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SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER SMITH, APPELLANT

**FILED**  
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STATE OF WASHINGTON  
*[Signature]*

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Linda Lee

No. 06-1-05013-6

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**Supplemental Brief of Respondent on Discretionary Review**

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ORIGINAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the attenuation doctrine derives from jurisprudence focused on the primacy of the Fourth Amendment and the duty to give it effect, such that the doctrine is closely related to the independent source and fruit of the poisonous tree doctrines?
2. Whether the attenuation doctrine is consistent with and proper under article I, section 7 of the Washington Constitution?
3. Whether the court should reconsider its rejection of a good faith exception and instead adopt a narrow exception for cases in which officers act in reliance upon controlling precedent?

B. STATEMENT OF THE CASE.

The State hereby incorporates by reference the statement of the case from the Brief of Respondent.

C. ARGUMENT.

1. THE FOUR PHASES OF THE EXCLUSIONARY RULE UNDER FEDERAL LAW.

Federal law on the exclusionary rule can be divided into four historical doctrinal phases: First, the common law era; Second, the constitutional origin; Third, the primacy of the Fourth Amendment and the

duty to give it effect; Fourth, the deterrence of police misconduct.

a. First Phase: The Common Law Era Of Non-Exclusion

In the first phase, under the common law, courts adhered to a strict rule of the nonexclusion of evidence that was obtained unlawfully. Sanford E. Pitler, *The Origin And Development Of Washington's Independent Exclusionary Rule: Constitutional Right And Constitutionally Compelled Remedy*. 61 Wash. L.Rev. 459, 466 (1986) (citing 4 J. Wigmore, Evidence § 2183 (2d ed. (1923))). Under the common law rule, the officer or party engaging in the illegality was responsible for the illegality, not the state, so that the courts would not take notice of how evidence was obtained. Pitler, 61 Wash. L.Rev. at 466 n. 6 (citing 4 J. Wigmore, Evidence § 2183 (2d ed. 1923)).

When applied to constitutional violations, evidence resulting from an unlawful search was viewed as having been completed when the search was completed. Pitler, 61 Wash. L. Rev. at 466 n. 38. Court's read the constitutional provision literally and concluded that only the search was unlawful, but that it did not violate the constitution to use in court the evidence obtained from the unconstitutional search. Pitler, 61 Wash. L. Rev. at 466 n. 38. A person's remedy for an unlawful search would be to bring a separate action against the officer or person who committed the violation. Pitler, 61 Wash. L. Rev. at 466.

According to Wigmore, the earliest formulation of the common law rule occurred in 1841. Pitler, 61 Wash. L. Rev. at 466 (citing 4 J. Wigmore, Evidence § 2183 (citing *Commonwealth v. Dana*, 43 Mass. 329, 2 Met. 329 (1841))). Assuming Wigmore is correct as to the origin of the common law rule, this phase ran 45 years until 1886.

b. Second Phase: Constitutional Beginning:  
Fifth Amendment Right Against Self-  
Incrimination.

The second phase began when the United States Supreme Court issued its opinion in *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524 (1886), 29 L. Ed. 746 (1886). See Pitler, 61 Wash. L. Rev. at 466-67. In *Boyd*, the court considered a proceeding by the United States for forfeiture of 35 cases of plate glass upon which import duties had been fraudulently imported. *Boyd*, 116 U.S. at 617. Boyd claimed that a warrant directing him to produce invoices for the 35 cases of plate glass was unconstitutional so that the invoice evidence obtained based upon the warrant was unlawfully admitted at trial. *Boyd*, 116 U.S. at 618.

As to a foundational issue, the court in *Boyd* held that although forfeiture action was civil in form, they were criminal in nature so as to be *quasi* criminal, such that the constitutional protections in the bill of rights applied to them. *Boyd*, 116 U.S. at 634. The court concluded that the statute which authorized the issuance of the search warrant was unconstitutional. *Boyd*, 116 U.S. at 632.

Moreover, the court held that the search warrant unlawfully compelled Boyd to testify against himself in violation of the Fifth Amendment, thereby making the search itself unlawful under the Fourth Amendment.<sup>1</sup> *Boyd*, 116 U.S. at 633-35. In doing so, the court construed the Fourth and Fifth amendments to be intimately related such that they throw great light on each other. *Boyd*, 116 U.S. at 633. The court further reasoned that the unreasonable searches and seizures in the fourth amendment were almost always made for the purpose of compelling a man to give evidence against himself, which is condemned by the Fifth Amendment, while the right against self-incrimination throws light on the question as to what is an unreasonable search and seizure. *Boyd*, 116 U.S. at 633. Key to this connection is that “the seizure of a man’s private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself.” *Boyd*, 116 U.S. at 633.

