No. 95632-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN DOUGLAS MAYFIELD,

Petitioner.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION

APPEAL FROM THE SUPERIOR COURT OF COWLITZ COUNTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

SECONDARY SOURCES

INTEREST OF AMICI CURIAE

Amici Curiae strongly support adherence to article 1, section 7 of the Washington Constitution, which prohibits unlawful interference in private affairs. The American Civil Liberties Union of Washington is a statewide, nonpartisan, nonprofit organization dedicated to the preservation of civil liberties. The Fred T. Korematsu Center for Law and Equality advances justice through research, advocacy, and education. The Washington Association of Criminal Defense Lawyers is a professional bar association committed to promoting a fair, rational, and humane criminal justice system. The Washington Defender Association is a non-profit association committed to supporting and improving indigent defense and the lives of indigent defendants and their families. These interests are explained more fully in the Motion for Leave To File Amici Curiae Brief.

ISSUES TO BE ADDRESSED BY AMICI CURIAE

1. Whether the inclusion of a formulaic "*Gunwall* analysis" should determine whether Washington courts undertake an independent analysis under the Washington Constitution.

2. Whether the Court should reject the attenuation exception to the exclusionary rule as incompatible with article I, section 7.

3. Whether the mere incantation of *Ferrier* warnings serves to cure a prior constitutional violation by police officers.

STATEMENT OF THE CASE

The evidence used to convict John Douglas Mayfield was obtained by police officers in what the State *concedes* to have been an unconstitutional seizure and violation of his right to privacy. Supp. Br. Resp. 22. Mayfield argued below that the illegally obtained evidence should be excluded under article 1, section 7 of the Washington Constitution but the Court of Appeals refused to hear the argument due to a technicality—Mayfield had not structured his brief around the so-called *Gunwall* criteria. The Court of Appeals instead applied federal law and affirmed his conviction, holding that the mere recitation of *Ferrier* warnings cured the effects of the ongoing constitutional violation. This Court should reach the state constitutional issue and hold that the federal attenuation exception to the exclusionary rule is incompatible with article 1, section 7. In the alternative, this Court should reverse on Fourth Amendment grounds and clarify there is no per se rule that attenuation exists whenever *Ferrier* warnings are given.

ARGUMENT

I. THIS COURT SHOULD CONSIDER MAYFIELD'S ARTICLE 1, SECTION 7 ARGUMENT

The Court of Appeals refused to consider Mayfield's article 1, section 7 claim despite the fact that his brief devoted twelve pages to the argument. Instead, over a vehement dissent, the Court of Appeals rejected

the claim solely because the brief did follow the *Gunwall* template. *See* Slip op. at 5 (citing *State v. Wethered*, 110 Wn.2d 466, 755 P.2d 797 (1988)). In Washington, where privacy rights are jealously guarded by this Court, this result cannot be countenanced. This Court should explicitly hold that where litigants assert their state constitutional rights and support their claims with substantial argument and authority, that suffices for the Court to reach the state constitutional issue. To the extent that *Wethered* says otherwise, it should be overruled.[1]

A. Formalistic Recitation of *Gunwall* Criteria Is Not Required To Invoke State Constitutional Rights

In 1986, this Court identified six nonexclusive criteria to assist in determining whether the Washington Constitution affords broader rights in a particular context than the United States Constitution. *State v. Gunwall*, 106 Wn.2d 54, 61–62, 720 P.2d 808 (1986). These criteria include: "(1) the textual language, (2) differences in the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern." *Id.* at 58. At the time *Gunwall* was decided, some feared that state high courts were "resorting to state constitutions" without articulating principled reasons for departing from

[1] Stare decisis is not an "absolute impediment to change," *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), for "the goal of obtaining stability in the law" does not justify "the continued existence of clearly outdated rules," *Crown Controls v. Smiley*, 110 Wn.2d 695, 705, 756 P.2d 717 (1988). It simply requires a "clear showing" that the established rule is "incorrect and harmful." *Stranger Creek*, 77 Wn.2d at 653.

analogous provisions of the United States Constitution. *Id.* at 60. *Gunwall* was intended to alleviate this concern by "suggesting" to counsel "where briefing might appropriately be directed," so arguments under state law could be based on "well founded legal reasons." *Id*. at 62–63.

