J.M. JOHNSON, J. (dissenting)—The majority throws up its hands in the face of clear evidence supporting the jury's verdict and reverses that verdict, without answering the question for which we granted review. The record before us clearly shows that two police officers lawfully, in a public parking lot, saw a bindle[1] of cocaine at Gilberto Ibarra-Cisneros' feet just after he had exited a pickup truck. The bindle was fresh, showing no dust or dirt. After Ibarra-Cisneros was arrested and advised of his *Miranda*[2] rights, he told the police officers, "'If you saw me drop it, then I'll admit it's mine . . . [b]ut if you didn't see me drop it then you can't charge me with it.'" 1 Verbatim Report of the Proceedings (VRP) at 210-11.

The officers had the authority of law necessary under article I, section 7 of the Washington Constitution to arrest Ibarra-Cisneros and to seize the

[1] A bindle is a small envelope made by folding a square piece of paper, often used for carrying powdered illegal drugs.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1996).

cocaine bindle. They had probable cause to arrest, and the cocaine bindle was in open view. The bindle, therefore, was properly admitted into evidence at trial. The jury decided Ibarra-Cisneros constructively possessed the cocaine bindle and convicted him. Because the majority reverses this clear-cut verdict, I dissent.

Facts

The majority asserts that the State has not met its burden in this case. Majority at 6. A closer look at the record demonstrates otherwise.

A. The Search of Adrian Ibarra-Raya's Residence

In the early morning hours of July 14, 2006, officers from the Walla Walla Police Department conducted a warrantless search of a house subleased by Adrian Ibarra-Raya, the defendant's brother. After obtaining a warrant, the officers found large quantities of illegal drugs. The officers arrested Adrian and transported him to the police station.

B. The Cell Phone

Adrian's cell phone rang several times at the police station. It was answered by Agent Rafael Palacios, a federal Drug Enforcement Administration officer. Ibarra-Cisneros asked to speak with Adrian. When

Agent Palacios refused, Ibarra-Cisneros threatened to "put a bullet between [Agent Palacios's] eyes." 1 VRP at 139. Ibarra-Cisneros then asked Agent Palacios if he wanted to meet. Agent Palacios assented and asked Ibarra-Cisneros where to meet. The two arranged to meet in the parking lot of Super One Foods in Walla Walla.

C. The Local Police Meet Ibarra-Cisneros in a Public Parking Lot

Officer Steve Harris was detailed to the Super One Foods parking lot to wait for Ibarra-Cisneros. After 5 to 10 minutes, Officer Harris saw two Hispanic males driving slowly into the parking lot in a Ford pickup truck. The passenger, defendant Ibarra-Cisneros, appeared to be looking for someone. The Ford pickup pulled up next to Officer Harris' vehicle. Officer Harris saw that Ibarra-Cisneros had a cell phone in his hand. The Ford pickup truck then departed from the Super One Foods parking lot. Officer Harris followed. Meanwhile, Sergeant Randy Allessio and Officer Saul Reyna were in the general area. They were alerted and followed Officer Harris and Ibarra-Cisneros. Agent Palacios remained at the police station. According to Agent Palacios, "[Ibarra-Cisneros] kept tripping me[3] asking where I was," and stated several times, "Where you at? Where you at?" *Id.*

at 139-40.

D. The Arrest

The pickup truck came to a stop in the Blue Mountain Mall parking lot. Sergeant Allessio and Officer Reyna drove past and observed Ibarra-Cisneros get out and walk to the front of the vehicle with his hands in his pockets. The officers pulled in behind, as Ibarra-Cisneros watched.

Concerned for their safety and that of the public,[4] the officers got out of the vehicle. Officer Reyna ordered Ibarra-Cisneros to put his hands up. Officer Reyna told Ibarra-Cisneros to remove his left hand from his pocket.