The court went on to hold that the evidence obtained by the warrant was unlawfully admitted at trial, reversed the case and remanded it for a new trial. *Boyd*, 116 U.S. at 638. The court in *Boyd* never used the phrase “exclusionary rule” or even the word “exclusion,” instead

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<sup>1</sup> The deriving of a Fourth Amendment violation based on a violation of the Fifth Amendment right against self-incrimination has been referred to some commentators as the “Boyd convergence theory.” See *Pitler*, 61 Wash. L. Rev. at 467.

merely holding in part that the “admission in evidence by the court [was] erroneous.” *Boyd*, 116 U.S. at 638.

The opinion in *Boyd* also contained a significant “trespass” component, in part because that was the theory contained in several cases the court relied upon. *See Boyd*, 116 U.S. at 625-30. The idea was that where a search was conducted unlawfully, it amounted to a trespass, and in some instances the defendant would bring a claim of trespass against the officials. *Boyd*, 116 U.S. at 625-26. In later cases, this mechanism was used to pursue the return of property the prosecution intended to use as evidence against the defendant, thereby making it unavailable for trial.

The *Boyd* opinion was widely criticized, and was rejected by State Supreme Courts (which were not yet bound by it at the time). *See Pitler*, 61 Wash. L. Rev. at 467.

Eighteen years later, in 1904, the United States Supreme Court repudiated the analysis in *Boyd* in favor of a return to the common law rule of non-exclusion<sup>2</sup> *Adams v. People of State of New York*, 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904). The objection at the trial court level had been to the admission into evidence of certain private papers that tended to prove the defendant’s knowing possession of contraband lottery slips, but no objection was made to the testimony of the officers who

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<sup>2</sup> Interestingly, the court in *Adams* also expressly declined to reach the question of whether the 14<sup>th</sup> Amendment made the 4<sup>th</sup> and 5<sup>th</sup> Amendments applicable to the States. *Adams*, 192 U.S. at 594.

served the warrant, nor to the unlawfulness of the seizure of the private papers. *Adams*, 192 U.S. at 594.

The court in *Adams* held that under such circumstances, “the weight of authority, as well as reason limits the inquiry to the competency of the proffered testimony and the courts do not stop to inquire as to the means by which the evidence was obtained.” *Adams*, 192 U.S. at 594 (citing Greenleaf (vol. 1, §254a)). In returning to the common law, the court in *Adams* cited to *Commonwealth v. Dana*, the very same case that Wigmore identified as the origin of the common law rule of non-exclusion. *Adams*, 192 U.S. at 595 (citing *Com. v. Dana*, 43 Mass. 329, 2 Met. 329).

The court in *Adams* noted that the *Boyd* case had been frequently cited to the court, which had no wish to detract from its authority. *Adams*, 192 U.S. at 597. However, the *Adams* court greatly narrowed the scope of the *Boyd* opinion by limiting to the very particular facts of that case:

That case [*Boyd*] presents the question whether one can be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pay of having the statements of government’s counsel as to the contents thereof taken as true and used as testimony for the government.

*Adams*, 192 U.S. at 597.

The court in *Adams* rejected the *Boyd* court’s analysis of the Fourth and Fifth Amendments. It noted that:

The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the *Boyd* case. The security intended to be guaranteed by the 4<sup>th</sup> Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English, and nearly all of the American, case, have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means if it is otherwise competent.

The court went on to hold that contrary to the analysis in *Boyd*, it believed the Fourth and Fifth Amendments were never intended to have the effect of suppressing evidence, but rather were "...designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish the wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect" (but apparently not resulting in the exclusion of evidence in a criminal trial). *Adams*, 192 U.S. at 598.