That changed in *Wethered*, where the Court first declined to consider a state constitutional argument for failing to discuss the *Gunwall* criteria. 110 Wn.2d at 472. What began as guidance was thus transformed into a rule, and it was not long before *Gunwall* was used as a means of disposing of a significant number of state constitutional claims.[2]

Thirty-plus years later, the concern that animated *Gunwall* no longer exists. This Court has analyzed the Washington Constitution in dozens of decisions, building a "rich body of case law," *State v. Mecham*, 186 Wn.2d 128, 148, 380 P.3d 414 (2016), that amply prepares courts of this State to interpret the Washington Constitution in a principled, reasoned fashion. They "do not require *Gunwall* to take [them] any further." *State v. Frawley*, 181 Wn.2d 452, 466, 334 P.3d 1022 (2014).

This Court's decisions applying the *Gunwall* criteria demonstrate this. Four of the six factors (1, 2, 3, and 5) require analyzing only once for each provision of the state constitution, because "these factors arise

[2] The effect was pronounced—in the eleven years following *Gunwall*, this Court discarded state constitutional arguments in 108 cases, and the Court of Appeals in 96. Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "*Gunwall *Is Dead—Long Live* Gunwall!" 37 RUTGERS L.J. 1169, 1183 & n.91 (2006).

whenever" a state constitutional provision is compared to an analogous federal provision. *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) (citation omitted). As for factors 4 and 6—preexisting state law and matters of state or local concern—courts frequently turn to the same source: Washington law. *See State v. Johnson*, 128 Wn.2d 431, 445 & nn.56–59, 909 P.2d 293 (1996) (article I, section 7—citing Washington statutes as to factor 4 and a past decision as to factor 6); *Russell*, 125 Wn.2d at 60–62 (article I, section 9—analyzing Washington decisions as to both factors). In fact, this Court sometimes observes that the two factors "overlap" and considers them together. *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (article I, section 7); *State v. Foster*, 135 Wn.2d 441, 461–62, 957 P.2d 712 (1998) (article I, section 22). As state constitutional jurisprudence has developed, the multi-tiered *Gunwall* analysis has flattened out into a straightforward analysis of preexisting law, leaving no more work for the other *Gunwall* criteria to do.[3]

Gunwall might still provide value when the Court faces novel constitutional issues, but the time for *Wethered* has passed. This Court should renounce the idea that *Gunwall* dictates a lockstep format that a brief must follow for a litigant's rights under the Washington Constitution

[3] In this light, it is difficult to see why the Court of Appeals found that Mayfield's brief failed to comply with *Gunwall*, at least in substance. Although not labelled a "*Gunwall* analysis," it thoroughly briefed the preexisting article 1, section 7 case law.

to be considered. *See City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) (rigid *Gunwall* approach resembles "antiquated writ system where parties may lose their constitutional rights by failing to incant correctly"); *State v. Thorne*, 129 Wn.2d 736, 785, 921 P.2d 514 (1996) (Madsen, J., dissenting) (formalistic *Gunwall* analysis "elevate[s] form over substance" and "unjustly den[ies]" citizens "the protections [they] deserve."); *State v. Gocken*, 127 Wn.2d 95, 110, 896 P.2d 1267 (1995) (Madsen, J., dissenting in part) (*Gunwall* is not a "talisman"). Of course, litigants must support their claims with substantial argument and authority; "naked castings into the constitutional sea" do not suffice. *State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014) (citation omitted). But requiring that all state constitutional arguments use the *Gunwall* template no longer makes sense.[4] At this point, *Wethered* is actually slowing the development of state constitutional law. It is incorrect and harmful and should be overruled.

B. This Court Needs To Resolve Persistent Confusion Surrounding the Necessity for *Gunwall* Briefing

This Court has already recognized that *Gunwall* briefing is unnecessary in certain contexts—for example, where a state constitutional

[4] In those instances where a litigant has supported a claim with substantial argument and authority but the court still believes that a formal *Gunwall* analysis would be helpful, the court can always require re-briefing, *State v. Jewett*, 146 Vt. 221, 222, 500 A.2d 233 (Vt. 1985), avoiding the draconian effects of dismissal.

