest evidence" officer intended unlawful discovery of evidence). Yet, this factor should be largely irrelevant under article 1, section 7 given its primary concern with protecting privacy rights. Under our provision, the purpose and flagrancy of the constitutional violation matters little. What matters is that there was a violation at all.⁸

The same is true for the other attenuation factors. As previously noted, when deciding whether to suppress the testimony of a witness discovered through an illegal search, federal courts weigh competing interests and examine (1) length of the road between the unlawful conduct,

⁸ This Court's rejection of the federal "good faith exception" to the exclusionary rule, an exception only applicable in the absence of a flagrant violation of the defendant's rights, seems to recognize this. Flagrant or reasonable, article 1, section 7 demands suppression. See Afana, 169 Wn.2d at 179-180, 183-184.

initial contact with the witness, and the decision to testify (2) willingness of the witness to freely testify, and (3) the fact exclusion perpetually disables a witness from testifying regardless of the relationship between that testimony and the original illegality or the evidence discovered at that time. Ceccolini, 435 U.S. at 274-280. Lower federal courts have added additional factors, including “police motivation in conducting the search.” United States v. Hooton, 662 F.2d 628, 632 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982).

Again, while these factors may help federal courts in their cost/benefit analysis aimed at deterring police misconduct, they do not ensure the protection of Washington’s greater privacy rights and are inconsistent with our “nearly categorical” exclusionary rule. None of these factors converts a violation of article 1, section 7 into a non-violation or the fruits of that violation into non-fruit. As four justices of this Court recently indicated, “Evidence obtained in violation of a person’s constitutional rights, even if attenuated, still lacks the authority of law [required by article 1, section 7] and should be suppressed.” Eserjose, 171 Wn.2d at 940 (C. Johnson, J., dissenting).

Rejecting the federal attenuation doctrine is consistent with the reasoning in Winterstein, where this Court found the inevitable discovery

doctrine “necessarily speculative.” Winterstein, 167 Wn.2d at 634. Attenuation is also speculative. Inevitable discovery rests on the State’s ability to prove, despite unlawful police conduct, the evidence in question would necessarily have been discovered through proper means. Id. at 634-635. Similarly, attenuation in the context of witness testimony rests on the State’s ability to prove, despite unlawful police conduct, the witness would have been lawfully discovered anyway and would have been willing to testify against the defendant. See Ceccolini, 435 U.S. at 276 (“The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness.”).

In short, both doctrines call for a speculative hindsight examination of the same question: “what if police had not acted unlawfully”? Since an officer’s testimony that he or she inevitably would have discovered evidence using proper procedures falls short of article 1, section 7, it is not clear why an accuser’s testimony that she eventually would have come forward to incriminate the defendant (i.e., her testimony is the product of independent free will) is any more compelling.

Indeed, in his concurrence in Ceccolini, Justice Burger – in arguing for a per se rule of *non*-exclusion for live testimony – highlighted the speculative nature of the majority’s test, describing it as “scholastic hindsight . . . in which speculation proceeds from unfounded hypotheses as to the *probable* explanations for the decision of a live witness to come forward and testify.” Ceccolini, 435 U.S. at 283 (Burger, C.J., concurring). Burger believed that only a per se rule could “alleviate the burden – now squarely thrust upon courts – of determining in each instance whether the witness possessed that elusive quality characterized by the term ‘free will.’” Id. at 285.

On this one point, Justice Burger was correct: because the attenuation doctrine is inherently speculative, only a per se rule will suffice. But under article 1, section 7’s “nearly categorical exclusionary rule,” it is not the per se rule he envisioned. This Court should hold that the federal attenuation exception – like the federal good faith and inevitable discovery exceptions – is incompatible with article 1, section 7.

2. EVEN IF THE FEDERAL ATTENUATION DOCTRINE WERE COMPATIBLE WITH ARTICLE 1, SECTION 7, THE STATE WAIVED RELIANCE ON THE DOCTRINE BY FAILING TO RAISE IT UNTIL APPEAL.

Appellate courts are authorized to affirm on any ground supported by the facts and the law. State v. Villareal, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999), review denied, 140 Wn.2d 1008 (2000). But where the State has argued the fruits of a warrantless search should be affirmed on an alternative ground not argued below, and therefore “the requisite factual inquiry for proper analysis was not done,” appellate courts will not speculate on the necessary facts. State v. Rulan C., 97 Wn. App. 884, 889, 970 P.2d 821 (1999); see also State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (citing general bar against arguments made for first time on appeal and concluding record insufficient to determine whether some evidence independent from initial illegality).

Recently, in State v. Ibarra-Cisneros, 172 Wn.2d 880, 263 P.3d 591 (2011), this Court declined to consider the State’s attenuation argument, made for the first time on appeal. Noting the State’s burden to establish attenuation, this Court held that “[c]ourts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts or argument.” Ibarra-Cisneros, 172 Wn.2d at 885.