Thus, with *Adams*, the second phase of the exclusionary rule (the *Boyd* phase) came to an end with a reversion to the common law rule of non-exclusion, from which *Boyd* had only been a temporary diversion.

c. Third Phase: The Primacy Of The Fourth Amendment And The Obligatory Duty To Give It Force And Effect

The third phase began in 1914, ten years after *Adams*, with the Supreme Court's issuance of its case, *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). In *Weeks*, yet another defendant was charged with engaging in unlawful activity related to promoting a lottery.<sup>3</sup> *Weeks*, 232 U.S. at 386. Weeks was arrested at his place of work, while his home was twice searched by officers without a warrant. *Weeks*, 232 U.S. at 386. In the lower court, Weeks had timely petitioned for return of the seized materials both before trial, and then renewed the request again after a jury was empanelled, and objected to the use of the evidence at trial. *Weeks*, 232 U.S. at 387-389, 393. The trial court directed that property not pertinent to the charges be returned, but denied the petition as to any pertinent items. *Weeks*, 232 U.S. at 388.

The court in *Weeks* also discussed the opinions in both *Boyd* and *Adams*. The court first focused its analysis solely on the Fourth Amendment. *Weeks*, 232 U.S. at 389. The court in *Weeks* then looked to the opinion in *Boyd* for a brief history of the Amendment. *Weeks*, 232 U.S. at 389-90. However, conspicuously, the court in *Weeks* made no

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<sup>3</sup> Both *Adams* and *Commonwealth v. Dana* also involved charges for unlawfully engaging in activities related to a lottery.

reference to the Fifth Amendment self-incrimination theory of *Boyd*. See

*Weeks*, 232 U.S. at 389-92. Instead, the court held that,

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

*Weeks*, 232 U.S. at 392. Thus, the court in *Weeks* held that the duty of giving the Fourth Amendment force and effect is obligatory upon all entrusted under the Federal system with the enforcement of law.

In *Weeks*, the court also made reference to the trespass theory, which is not surprising insofar as it was implicit in the defendant's motion for return of his papers. *Weeks*, 232 U.S. at 390, 393.

The court in *Weeks* also did to the *Adams* opinion the same thing that the court in *Adams* had done to *Boyd*: namely, it severely limited the

application of *Adams* by holding that the opinion only applied to the specific procedural posture of the case before it. See *Weeks*, 232 U.S. at 395-396. That meant that the opinion in *Adams*,

... affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant, and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes.

*Weeks*, 232 U.S. at 396.

Ultimately, the court in *Weeks* held that the papers were taken in violation of the constitutional rights of the defendant by an official of the United States acting under color of his office; that the defendant made a timely application for their return, that the trial court's order refusing the petition for return of the property was a denial of the defendant's constitutional rights, so that in holding the items and permitting their use in trial, the trial court committed prejudicial error. *Weeks*, 232 U.S. at 398.

Thus, the holding in *Weeks* meant that in the future, when a defendant brought a timely challenge to the evidence, the defendant could obtain relief in the form of the return of the unlawfully obtained evidence.

In 1920, six years after *Weeks*, the fruit of the poisonous tree doctrine first began to appear in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920). *Silverthorne Lumber* involved an unlawful search of the defendants' business in which the defendants' papers were photographed and copied, and the originals returned. *Silverthorne Lumber*, 251 U.S. at 390-92. The court impounded the copies. *Silverthorne Lumber*, 251 U.S. at 391. However, the originals were then subpoenaed by the grand jury at the behest of the prosecutor. *Silverthorne Lumber*, 251 U.S. at 391.

The prosecution made the argument that the seizure was unlawful and regretted, but nonetheless the government could study the papers and copy them before returning them, and then make use of the knowledge it has gained to call upon the owners in a more regular form to produce the papers. To this the court responded:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others...

*Silverthorne Lumber*, 251 U.S. at 392.

The opinion in *Silverthorne Lumber* is short and without much analysis. It is important for three reasons. It reaffirms the Fourth

Amendment as the source of the protections requiring the exclusion of evidence. *Silverthorne Lumber*, 251 U.S. at 392. Additionally, the language quoted above is the first step toward the fruit of the poisonous tree doctrine (even if not yet so named), as well as the independent source doctrine, which is named. See Wayne R. LaFare, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 4<sup>th</sup> ed. (2004), vol. 6 § 11.4, p. 256.

In the year after *Silverthorne Lumber*, the court issued two additional cases that confused the exclusionary rule under *Weeks* by reincorporating the Fifth Amendment self-incrimination analysis from *Boyd*. See *Gouled v. United States*, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921); *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921).