provision has already been addressed in the "particular context." *State v. Reichenbach*, 153 Wn.2d 126, 131 n.1, 101 P.3d 80 (2004); *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) (required once per "legal issue"). But how to define a "particular context" remains unclear. Cases frame the issue as broadly as "warrantless searches of automobiles," *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996), and as narrowly as "DNA samples taken from convicted felons," *State v. Surge*, 160 Wn.2d 65, 86, 156 P.3d 208 (2007) (Owens, J., concurring). Some require a *Gunwall* analysis only once per provision, even when later applied in a "new context," *e.g.*, *Am. Legion Post #149 v. Wash. Dep't of Health*, 164 Wn.2d 570, 596–97, 192 P.3d 306 (2008) (article I, section 7); others analyze a provision without citing the factors at all, *e.g.*, *Bird v. Best Plumbing Grp.*, 175 Wn.2d 756, 767–73, 287 P.3d 551 (2012) (article I, section 21). Perhaps most confusingly, despite pronouncing nine years ago that *Gunwall* briefing is not strictly required, *City of Woodinville*, 166 Wn.2d at 641–42, this Court has since rejected arguments for failure to brief *Gunwall* at least three times.[5]

The opinion of the Court of Appeals in this case illustrates the confusion. Mayfield thoroughly discussed this Court's pertinent decisions

[5] *See Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 876, 409 P.3d 160 (2018); *State v. Walker*, 182 Wn.2d 463, 484–85, 341 P.3d 976 (2015); *State v. Sieyes*, 168 Wn.2d 276, 293–94, 225 P.3d 995 (2010).

and argued that they call for a broader exclusionary rule under article I, section 7 than the Fourth Amendment. Relying on *Wethered*, the majority discarded the argument solely for failure to use the *Gunwall* template. Slip op. at 5, 7. Chief Judge Bjorgen, by contrast, reviewed this Court's discussions and concluded that no *Gunwall* analysis was necessary. *Id.* at 11–14 (Bjorgen, C.J., dissenting). The constitutional rights of Washingtonians are too important to be jeopardized by confusion over briefing standards. Clarity is necessary.

C. Even If *Gunwall* Analysis Is Needed in Some Instances, It Is Unnecessary for Article I, Section 7 Claims

If any provision of our State's Constitution no longer requires *Gunwall* briefing, it is article I, section 7. In dozens of cases before and since 1986, this Court has considered how to apply article I, section 7 to a broad range of issues. *See Mecham*, 186 Wn.2d at 148. Again and again, this Court has held that *Gunwall* briefing is no longer necessary—as to a particular issue,[6] or as to article I, section 7 in general.[7] In fact, this Court often interprets the provision independently without mentioning the

[6] *See, e.g.*, *State v. Meneese*, 174 Wn.2d 937, 945–56 & n.3, 282 P.3d 83 (2012) (school search); *State v. Eisfeldt*, 163 Wn.2d 628, 636 n.5, 185 P.3d 580 (2008) (private search doctrine); *Andersen v. King Cty.*, 158 Wn. 2d 1, 43–44, 138 P.3d 963 (2006) (privacy interest in intimate relationships); *State v. Reichenbach*, 153 Wn.2d 126, 129–31 n.1, 101 P.3d 80 (2004) (consent to vehicle search).

[7] *See, e.g.*, *State v. Snapp*, 174 Wn.2d 177, 193 n.9, 275 P.3d 289 (2012); *State v. Fry*, 168 Wn.2d 1, 5 n.2, 228 P.3d 1 (2010); *State v. Harrington*, 167 Wn.2d 656, 662–63, 222 P.3d 92 (2009); *Am. Legion Post #149*, 164 Wn.2d at 596–97; *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 400, 180 P.3d 1257 (2008); *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007); *State v. Athan*, 160 Wn.2d 354, 365, 158 P.3d 27 (2007).

Gunwall criteria at all,[8] including in cases involving the exclusionary rule. *See infra* Section II.B. Members of this Court have even considered the precise issue in this case—whether the attenuation doctrine is consistent with article I, section 7—without analyzing the *Gunwall* criteria. *See infra* n.9. At the very least, Washington courts should no longer disregard well-briefed challenges under article I, section 7.

II. THIS COURT SHOULD REJECT THE ATTENUATION EXCEPTION UNDER ARTICLE 1, SECTION 7

This Court has never recognized the "attenuation" exception to the exclusionary rule under article I, section 7, and it should decline to do so now. While recognized under Fourth Amendment jurisprudence, the attenuation exception is wholly incompatible with the "near categorical" protections of article I, section 7.