Ibarra-Cisneros should have dictated the outcome in the Court of Appeals. The federal attenuation doctrine requires the presentation of evidence on several factors:

- (1) the length of the “road” between the unlawful conduct of the police, the witness’ decision to testify, and the witness’ testimony;
- (2) the degree of free will by the witness, including the role played by the illegally-seized evidence in gaining the witness’ cooperation;
- (3) the fact exclusion would permanently disable a witness from testifying regardless how unrelated the evidence might be to the purpose of the original illegal search or the evidence discovered;
- (4) the stated willingness of the witness to testify; and
- (5) the police motivation in conducting the search.

State v. West, 49 Wn. App. 166, 168-170, 741 P.2d 563, review denied, 109 Wn.2d 1010 (1987).

Yet, the State made no effort to address these factors below. Instead, the prosecutor simply stated that if inevitable discovery did not apply, the court was faced with “rather complicated questions,” about which he would not “pretend to know the answers.” RP 156. An attempt to apply these factors for the first time on appeal reveals that either the factors negate attenuation or the necessary evidence is simply missing.

Regarding factor (1), where the illegality leads directly to discovery of the prosecution witnesses, “the ‘road’ between the police misconduct and the witnesses’ testimony is short and direct” and “does not support

attenuation of the taint.” West, 49 Wn. App. at 168-69. That is the situation here. The unlawful arrest of Smith led directly and immediately to the State’s complaining witnesses.

Factors (2) and (4) can be considered together because both are aimed at determining the witnesses’ free will in testifying. While Quabner testified she eventually would have called police, there is no evidence of L.S.’s intentions. And, critically, neither Quabner nor L.S. was ever asked to what extent the illegally discovered evidence ultimately influenced their decisions to cooperate with law enforcement and testify at trial.

Regarding factor (3), where the witnesses’ testimony relates to the evidence gathered as a result of the illegality, this factor does not support attenuation, either. West, 49 Wn. App. at 169. That is the situation here.

Finally, regarding factor (5) – police motivation in conducting the search – Lakewood Police Officers’ initial motivation in searching the motel registry was to locate and arrest individuals with outstanding warrants. However, after unlawfully arresting Smith, officers began collecting evidence of crimes against Quabner and L.S., taking statements from them and gathering physical evidence. While officers *also* were motivated to render aid to Quabner while unlawfully in the motel room,

they were clearly motivated to collect evidence against Smith. Therefore, this factor also militates against a finding of attenuation.

This Court should decline the State's request to address an issue not raised below. Even if willing to address the issue, this Court should find the State has failed to establish attenuation.

3. THE STATE ALSO WAIVED ITS INDEPENDENT SOURCE ARGUMENT AND, IN ANY EVENT, COULD NOT HAVE DEMONSTRATED AN INDEPENDENT SOURCE.

The prosecutor handling Smith's case affirmatively indicated the State was not arguing independent source. RP 176. This was an affirmative waiver of the issue and should preclude reliance on the doctrine now. But even ignoring the affirmative waiver, the State could not demonstrate an independent source in this case.

In State v. Gaines, this Court found the independent source exception to the exclusionary rule compatible with article 1, section 7. Gaines, 154 Wn.2d at 713. Under the exception, "evidence tainted by unlawful government action is not subject to suppression . . . provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." Id. at 718 (emphasis added).

Police did not obtain a warrant in Smith's case, so the issue is whether police gathered their evidence by "other lawful means independent

of the unlawful action.” The majority in Smith’s case reasoned that the officers, who were present at the Golden Lion to arrest Smith on the warrant, “independently” decided to enter the room in response to seeing Quabner inside. Therefore, their community caretaking responsibilities “was a supervening intervening factor that allowed an emergency aid exception to the warrant requirement.”⁹ Smith, 165 Wn. App. at 311.

As Judge Armstrong pointed out, however, officers would not have been on the scene or knocked on the door to the motel room, and the door would not have been open to reveal Quabner, were it not for the illegal warrantless search of Smith’s name. Although the majority artificially separated the event into two incidents (Smith’s arrest and the investigation of Quabner’s injuries), these were not independent events. Officers’ “observations stemmed directly from the initial, illegal search.” Smith, 165 Wn. App. at 331-332 (Armstrong, J., dissenting).

4. EVEN IF QUABNER AND L.S.’S TESTIMONY WERE ADMISSIBLE, ADMISSION OF THE REMAINING EVIDENCE WAS NOT HARMLESS.

A constitutional error is harmless only if the State demonstrates, beyond a reasonable doubt, the untainted evidence is so overwhelming, it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 425-

⁹ The term “supervening intervening factor” has not been used in any prior Washington case.