In fairness to the court, in its opinion in *Gouled*, the court answered a number of questions certified to it by the circuit court of appeals. *Gouled*, 255 U.S. at 303. Thus, it was not the court itself that raised the Fifth Amendment self-incrimination issue. It appears clear that the defendant may have been hedging his bets so to speak by relying upon all available authority, including *Boyd*, *Weeks* and *Silverthorne Lumber*.

The *Amos* case also mentions in passing that either the search in the first place, or the trial court's denial of the defendant's motion for

return of property, as violative of the Fourth and Fifth Amendments. *Amos*, 255 U.S. at 315-16. However, ultimately the court's holding was merely that the case was controlled by the ruling set forth earlier that day in *Gouled*. *Amos*, 255 U.S. at 316.

Perhaps most interesting, both cases use the word "exclusion," or "exclude" which appears to be the first time that is done. See *Gouled*, 255 U.S. at 312-13; *Amos*, 255 U.S. at 316.

In 1939, nineteen years after the court's opinion in *Silverthorne Lumber*, the court issued another case of significance for the exclusionary rule, *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939). In *Nardone*, the issue was where the government had conducted illegal wire taps, the contents of which had been excluded, could the government nonetheless use the information obtained for "every derivative use that they may serve." *Nardone*, 308 U.S. at 340.

As part of its analysis of the issue, the court cited the "independent source" language from *Silverthorne Lumber*, and then stated the following:

In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. ...

*Nardone*, 308 U.S. at 341. The court continues that once a defendant meets his burden to prove that wiretapping was unlawfully employed, the trial judge must give opportunity...:

...to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

...

*Nardone*, 308 U.S. at 341. The significance of these passages will be discussed further in section 2 below.

In 1963, the court further considered the independent source and attenuation doctrines in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). In *Wong Sun*, with Justice Brennan writing for the majority, the Government unlawfully arrested him as a suspect in a narcotics case. *Wong Sun*, 371 U.S. at 475. The defendant was arraigned and released on his own recognizance. *Wong Sun*, 371 U.S. at 475-76. A few days later, Wong Sun was interviewed at the offices of law enforcement after being advised of his rights. *Wong Sun*, 371 U.S. at 475-76. Officers prepared Wong Sun's statement in English, and he acknowledged the content of the statement, but refused to sign it. *Wong Sun*, 371 U.S. at 476-77.

The court held that even though the arrest of Wong Sun was unlawful, the unsigned statement he acknowledged was correct and was

properly admitted at trial where he had been released from custody and voluntarily returned several days later to make the statement. *Wong Sun*, 371 U.S. at 491. The court stated:

...we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'

*Wong Sun*, 371 U.S. at 491 (quoting *Nardone*, 308 U.S. at 341).

d. Fourth Phase: The Purpose of Deterrence

Starting in 1974, the court began to view the exclusionary rule as either solely or primarily serving the purpose of deterring police misconduct, and declined to apply the rule in circumstances where that objective was not served. See *Calandra v. United States*, 414 U.S. 338, 94 S. Ct. 613, 38 L.Ed.2d 561 (1974). See also, LaFave, vol. 1, § 1.1(a), (f). To some extent, this limitation of the application of the exclusionary rule may have harkened back to the common law non exclusion rule by viewing the constitutional violation as having been completed when the unlawful search or seizure was completed. See Pitler, 61 Wash. L.Rev. at 490.

2. ATTENUATION IS AN INHERENT ASPECT OF THE EXCLUSIONARY RULE AND INSEPARABLE FROM IT.

As was stated in section 1(c) above, attenuation arose under the exclusionary rule jurisprudence of *Weeks* based upon the need to give the Fourth Amendment its full force and effect. Attenuation is part and parcel of that jurisprudence. It arose in conjunction with the independent source doctrine and the fruit of the poisonous tree doctrine.

a. Attenuation And The Fruit Of The Poisonous Tree Doctrine Are Two Sides Of The Same Coin

Understood correctly, attenuation is not an exception to the exclusionary rule. Rather, attenuation and fruit of the poisonous tree are two sides to the same coin. Properly understood, attenuation is an expression of the how far the fruit of the poisonous tree doctrine extends. This is because if a piece of evidence is attenuated, it is no longer the fruit of the poisonous tree. As such, attenuation is the twin to independent source. When something is attenuated, it is not the fruit of the poisonous tree. This is because it has an independent source.

b. The Problem Of Causation

The challenge of attenuation, is that at its core it involves the problem of causation. Unfortunately, causation seems to be something about which legal analysis often run into difficulty. Thus, in *Nardone*, the

court noted, “Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.” *Nardone*, 308 U.S. at 341.