A. This Court Has Never Recognized the Attenuation Exception Under Article 1, Section 7

Over the past five to seven years, members of this Court have vigorously and openly debated whether the federal attenuation exception has any application under article 1, section 7.[9] But to this day, this Court has never recognized an attenuation exception under article 1, section 7.[10]

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[8] *See, e.g.*, *State v. Betancourth*, 190 Wn.2d 357, 362–64, 413 P.3d 566 (2018); *State v. Vanhollebeke*, 190 Wn.2d 315, 321–22, 412 P.3d 1274 (2018); *State v. Cornwell*, 190 Wn.2d 296, 301–06, 412 P.3d 1265 (2018); *State v. Olsen*, 189 Wn.2d 118, 120–23, 399 P.3d 1141 (2017); *State v. Mecham*, 186 Wn.2d 128,142–43, 380 P.3d 414 (2016).

[9] *See State v. Smith*, 177 Wn.2d 533, 552–53, 303 P.3d 1047 (2013) (Madsen, J., concurring in result); *id.* at 553–54 (González, J., concurring in result); *id.* at 559–61

Although the lead opinion in *Eserjose* relied upon the attenuation doctrine, it garnered only three votes, so the holding in that fractured decision is the position of Chief Justice Barbara Madsen, who concurred in the result on the "narrowest ground." *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 532 n.7, 242 P.3d 866 (2010). Chief Justice Madsen held that a decision on attenuation was unnecessary because the suspect's confession was not caused by the underlying constitutional violation. *Eserjose*, 171 Wn.2d at 931 (Madsen, C.J., concurring). It was, essentially, an application of the independent source rule.

Although the *Ibarra-Cisneros* dissent claimed that this Court has "consistently adhered to" the attenuation exception, 172 Wn.2d at 909 (J.M. Johnson, J., dissenting), the cited cases do not withstand scrutiny. Most predate *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980), the landmark case in which this Court recognized that article 1, section 7 provided stronger protections than the Fourth Amendment. Many involved discussions of the independent source rule, not the attenuation exception. *See State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184

(Chambers, J.P.T., dissenting); *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 886–88, 263 P.3d 591 (2011) (Alexander, J., concurring); *id.* at 906–16 (J.M. Johnson, J., dissenting); *State v. Eserjose*, 171 Wn.2d 907, 913–23, 259 P.3d 172 (2011) (plurality); *id.* at 934–40 (C.W. Johnson, J., dissenting).

[10] *See Smith*, 177 Wn.2d at 552 (Madsen, C.J., concurring) ("[W]e have not explicitly adopted it under article 1, section 7."); *id*. at 553 (González, J., concurring) ("[T]his court has shown some reluctance to adopt the attenuation doctrine."); *id*. at 559 (Chambers, J., dissenting) ("This court has never adopted the attenuation doctrine . . . ."); *Eserjose*, 171 Wn.2d at 919 ("[W]e have not explicitly adopted the attenuation doctrine . . . .").

(1968); *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967). Others analyzed attenuation under the Fourth Amendment but not its compatibility with article I, section 7. *See State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003).[11] Still others examined the voluntariness of a confession without analyzing article I, section 7. *See State v. Vangen*, 72 Wn.2d 548, 433 P.2d 691 (1967). These cases are inapposite.

B. The Attenuation Exception to the Exclusionary Rule Is Incompatible with the Nearly Categorical Protections of Article 1, Section 7

Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The framers crafted article 1, section 7 to provide stronger protections for personal privacy than the Fourth Amendment. *See State v. White*, 97 Wn.2d 92, 108 n.7, 640 P.2d 1061 (1982). This Court has repeatedly held that article I, section 7 is "qualitatively different" from the Fourth Amendment, *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002), because it recognizes an individual right to privacy "with no express limitations," *White*, 97 Wn.2d at 108–10.

Given this, it is not surprising that this Court has embraced a strong version of the exclusionary rule, stating that it is "constitutionally

[11] *See also State v. Le,* 103 Wn. App. 354, 12 P.3d 653 (2000); *State v. Armenta,* 134 Wn.2d 1, 948 P.2d 1280 (1997); *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995); *McNear v. Rhay*, 65 Wn.2d 530, 398 P.2d 732 (1965); *State v. Riggins*, 64 Wn.2d 881, 395 P.2d 85 (1964).

mandated," *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009), and that its "paramount concern" is "protecting an individual's right of privacy." *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). Unlike the federal exclusionary rule, which applies only when the benefits of deterrence outweigh the cost to society, the application of the state exclusionary rule has never depended on a cost-benefit analysis. *See Winterstein*, 167 Wn.2d at 632 (cost-benefit analysis "should not be carried out when evidence is obtained in violation of a defendant's constitutional rights"); *White*, 97 Wn.2d at 109–10 (same). Where there is a violation of article 1, section 7, the state exclusionary rule "automatically" applies. *Afana*, 169 Wn.2d at 180; *Winterstein*, 167 Wn.2d at 633; *White*, 97 Wn.2d at 110. Indeed, the rule is "nearly categorical." *Winterstein*, 167 Wn.2d at 636.