426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Smith's defense at trial was that, although he assaulted Quabner, it was not a first-degree assault and he did not commit any of the other charged crimes involving Quabner or L.S. RP 545-546, 553-554, 556-565. Counsel argued that Quabner and L.S. had time to concoct their story and motive given that Smith had assaulted Quabner and tried to evict Quabner and her children from the motel room just prior to the assault. RP 554-555.

In convincing jurors to reject Smith's defense, the State relied extensively on evidence collected at the motel and testimony of witnesses other than Quabner and L.S.¹⁰ Specifically, the State used significant physical and photographic evidence, including evidence of a struggle in the room, evidence of restraint, and evidence of the victims' injuries. RP 292-296, 354-371; exhibits 1-20, 22-27, 32-38, 40-41, 42A, 44-51. Two officers involved in Smith's arrest described what they saw at the scene. RP 330-336, 339-348. An evidence supervisor for the Lakewood Police testified about items found in the dumpster just outside the motel room and Quabner's injuries. RP 351-354, 360-371. A pediatric nurse testified that L.S. described in detail how she was restrained and sexually assaulted.

¹⁰ The State has never argued this evidence was properly admitted under any exception to the warrant requirement. See Brief of Respondent, at 40-41 (merely arguing its admission was harmless).

RP 439-440, 451-452. A responding paramedic testified to Quabner's injuries and her claim of assault. RP 483-489. And a police detective and Quabner's sister testified to Quabner's injuries after she had been taken to a hospital. RP 460-467, 493-495.

This evidence was sufficiently important that the trial deputy repeatedly used it to his great advantage during closing argument. See RP 525-26 (physical evidence corroborates L.S.'s story); RP 526-28 (blood stained evidence consistent with assault on Quabner); RP 528 (cords and ropes in dumpster consistent with testimony that L.S. and Quabner were restrained and kidnapped); RP 528 (cuts on cords consistent with L.S.'s testimony that Davis was armed with a knife during crimes); RP 530 ("as with [L.S.]'s testimony, what Quianna tells you is corroborated by the physical evidence in the case, and also the observations of the police officers"); RP 530-531 (Quabner's reaction to seeing bloody shirt collected at scene demonstrated "demeanor of someone who's telling you the truth."); RP 532 (evidence in dumpster, bloody clothes, ropes, cords, and broken glass corroborate victims' testimony); RP 532 (ambulance driver's observations of Quabner point to defendant's guilt); RP 533 (L.S.'s statements about rape to pediatric nurse shows Smith guilty); RP 533 (cut electrical cord, photographs of injuries, and broken picture frame

show guilt); RP 534 (fact police found Smith alone with victims shows that he was culprit); RP 534 (ropes, cords, and broken glass found in dumpster); RP 568-69 (ropes, cords, and glass again).

Without this corroborating evidence (both physical and oral) presented by the State and emphasized during closing argument, Smith had a chance to convince jurors his guilt had not been established. But with the corroborating evidence, jurors were far more likely to convict. Because the State cannot demonstrate this evidence was harmless beyond a reasonable doubt, reversal would still be required even if Quabner and L.S.'s testimony had been properly admitted.

5. SMITH'S TWO RAPE CONVICTIONS, BASED ON THE SAME ACT, VIOLATE DOUBLE JEOPARDY.

The double jeopardy clauses of the State and Federal Constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. amend. 5; Wash. Const. art. 1, § 9; State v. Calle, 125 Wn.2d 769, 772, 776, 888 P.2d 155 (1995). The protection is constitutional, but because the Legislature is free to define crimes and fix punishments as it will, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

Smith was tried and convicted of Rape in the First Degree and Rape of a Child in the Second Degree for the same act against L.S. CP 236, 241; see also RP 514 (during closing arguments, prosecutor tells jurors “there’s in fact one act of rape that is at issue here, but two different sets of laws that have been violated”). Nonetheless, the prosecutor convinced the trial court there was no double jeopardy violation by conducting a strict analysis under the “same evidence” test and Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). CP 339.

Under Blockburger:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304. The Court of Appeals found that although the two offenses were the same in fact, they were not the same in law because each contained an element the other does not – Rape in the First Degree requires proof of compulsion, and Child Rape in the Second Degree requires proof of status based on age and marriage. Smith, 165 Wn. App. at 320-321. This was error.

The Blockburger’s “same evidence” test is but one tool for discerning legislative intent. It is not dispositive where there is a clear indication of

contrary intent. Calle, 125 Wn.2d at 778. And both the Court of Appeals and this Court determined long ago that the Legislature did not intend separate convictions for rape and child rape when based on the same act.