In *Wong Sun*, Justice Brennan again pointed to the problem caused by the misunderstanding of causation when he rejected “but for” causation for the fruit of the poisonous tree.

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.

*Wong Sun*, 371 U.S. at 487-88. Justice Brennan then went on to state,

Rather, the more apt question in such a case is ‘whether, granting the 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 488 (quoting Maguire, EVIDENCE OF GUILT, 221 (1959)). These sentences make two things clear. Despite an inclination of some to evaluate the fruit of the poisonous tree on the basis of “but for” causation, that is the wrong analysis. Further, if it is sufficiently distinguishable, i.e. independent, it is purged of the primary taint.

3. ATTENUATION IS ALSO NECESSARILY AN  
INHERENT PART OF THE EXCLUSIONARY RULE  
UNDER ARTICLE I, SECTION 7.

a. History Of The Exclusionary Rule Under  
Art. I, Sec. 7

The history of the exclusionary rule in Washington has been adequately addressed. *See* Pitler, 61 Wash. L. Rev. 459. Without necessarily agreeing or disagreeing with all or any of Pitler's analysis, his review of the history of the exclusionary rule is sufficient such that it is not worth separately repeating it here.

Perhaps most usefully, Pitler has identified the exclusionary rule in Washington as having gone through three distinct historical periods. *See* Pitler, 61 Wash. L.Rev. at 465. Because Pitler begins with the adoption of the exclusionary rule by Washington Courts, there should properly be an additional period added at the beginning, with the subsequent periods being renumbered. That is because the first Washington case to consider the exclusionary rule rejected it in favor of the common law rule of non-exclusion. *See State v. Royce*, 38 Wash. 11, 80 P. 268 (1905).

Thus, properly considered the exclusionary rule in Washington has gone through four phases (which are different from and do not necessarily correlate to the federal phases): First, the common law rule of non-exclusion; Second, an initial period of development of a State law jurisprudence from the adoption of the rule in 1922 until 1961; Third, a

period of dormancy after *Mapp v. Ohio* made the Fourth Amendment applicable to the States; and Fourth, starting in 1982 a period of renewed activism by the court in response to the focus of the United States Supreme Court on limiting the exclusionary rule to circumstances that serve the deterrent purpose of the rule. *See* Pitler, 61 Wash. L.Rev. at 465.

The second historical phase in which Washington adopted its exclusionary rule correlates closely to the period in which the federal courts were following the jurisprudential standards laid out in *Weeks* and its progeny. Pitler refers to this jurisprudence as “unitary.” And as Pitler notes, this is the same jurisprudence that the Washington courts have followed as to the exclusionary rule under state law. Pitler, 61 Wash. L.Rev. at 495-96 (citing *State v. Bonds*, 98 Wn.2d 1, 643 P.2d 1024 (1982)). Thus, federal case law that derives from *Weeks* and its progeny applies the same jurisprudence as the Washington exclusionary rule and is applicable authority.

It was precisely under the *Weeks* standard that attenuation, like independent source was first came into being. Indeed, the two doctrines are essentially twins.

However, cases based solely on the deterrent effect of the exclusionary rule have also considered attenuation, and in some instances perhaps expanded it beyond what the jurisprudence in *Weeks* can support.

b. The Split Opinion In *Eserjose* Can Be Reconciled.

This Court issued a split opinion on the recognition of attenuation under Washington law in *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011). Despite the split, both opinions were correct and can be reconciled. As for the lead opinion, it is well established as a matter of historical fact, as well as well considered jurisprudence that the attenuation doctrine is appropriate under Washington's exclusionary rule jurisprudence when attenuation is limited to being an expression of the extent of the fruit of the poisonous tree doctrine. In this regard, Justice Alexander's lead opinion was completely correct.

On the other hand, Justice Johnson's dissenting opinion was also equally correct insofar as more recent federal case law has expanded the attenuation doctrine beyond its historical roots and into a new exception akin to good faith or inevitable discovery. To the extent that federal opinions on attenuation are based on an application of the newer federal jurisprudence of limiting the exclusionary rule to circumstances where furthering the deterrent effect, that case law would not be applicable in Washington.