This Court has repeatedly resisted attempts to chip away at the rule. In *Winterstein*, the Court rejected an "inevitable discovery" exception to the rule because it was "necessarily speculative" and did not "disregard illegally obtained evidence." *Id.* at 634. The Court admonished the Court of Appeals for relying upon a "federal rationale" to embrace the exception and noted that the doctrine is "at odds with the plain language of article I, section 7." *Id*. at 635. Similarly, in *Afana*, this

Court rejected the "good faith" exception to the exclusionary rule, reaffirming the "automatic" nature of the rule. 169 Wn.2d at 179–81.

It is true that this Court has embraced the independent source rule, *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987); *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005), but that rule allows evidence obtained from lawful means *entirely unconnected* to the original illegality to be admissible: it is more properly considered a corollary to the exclusionary rule than a true "exception." *State v. Poaipuni*, 98 Haw. 387, 393 n.6, 49 P.3d 353 (Haw. 2002).[12] Indeed, this Court has cautioned that *Coates* and *Gaines* should not be read "expansively" to create further exceptions to the exclusionary rule, *Winterstein*, 167 Wn.2d at 634, although that is exactly what the State argues for here.

This case is more akin to *Winterstein* and *Afana* than *Coates* or *Gaines*. The attenuation exception does not disregard illegally obtained evidence; it requires speculation, and it denies a remedy even as it concedes a constitutional violation. *See Smith*, 177 Wn.2d at 552 (Madsen, C.J., concurring) (attenuation doctrine "relies on speculation,"

[12] *See also* Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle & Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 140 n.5 (1984) [hereinafter Stratton]. The State claims that the independent source rule and attenuation doctrine are closely related because "[they] both inquire whether the illegality and the evidence are, in fact, causally related." Supp. Br. Resp. 10, 13. This is false. The independent source rule asks whether causation is lacking because the evidence could be traced to a legal source; the attenuation doctrine concedes a causal connection but asks whether the evidence should be admitted nonetheless.

including "speculation of . . . the deterrent effect" of the rule). It is based on a "federal rationale" that is inconsistent with the state exclusionary rule, which is constitutionally mandated and whose primary purpose is not deterrence. *See supra* pp. 11–12. In contrast to the independent source context, this Court would need to engage in cost-benefit analysis before determining whether to exclude evidence, *see Smith*, 177 Wn.2d at 552 (Madson, C.J., concurring), something it declined to do in *Winterstein* and *Afana*. Also unlike the independent source rule, the attenuation exception actually puts the State in a *better* position than it would have been had the constitutional violation not occurred because it allows the State to use illegally obtained evidence. *See* 6 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a) (5th ed. October 2017). Finally, "nothing in the attenuation doctrine . . . suggests how time, intervening circumstances, or less egregious misconduct can infuse the fruits of an illegal seizure with the authority of law required by article 1, section 7." *Eserjose*, 171 Wn.2d at 940 (C.W. Johnson, J., dissenting). The exception has no place under article 1, section 7.

C. An Attenuation Exception Would Seriously Erode the Exclusionary Rule Under Article I, Section 7

This Court has previously warned that the personal right to privacy is easily "diminished by the judicial gloss of a selectively applied exclusionary remedy," and that the allowance of exceptions carries the

danger of "seriously eroding" the state exclusionary rule. *White*, 97 Wn.2d at 110–12. These warnings have proven prescient.

There was once a strong federal exclusionary rule based on principles of individual rights and judicial integrity. *See Mapp v. Ohio*, 367 U.S. 643, 648, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). Since it formally adopted the attenuation exception and its close cousins, the good-faith and inevitable-discovery exceptions, the U.S. Supreme Court has proceeded to hollow out the federal exclusionary rule. In *Hudson v. Michigan*, 547 U.S. 586, 591, 99 S. Ct. 2159, 165 L. Ed. 2d 56 (2006), the Court declared that the federal exclusionary rule would only be applied as a "last resort." In *Davis v. United States*, 564 U.S. 229, 236–37, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), it held that the sole purpose of the rule was deterrence and disavowed any personal constitutional right, and in *Utah v. Strieff*, 136 S. Ct. 2056, 2062–63, 195 L. Ed. 2d 400 (2016), it suggested that attenuation would only be found with "flagrant" conduct. The federal rule is frankly a shadow of what it once was.