Officer Reyna looked down and saw a bindle at Gilberto Ibarra-Cisneros' feet, adjacent to the parking stall strip next to the pickup. The bindle was fresh, showing no dust or dirt. Officer Allessio also saw the bindle. The officers patted down Ibarra-Cisneros.

Meanwhile, other officers arrived at the mall, arrested Ibarra-Cisneros, and advised him of his *Miranda* rights. *Id.* at 209. After he was arrested,

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[3] That is, Ibarra-Cisneros initiated contact with Agent Palacios in some way, either by calling or by paging. *See* 1 VRP at 144. Agent Palacios had ended the conversation after Ibarra-Cisneros arranged to meet him at Super One Foods. *Id.* at 139.

[4] Officer Allessio testified that he had reason to believe the passenger was armed based on the threat Ibarra-Cisneros had made on the phone. 1 VRP at 165-66.

Ibarra-Cisneros stated, referring to the bindle, "'If you saw me drop it, then I'll admit it's mine . . . [b]ut if you didn't see me drop it then you can't charge me with it.'" *Id.* at 210-11.

Procedural History

The majority decides not to engage in a robust analysis of this case because of "the way this case has developed." Majority at 6. This is not an adequate reason to pass on a case for which there is clearly an answer. While the majority describes the Court of Appeals' analysis as "cursory,"[5] it is important to remember that the Court of Appeals was asked to review, in general, whether any exceptions to the warrant requirement applied. *See* Appellant's Br. at 2-4; Br. of Resp't at 2. Finding that none of the exceptions the State raised applied, it was not unreasonable for the Court of Appeals to state the law accurately and to reach the just result using an appropriate and long-recognized analytical tool, the attenuation doctrine.

As explained below, we should affirm the Court of Appeals and answer the question for which we granted review.[6] The facts that brought Ibarra-

[5] Majority at 4.

[6] *See* Pet. for Review at 5-6; *State v. Ibarra-Cizneros*, 165 Wn.2d 1036, 205 P.3d 131 (2009) (granting review).

Cisneros and the police officers together are far too attenuated from the legal arrest and the seizure of the cocaine bindle to affect his conviction. Any prior taint does not extend to invalidate the officers' lawful acts.

Analysis

The federal attenuation doctrine, an exception to the exclusionary rule, is consistent with article I, section 7 of the Washington Constitution.[7] This exception was first enunciated in *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939), and was reiterated in *Wong Sun v. United States*, 371 U.S. 471, 491, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). These cases have been cited and applied by this court since the 1960s,[8] and

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[7] This is not to say that the federal attenuation doctrine will always comport with our interpretation of article I, section 7. *Compare Hudson v. Michigan*, 547 U.S. 586, 603, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) ("the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression" (Kennedy, J., concurring)), *with State v. Coyle*, 95 Wn.2d 1, 14, 621 P.2d 1256 (1980) (stating that suppression is the proper remedy for violations of Washington's knock-and-wait rule), *and State v. Richards*, 136 Wn.2d 361, 962 P.2d 118 (1998)).

[8] *E.g.*, *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) ("We have consistently adhered to the exclusionary rule expounded by the United States Supreme Court and have likewise embraced the 'fruit of the poison tree' doctrine . . . ."); *State v. Vangen*, 72 Wn.2d 548, 555, 433 P.2d 691 (1967) (stating that the attenuation doctrine "fits the present situation with tailor-like exactness" and affirming defendant's conviction); *State v. Rothenberger*, 73 Wn.2d 596, 601, 440 P.2d 184 (1968) (finding that "[t]he 'poison' . . . which had inhered in the original unlawful arrest was so greatly attenuated by the time and circumstances intervening . . . that it had lost its potency, if it ever had any"). The *Rothenberger*, *O'Bremski*, and *Vangen* courts each affirmed the defendant's conviction. *Rothenberger*, 73 Wn.2d at 601; *O'Bremski*, 70 Wn.2d at 430; *Vangen* 72 Wn.2d at 555; *see also McNear v. Rhay*, 65 Wn.2d 530, 541, 398 P.2d 732 (1965) (citing

we have even remanded its application to the trial court[9] and have applied the United States Supreme Court's consideration of a fourth factor (whether *Miranda* warnings were given) where applicable.[1]