In State v. Birgen, 33 Wn. App. 1, 2, 651 P.2d 240 (1982), review denied, 98 Wn.2d 1013 (1983), the defendant was convicted of Rape in the Third Degree and Statutory Rape in the Third Degree based on a single act of intercourse with a 15-year-old girl. Under the “same evidence” and Blockburger tests, the offenses had different legal elements and were not the same in law. But the court recognized this was not dispositive. Id. at 7. Examining the historical development of Washington’s rape statutes, and interpretative Supreme Court case law, the Birgen Court held that rape and statutory rape define a single crime and the Legislature has not authorized multiple convictions based on a single act. Birgen, 33 Wn. App. at 5-14.

Birgen received concurrent sentences and, under Washington law at that time, this precluded a double jeopardy violation. Birgen, 33 Wn. App. at 3. Therefore, technically, Birgen was not decided on double jeopardy grounds. But the “concurrent sentence rule” subsequently was abandoned. See Ball v. United States, 470 U.S. 856, 864-65, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). And thirteen years after Birgen, in Calle,

this Court cited approvingly to Birgen, upholding the opinion on double jeopardy grounds. Calle, 125 Wn.2d at 772-775, 779-780.

More recently, this Court again relied on Birgen, concluding that the Legislature had not authorized separate convictions for Rape in the Second Degree and Rape of a Child in the Second Degree. See State v. Hughes, 166 Wn.2d 675, 685-686, 212 P.3d 558 (2009).

In Smith's case, Division Two acknowledged that "our courts have specifically recognized that the legislature did not intend one act of sexual intercourse to violate both the rape and statutory rape provision of our code." Smith, 165 Wn.2d at 322 (quoting Hughes, 166 Wn.2d at 685). But it did not feel bound by this "when the use of force against a victim enters the equation." Id. at 323. Instead, it limited double jeopardy prohibitions to situations where both a rape and a child rape conviction are based on the victim's status.¹¹ Id. at 322-324.

In deciding to question well-established precedent in this manner, Division Two overlooked the fact Birgen, and the Supreme Court cases on which it is based, specifically considered the relationship between *forcible*

¹¹ Presumably, this new interpretation of Washington's rape statutes is not limited to cases in which the defendant is charged with rape and child rape. For example, where a defendant forcibly rapes a mentally incapacitated adult, under Division Two's reasoning, the State could now obtain two adult rape convictions – one for Rape in the First Degree (based on forcible compulsion) and one for Rape in the Second Degree (based on mental incapacitation). Compare RCW 9A.44.040(1)(a) with 9A.44.050(1)(b).

rape and status-based rape. See Birgen, 33 Wn. App. at 6-7 (Rape in the Third Degree based on expressed non-consent and threatened harm same offense as statutory rape); State v. Elswood, 15 Wash. 453, 454, 46 P. 727 (1896) (information alleging defendant “did make an assault . . . and feloniously did ravish, carnally know, and abuse” and also alleging age-based rape charged a single crime); State v. Roller, 30 Wash. 692, 696-697, 71 P. 718 (1903) (when rape involves a child, force is presumed; rape by force and statutory rape are the same charge); State v. Adams, 41 Wash. 552, 83 P. 1108 (1906) (same as Roller); State v. Dye, 81 Wash. 388, 389-390, 142 P. 873 (1914) (acquittal on child rape precluded subsequent prosecution for forcible rape against child based on same act); State v. Allen, 128 Wash. 217, 219, 222 P. 502 (1924) (allegation of forcible rape against 13-year-old charges a single crime); State v. Powers, 152 Wash. 155, 160, 277 P. 377 (1929) (even after Legislature defined forcible rape and statutory rape in separate statutory sections, a single act in violation of both is one crime).

Birgen, Calle, and Hughes dictate the outcome in Smith’s case. No case has ever upheld – under double jeopardy principles – convictions for rape and child rape based on a single act of intercourse. Smith’s conviction for Rape of a Child in the Second Degree must be vacated. See

State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006) (usual remedy for double jeopardy violation is to vacate the offense carrying the lesser sentence), cert. denied, 551 U.S. 1137 (2007).

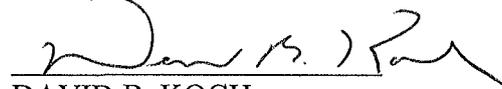
D. CONCLUSION

The federal attenuation doctrine is inconsistent with article 1, section 7. Even if constitutional, reliance on the doctrine was waived in this case. The State also waived reliance on the independent source doctrine and, in any event, failed to meet its requirements. The violation of Smith's article 1, section 7 privacy rights requires reversal of his convictions. Finally, Smith's two rape convictions for one rape violate double jeopardy.

DATED this 29th day of May, 2012.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)

Respondent,)

vs.)

CHRISTOPHER SMITH,)

Petitioner.)

SUPREME COURT NO. 86951-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF MAY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEPHEN TRINEN
PIERCE COUNTY PROSECUTING ATTORNEY
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[X] CHRISTOPHER SMITH
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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MAY, 2012.

x  _____