The malleability of the concept of attenuation played a key part in this devolution. In *Hudson*, for example, the U.S. Supreme Court suggested that attenuation was appropriate not only "when the causal connection is remote," but also whenever exclusion fails to serve an "interest protected by the constitutional guarantee that has been violated."

547 U.S. at 593. The dissent rightly noted that this gave a completely "new meaning" to attenuation. *Id*. at 620 (Breyer, J., dissenting). There are myriad examples like this. *E.g.*, *Herring v. United States*, 555 U.S. 135, 137, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) (framing attenuation analysis, not as whether evidence was attenuated from illegal arrest, but whether computer error was "attenuated" from arrest); *Oregon v. Elstad*, 470 U.S. 298, 324, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) (Brennan J., dissenting) (majority used "marble-palace psychoanalysis" in its attenuation analysis). Indeed, it is ironic that the State would urge the adoption of the attenuation exception while conceding that "federal courts have struggled with correctly applying" it. Supp. Br. Resp. 17.

D. Article I, Section 7 Needs No Attenuation Exception

Far from the "long-recognized analytical tool" portrayed in the *Ibarra-Cisneros* dissent, 172 Wn.2d at 905 (J.M. Johnson, J., dissenting), the federal attenuation exception has shallow roots. While it is often traced back to *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), that opinion appears to have misread a passage from *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939), that simply restated the independent source rule. *See* Stratton at 149, 151–55, 164–65. *Wong Sun* did not explicitly recognize a separate attenuation exception, and the Court did not develop an analytic

framework for it until *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

There is no reason to believe that Washington courts cannot survive without an attenuation exception. The independent source rule, which has always been the primary limitation on the exclusionary rule, is "unquestionably sound" and a "paragon of simplicity" compared to the attenuation doctrine. LaFave, § 11.4(a). Although the lead opinion in *Eserjose* suggested no jurisdiction had ever rejected the attenuation exception, 171 Wn.2d at 928, this is inaccurate. Indiana has declined to recognize it because Indiana's Constitution, like Washington's, offers greater protection of personal rights. *See State v. Trotter*, 933 N.E.2d 572, 582 (Ind. Ct. App. 2010) (attenuation "has no application under [our] Constitution"). Needless to say, Indiana has not fallen into a state of lawlessness as a result.

III. ALTERNATIVELY, THIS COURT SHOULD REJECT ANY PER SE RULE THAT ATTENUATION EXISTS WHENEVER *FERRIER* WARNINGS ARE GIVEN

The Court of Appeals also erred in its Fourth Amendment analysis. Because it is not uncommon for police officers to seek consent to sanitize prior illegal conduct, *United States v. Washington*, 387 F.3d 1060, 1074 (9th Cir. 2004), attenuation cases often involve allegations of consent. The threshold issue is whether consent was voluntary under the Fifth

Amendment, for that would be an independent ground for excluding the evidence. *Id.* at 1072 n.12. But even if consent was voluntary, a court must still use the *Brown* factors to determine under the Fourth Amendment whether consent was obtained by "exploitation," or taking advantage, of the illegal action.[13] 422 U.S. at 600.

The Court of Appeals created a per se rule that attenuation exists whenever valid *Ferrier* warnings are given. Slip op. at 4 ("When the intervening circumstances include giving Ferrier warnings, a search is sufficiently attenuated from the illegal seizure."). [14] It reached this erroneous result by improperly collapsing the question of voluntariness into that of exploitation. *Id*. at 9 ("By giving Mayfield *Ferrier* warnings, the deputy ensured that Mayfield's consent was voluntary even though there was an illegal seizure."). [15] *Ferrier* warnings may help ensure voluntary consent, but they say little about how police exploit a given

[13] The State repeatedly uses the phrase "independent act of free will," as if that phrase guided the analysis. Supp. Br. Resp. 20. But the tests for an "independent act of free will," "attenuation" or "exploitation" are the same: they are just different names for the *Brown* test, and the focus of that test, as the State initially conceded, is whether the evidence was "a product of police exploitation." Supp. Br. Resp. 9.