I. <u>The Exclusionary Rule</u>

A. *Summary of the Federal and State Exclusionary Rules*

The exclusionary rule is a judicially created remedy for constitutional violations of the Fourth Amendment to the United States Constitution and its

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Nardone, 308 U.S. 338), *abrogated on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); *State v. Riggins*, 64 Wn.2d 881, 886 n.2, 395 P.2d 85 (1964) (citing *Wong Sun*, 371 U.S. 471); *State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479 (1995) (remanding to the trial court to determine whether any exceptions to the "fruit of the poisonous tree" doctrine applied, including the federal attenuation doctrine); *State v. Tan Le*, 103 Wn. App. 354, 362, 12 P.3d 653 (2000) (holding that a postarrest identification was not attenuated from the illegal arrest); *State v. McReynolds*, 117 Wn. App. 309, 323, 71 P.3d 663 (2003) (finding that certain facts supported the trial court's finding of attenuation but others did not, and remanding to the trial court for new findings and conclusions of law).

[9] In *Warner*, 125 Wn.2d at 889, we remanded to the trial court to determine "whether the string of causation was sufficiently attenuated so as to bring it within the [attenuation] exception." The trial court did not reach the issue on remand because the defendant pleaded guilty. Statement of Def. on Plea of Guilty, *State v. Warner*, No. 92-1-01045-8 (Snohomish County Super. Ct. Sept. 9, 1996). Before agreeing to the plea, however, the State argued why its evidence was attenuated in that case, relying on the Washington Supreme Court's holding above. *See* State's Mem. of Law Pertaining to Remanded Suppression Hr'g 3-4 (Mar. 21, 1996), *Warner*, No. 92-1-01045-8.

[1] *State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997) (considering "'giving of *Miranda* warnings'" in addition to "'temporal proximity of the illegality and the subsequent conduct,'" "'the presence of significant intervening circumstances,'" and "'the purpose and flagrancy of the official misconduct'" (quoting *State v. Soto-Garcia,* 68 Wn. App. 20, 27, 841 P.2d 1271 (1922))); *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

Washington State counterpart, article I, section 7.[11] Ibarra-Cisneros contends that the exclusionary rule should apply to the cocaine bindle found at his feet because its seizure violated both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. He argues that the bindle's seizure was connected to the unlawful search of his brother's residence and, therefore, is "fruit of the poisonous tree." Pet. for Review at 8, 10.

The first question we must answer, therefore, is whether article I, section 7 requires exclusion of the cocaine bindle. If article I, section 7 does not require exclusion, then neither does the Fourth Amendment (assuming article I, section 7 offers more protection than the Fourth Amendment).[12]

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[11] *See also Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886) (first federal court shift away from the common law "nonexclusionary" rule, which required a court to admit all competent and probative evidence regardless of its source, *e.g.*, *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841), *cited in* 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 n.36 (1986)); *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922) (first adoption of an exclusionary rule in Washington State). *But see State v. Royce*, 38 Wash. 111, 80 P. 268 (1905) (rejecting the *Boyd* exclusionary rule and *not* addressing whether defendant's article I, section 7 rights were violated).

[12] We have previously interpreted article I, section 7 to provide greater protection than the Fourth Amendment as a result of its distinct language, purpose, and history. *E.g., State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005); Justice Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 Seattle U. L. Rev. 467, 587 (2005)); *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999); *State v. Gunwall*, 106 Wn.2d 54, 63-64, 720 P.2d 808 (1986).