These two split opinions can be reconciled once it is recognized that only an attenuation doctrine consistent with the "unitary" principles of the jurisprudence in *Weeks* would be applicable under Washington law. Attenuation was well established as such a doctrine under the *Weeks* line

of cases long before the “deterrent effect” jurisprudence took hold.

Attenuation is a proper doctrine under Washington law so long as it expresses the limit of the fruit of the poisonous tree doctrine, and is not expanded beyond that by the “deterrent effect” jurisprudence.

c. Attenuation Properly Applies To The Testimony Of Live Witnesses Under Art. I, Sec. 7.

The court’s opinion in *Wong Sun* derives from *Weeks*, and pre-dates the “deterrent effect” jurisprudence, which came later. In *Wong Sun*, the court held that a defendant’s own statement was attenuated and not the fruit of the poisonous tree where it was made voluntarily, notwithstanding the fact that he was originally arrested unlawfully. *Wong Sun*, 371 U.S. at 491-92. If a later made voluntary statement by the very same defendant whose constitutional rights were violated has been attenuated by the action of his free will, all the more so is this case with regard to third parties who are victims of a crime, give statements to officers at the time, and then also later come into court to testify.

Where a person freely and voluntarily makes a statement or report to police, that statement is sufficiently independent to be attenuated from the primary taint such that it is no longer the fruit of the poisonous tree.

4. THIS COURT SHOULD CONSIDER LIMITING ITS REJECTION OF GOOD FAITH WHERE OFFICERS HAVE RELIED UPON CONTROLLING PRECEDENT OF THE COURT.

This Court has rejected the good faith doctrine. See *State v. Afana* 169 Wn.2d 169, 233 P.3d 879 (2010); *State v. Adams*, 169 Wn.2d 487, 238 P.3d 459 (2010). However, this Court's ruling rejecting any form of the good faith exception produces an absurd result as is amply illustrated by this case. Despite officers' compliance with controlling precedent, evidence will be suppressed and prosecutions dismissed because officers failed to anticipate that a later change in the law would occur.

The effect of the court's rule is that investigations will be held unlawful and defendants rendered unprosecutable solely because officers lacked a crystal ball that could tell them what the later change in the law would be, or that that they should disregard the established precedent. Of course, officers have no such crystal ball. As such, this Court's rule amounts to a get out jail free card for randomly selected defendants that operate regardless of how vile or heinous the crime.

Any rule that requires officers to disregard established precedent in order to conduct a lawful search is contrary to an ordered system of law as well as to the authority and credibility of the courts.

As this case demonstrates, such issues can and will come up on extremely serious cases, which should not be rendered unprosecutable by the absurdity of this rule.

The Court should reconsider its holding in *Afana* and adopt a narrow application of the good faith rule only in those instances where: 1) controlling precedent exists on an issue; 2) the officers comply with that precedent, and 3) after the investigation was conducted, the precedent was reversed.

Such a narrow rule need not violate Washington's policy of strong protection of the right of privacy under art. I, sec. 7. This is because where such a search was conducted in compliance with controlling precedent, it was not unlawful at the time it was conducted.

D. CONCLUSION.

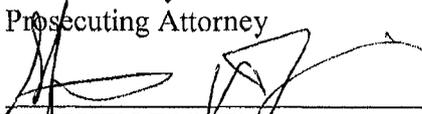
The attenuation doctrine is valid under article I, section 7 of the Washington Constitution, where it arose in conjunction with the independent source and fruit of the poisonous tree doctrines under a jurisprudence of the primacy of the Fourth Amendment and the duty to give it effect.

Adoption of an attenuation doctrine is proper in Washington so long as it is kept free of the "deterrent effect" jurisprudence of more recent United States Supreme Court cases.

The Court should reconsider its rejection of the good faith doctrine and adopt a narrow exception when officers have acted in reliance on controlling precedent. To do otherwise produces absurd results.

DATED: May 29, 2012.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



STEPHEN TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/29/12 Heck  
Date Signature

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Please see attached the State's Supplemental Brief of Respondent on Discretionary Review for the below stated matter:

St. v. Smith  
No. 86951-1  
Submitted by: S. Trinen  
WSB #30925

Please call me at 253/79-7426 if you have any questions.

Therese Kahn  
Legal Assistant to S. Trinen