[14] The State advocates the same. *See, e.g.*, Supp. Br. Resp. 20–21 ("By informing Mayfield of his *Ferrier* rights, [the police officer] did not exploit any preceding illegality . . . ."); *id*. at 21 ("[B]ecause Mayfield gave *Ferrier*-warned consent, the subsequent search . . . was cleansed of any taint . . . ."); *id*. at 24 (*Ferrier* warnings cured "prior illegal detention").

[15] The State did the same. *See, e.g.*, Supp. Br. Resp. 20–21 (equating non-exploitation with "voluntary, informed decision"); *id*. at 22 (evidence admissible absent showing that "consent was invalid"); *id*. at 24 (nothing to indicate "consent was anything but voluntary"); *id*. at 25 ("will to voluntarily consent" not "overborne").

opportunity. For this reason, federal and state courts have rejected any per se rule that right-to-refuse-consent warnings automatically excuse a Fourth Amendment violation.[16]

Brown and *Washington* control here.[17] In *Brown*, the Court held that "*Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will to break . . . the causal connection between the illegality and the confession." 422 U.S. at 602. Courts have consistently applied *Brown* to consent-to-search cases, *see supra* n.16, because the situations are parallel: a *Miranda* warning is to a subsequent confession what a right-to-refuse-consent warning is to subsequently uncovered contraband. In *Washington*, for example, the Ninth Circuit applied *Brown* where, following an illegal seizure, the defendant signed a form advising him of his right to refuse consent. 387 F.3d at 1072–74. The court held that the form was not determinative. *Id*. at 1075 n.16

[16] *See, e.g.*, *United States v. Alvarez-Manzo*, 570 F.3d 1070, 1077 (8th Cir. 2009) (fruit suppressed despite voluntary consent); *United States v. Reeves*, 524 F.3d 1161, 1170–71 (10th Cir. 2008) (unlawful arrest rendered subsequent consent invalid though defendant signed a consent form); *United States v. Robeles-Ortega*, 348 F.3d 679, 683–84 (7th Cir. 2003) ("consent alone does not necessarily purge the taint of the illegal action"); *State v. Gorup*, 279 Neb. 841, 860–61, 782 N.W.2d 16 (Neb. 2010) (consent advisements, standing alone, insufficient to break causal chain), *overruled on other grounds*, *State v. Perry*, 292 Neb. 708, 874 N.W.2d 26 (Neb. 2016); *State v. Lane*, 726 N.W.2d 371, 381 (Iowa 2007) (the attenuation inquiry in consent cases is "whether *consent* was obtained [by] exploitation").

[17] Decisions of the U.S. Supreme Court on matters of federal law are binding on state courts, while circuit court decisions are entitled to "great weight." *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014).

(consent should not be "double counted" both as "consent" under the Fifth Amendment and "intervening circumstance" under the Fourth).

A per se rule also has little to recommend it. Indeed, it would turn *Ferrier* on its head. *Ferrier* warnings were meant as a *shield* to protect Washington residents facing the prospect of a warrantless search; a per se rule would turn them into a *sword* used to absolve suspicionless searches. Moreover, allowing "talismanic" warnings to purge the taint of prior illegality would eviscerate Fourth Amendment protections. *Brown*, 422 U.S. at 601–03 (creating a "cure-all" would remove incentive to comply with Fourth Amendment); *Washington*, 387 F.3d at 1074 (per se rule would give officers a "free pass" for "uttering a few magic words"). In the end, this would "encourage—rather than discourage—investigatory shortcuts," *Washington*, 387 F.3d at 1074, and the impact of such invasions will be felt most acutely by the most vulnerable among us.[18]

CONCLUSION

The decision of the Court of Appeals should be reversed.

[18] *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SEATTLE POLICE DEP'T 25 (2011) (finding "troubling [police] practices that could have a disproportionate impact on minority communities" and noting community perceptions that "pedestrian stops are over-used and target minorities"). Moreover, punishing victims for *complying* with police requests sets up perverse incentives, particularly when racial minorities are often encouraged to comply for fear of their personal safety. *Cf. Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) ("For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.").

Respectfully submitted this 24th day of September, 2018.

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I certify that on the 24th day of September, 2018, I caused a true and correct copy of the Brief of Amici Curiae to be sent by e-mail and U.S. mail to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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