B. *The Exclusionary Rule under Article I, Section 7*

The exclusionary rule under article I, section 7 has been described as "nearly categorical." *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009);[13] *State v. Afana*, 169 Wn.2d 169, 181, 233 P.3d 879 (2010).[14] However, because the federal attenuation doctrine is not incompatible with the Washington Constitution for the reasons referred to in *Afana* and *Winterstein*,[15] and because this court has repeatedly referenced and applied the federal standard,[16] we should not hesitate to affirm the Court of Appeals' application of the attenuation doctrine to this case.

1. Washington applies the federal attenuation doctrine

This court has employed the attenuation doctrine time and time again in prior decisions to determine whether challenged evidence was "'fruit of the poisonous tree'" or so "'attenuated as to dissipate the taint.'" *State v.*

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[13] The majority's analysis of the inevitable discovery exception in *Winterstein* was unnecessary to its holding. *Winterstein*, 167 Wn.2d at 638 (J.M. Johnson, J., concurring). This court upheld the inevitable discovery exception in *Warner*, 125 Wn.2d at 889, at least in some cases. *Id.* at 638-39.

[14] The warrantless search of Afana's vehicle incident to the arrest of his passenger would have been constitutional if the arresting officer had perceived a threat to his safety. *Afana*, 169 Wn.2d at 184-85 (J.M. Johnson, J., concurring).

[15] *See Eserjose*, 171 Wn.2d at 913, 918, 927-29.

[16] *See supra* note 8.

Eserjose, 171 Wn.2d 907, 919, 259 P.3d 172 (2011) (quoting *Nardone*, 308 U.S. at 341 and citing *Warner*, 125 Wn.2d at 876; *Rothenberger*, 73 Wn.2d at 596; *Vangen*, 72 Wn.2d at 548). There has never been a need to explicitly adopt the doctrine under article I, section 7 because there has never been a concern about its propriety. Instead, we have consistently adhered to the federal attenuation doctrine to the exclusionary rule, as first enunciated in *Nardone* and as reiterated in *Wong Sun*, 371 U.S. at 491. *Eserjose*, 171 Wn.2d at 912-20.

Although many of these rulings were precipitated by the Court's holding in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961),[17] we have not questioned the application of the attenuation doctrine in light of article I, section 7 because, as we said in *O'Bremski*, "[w]e have consistently adhered to the exclusionary rule expounded by the United States Supreme Court [since 1922] . . . and have likewise embraced the 'fruit of the poison tree' doctrine," even extending it to secondary evidence. *O'Bremski*, 70 Wn.2d at 428 (citations omitted).

[17] *See generally Mapp*, 367 U.S. at 660 (holding that the right to privacy embodied in the Fourth Amendment is enforceable against the states through the due process clause of the Fourteenth Amendment).

Notably, several of our holdings applying the attenuation doctrine have been made *after* this court began asserting that article I, section 7 provides greater protections than the Fourth Amendment in this area. *Compare* Pitler, 61 Wash. L. Rev. at 493-98, *and Warner*, 125 Wn.2d at 888 ("if the 'fruit' is sufficiently attenuated from the original illegality, then it may be admitted" (citing *Nardone*, 308 U.S. at 341)); *see also State v. Tan Le*, 103 Wn. App. 354, 12 P.3d 653 (2000); *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003). In our most recent case on the topic, we specifically applied the factors of *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) – a federal attenuation case – to determine whether the taint from a prior illegal seizure had been removed. *State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997). We have even remanded application of the federal attenuation doctrine to the trial court[18] and applied the United States Supreme Court's consideration of a fourth factor (whether *Miranda* warnings were given) where applicable.[19]

2. The history of article I, section 7 confirms that the attenuation doctrine is appropriate in Washington

[18] *See supra* note 9.

[19] *See supra* note 10.

There is limited circumstantial evidence of the intent of the drafters of article I, section 7 (and those who ratified it) "to establish a search and seizure provision that varied from the federal provision." *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). First of all, the convention proposed and adopted a rule stating that committee proceedings were not to be made public "except as they may be reported by said committees from time to time." The Journal of the Washington State Constitutional Convention 1889, at 55, 73 (Beverly Paulik Rosenow, ed., 1962); *see also* Minutes of Proceedings of Constitutional Convention 73, 94 (on microfilm with the Washington State Law Library). Second, article I, section 7 passed *without debate* on July 31, 1889[2] and was even referred to as one of the "*sundry*"[21] amendments made to the initial Bill of Rights read to the Convention on July 11, 1889. Minutes of Proceedings of Constitutional Convention 216 (on microfilm with the Washington State Law Library). In

[2] *The Bill of Rights Adopted: The Preamble Was Recommitted – A Long Afternoon's Session*, Tacoma Daily Ledger, July 30, 1889, at 4, cols. 3-5, *in* 4 Washington State Constitutional Convention 1889: Contemporary Newspaper Articles 4-57 (Marian Gallagher Law Library 1998).

[21] Webster's International Dictionary of the English Language 1445 (1899), a publication ordered by Congress, defines "sundry" as (1) several, divers; more than one or two; various; (2) separate, diverse. "Sundries" are defined as "[m]any different or small things; sundry things." *Id.* A "sundryman" is defined as "one who deals in sundries, or a variety of articles." *Id.*

fact, the only substantial debate over the language submitted by the committee centered on the preamble.

Clear evidence in support of the framers' intent to apply an exclusionary rule is not found in this history. Contrary to the assertions of an oft-cited secondary source,[22] it is also plausible to posit that article I, section 7's language was merely intended to be a simplification of what is and is not a constitutional search, using then-contemporary language.[23] In contrast, direct evidence proves that this court has a long history of closely following United States Supreme Court precedent with respect to the exclusionary rule, especially the attenuation doctrine.[24]

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[22] Pitler, 61 Wash. L. Rev. at 460-61, 520-22.

[23] One of the seven committee members was an editor; two were lawyers. Wilfred J. Airey, A History of the Constitution and Government of Washington Territory 440-42 (June 5, 1945) (unpublished PhD Thesis, University of Washington) (on file with Washington State Law Library); The Journal of the Washington State Constitutional Convention 1889, at 19. Two of the first justices to sit on the Washington Supreme Court, Justice Stiles and Justice Dunbar, were not on the committee but were members of the Constitutional Convention. The Journal of the Washington State Constitutional Convention 1889 at 199. Both voted for the adoption of article I, section 7. *Id.* In 1905, Justice Dunbar concurred in an opinion rejecting the exclusionary rule. *See infra* note 25.

[24] The exclusionary rule originated in *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), just three years prior to the adoption of the Declaration of Rights at the Washington Constitutional Convention. This court, however, rejected the *Boyd* principle in 1905 in *Royce*, 38 Wash. at 116 (Dunbar, J., concurring). Importantly, we note that Justice Dunbar sat as a delegate to the Washington Constitutional Convention and had voted *for* the adoption of article I, section 7. Airey, *supra*, at 440-42; The Journal of the Washington State Constitutional Convention 1889, *supra,* at 199. It was not until 1922 that an exclusionary rule was adopted by this court in *Gibbons*, noted at

C. *Logical Consequences for Washington's Exclusionary Rule*

Article I, section 7 decrees that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Generally, we have read the phrase "authority of law" to require a warrant, *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citing *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)), unlike the more easily satisfied reasonableness standard of the federal exclusionary rule. We recognize few exceptions to the article I, section 7 warrant requirement, and those that are recognized are "'jealously and carefully drawn.'" *Winterstein*, 167 Wn.2d at 628 (internal quotation marks omitted) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). It is important to recognize, however, that it is exceptions to the warrant requirement that are "'jealously and carefully drawn,'" not exceptions to the exclusionary rule such as the

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118 Wash. 171. This was not done until *after* the United States Supreme Court rearticulated an exclusionary rule in *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), *overruled on other grounds by Mapp*, 367 U.S. 643, and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920), after it had temporarily returned to the common law rule of nonexclusion in *Adams v. New York*, 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904). Whether or not *Royce* stands for the proposition that the drafters of article I, section 7 (and those who ratified it, including Justice Dunbar) did not contemplate an exclusionary rule, this court has a long history of closely following United States Supreme Court precedent in this area, both in 1905 (*Royce* being one year after *Adams*), in 1922 (*Gibbons* being two years after *Silverthorne*), and since the 1960s in the wake of *Mapp v. Ohio*.

attenuation doctrine. *Id.* (internal quotation marks omitted) (quoting *Hendrickson*, 129 Wn.2d at 70; *Houser*, 95 Wn.2d at 149 (citing *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958))). Consistent with our basic holding in *Eserjose*, we should affirm that the attenuation doctrine is consistent with article I, section 7 and affirm the Court of Appeals.

II. The Attenuation Doctrine in Washington State

The attenuation doctrine requires us to consider "whether the . . . evidence was [obtained] 'by *exploitation* of [the initial] illegality [*rather than*] by means sufficiently distinguishable to be purged of the primary taint.'" *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984) (emphasis added and omitted) (third alteration in original) (internal quotation marks omitted) (quoting *Wong Sun*, 371 U.S. at 488). The key factor that courts must scrutinize when applying the attenuation doctrine is the causal link between the prior illegality and subsequently discovered evidence. Namely, the evidence is not to be excluded if that link is "so attenuated as to dissipate the taint" of the activity. *Nardone*, 308 U.S. at 341. In applying this test, federal courts utilize a three-part framework that weighs

(1) the temporal proximity between the illegal activity and the discovery of the evidence, (2) the presence of any intervening circumstances, and (3) the purpose and flagrancy of the official misconduct that tainted the case. *See Le*, 103 Wn. App. at 362 (citing *Brown*, 422 U.S. at 603-04). In Washington, as in federal court, we apply these three factors plus a fourth factor where applicable: whether *Miranda* warnings have been given. *See Armenta*, 134 Wn.2d at 17-18.[25]

III. The Officers Had Authority of Law to Arrest Ibarra-Cisneros and Seize the Cocaine Bindle

The issue squarely before us is whether the police officers who actually met Ibarra-Cisneros, followed him into a public parking lot, and arrested him had the requisite "authority of law" to seize the cocaine bindle found at his feet. *See supra* note 12. As demonstrated by the facts, the police officers *did* have the authority of law necessary to arrest Ibarra-Cisneros and seize the cocaine bindle. They had probable cause to arrest and the contraband was in open view.[26] The cocaine bindle is not subject to the exclusionary rule

[25] *See also State v. Knighten*, 109 Wn.2d 896, 910-11, 748 P.2d 1118 (1988) (Pearson, C.J., dissenting); *State v. Coyne*, 99 Wn. App. 566, 574, 995 P.2d 78 (2000); *State v. O'Day*, 91 Wn. App. 244, 252-53, 955 P.2d 860 (1998).

[26] We note here that the record supports a finding that the officers also had the authority of law to conduct a Terry stop, and lawfully pat down Ibarra-Cisneros. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Moreover, the bindle of

because the exclusionary rule does not apply.

IV. The Exclusionary Rule Does Not Apply to the Cocaine Bindle

The exclusionary rule does not apply to the seizure of the cocaine bindle because the seizure and Ibarra-Cisneros' arrest is far attenuated from the unlawful search of his brother's residence. A number of significant intervening circumstances separated the illegal seizure of the phone from the discovery of the cocaine bindle in the parking lot.

First, Ibarra-Cisneros spontaneously called a cell phone; the police did not contact him. *See State v. Gonzales*, 46 Wn. App. 388, 398, 731 P.2d 1101 (1986) ("a *spontaneous* volunteered statement can itself be a significant intervening circumstance, sufficiently attenuated from the original police illegality to allow admission"). Second, Ibarra-Cisneros continued talking to Agent Palacios even after he learned that he was speaking to a stranger. In *State v. Goucher* we held:

> "[The defendant] instituted the calls and spoke voluntarily and without hesitation to the agents. None of the agents pretended to be . . . the party [defendant] wished to reach. [Defendant] had no legitimate expectation of privacy in his telephone conversation with the agents. He assumed the risk of exposure

cocaine was not seized or manipulated pursuant to a Terry stop, but was found in open view on the ground where Ibarra-Cisneros had been standing. *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

when he spoke freely with strangers."

124 Wn.2d 778, 783, 881 P.2d 210 (1994 (most alterations in original) (quoting *United States v. Congote*, 656 F.2d 971, 976 (5th Cir. 1981)). Third, the cell phone did not belong to Ibarra-Cisneros; his standing to contest the search was never raised.

Fourth, it was Ibarra-Cisneros who asked to meet and confront Agent Palacios. It was also Ibarra-Cisneros, not Agent Palacios, who repeatedly "tripped" Agent Palacios when Ibarra-Cisneros arrived at the Super One Foods parking lot. 1 VRP at 139-40. Given his threat to "put a bullet between [Agent Palacios'] eyes," Ibarra-Cisneros cannot claim he was not ready to face the consequences of such a meeting. *Id.* at 139. Fifth, although Ibarra-Cisneros agreed to meet Agent Palacios, a federal officer, it was not Agent Palacios who eventually went to meet Ibarra-Cisneros – it was local police. The local police were not acting at the direction of Agent Palacios, but were responding, in real-time, to information given to them while they were on-duty. Sixth, the arrest was made several hours after the search of his brother's residence, and the officers were not looking for the cocaine bindle in the first place (it was in open view). Finally, Ibarra-Cisneros was arrested

by local police and advised of his *Miranda* rights.

The cocaine bindle is more than sufficiently attenuated from the unlawful search of the home and the seizure of the phone. In keeping with this court's application of state and Supreme Court precedent, the cocaine bindle was obtained by means sufficiently distinguishable to be purged of the primary taint, rather than by the exploitation of the illegality. *See Segura*, 468 U.S. at 830; *Wong Sun*, 371 U.S. at 488. The totality of the circumstances satisfies this principle and our four-factor test: the seizure of the cocaine bindle was not contemporaneous with the unlawful search,[27] there were many intervening circumstances (as listed above), the purpose of the police officers was to enforce the law, and the police officers exhibited proper behavior from start to finish, including their conduct at the Super One Foods parking lot and the Blue Mountain Mall. Finally, *Miranda* warnings were given. The local police officers in this case were not attempting to elicit an incriminating

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[27] *See generally O'Day*, 91 Wn. App. at 252 (no attenuation when illegality was contemporaneous to discovery of evidence); *McReynolds*, 117 Wn. App. at 344. The Court of Appeals in *McReynolds* reasoned that a four-day gap between the issuance of a warrant resulting in an illegal search and issuance of a subsequent search warrant was not sufficient to support attenuation, but also found that a lack of police flagrancy supported the trial court's finding of attenuation. *Id.* at 323, n.1, n.2. The *McReynolds* court concluded that "[t]he [trial] court . . . properly evaluated the relevant factors and concluded that some of the material [supporting the warrant] was not tainted," reversed the conviction but remanded for reconsideration of the attenuation issue. *See id.* at 324.

response from Ibarra-Cisneros.[28] They were responding to crime and preserving the peace. In sum, the Court of Appeals should be affirmed.[29]

Conclusion

The majority states "the only fair resolution of Ibarra-Cisneros's appeal is to treat it as the Court of Appeals treated Ibarra-Raya's appeal [and reverse the conviction]." Majority at 6. This is not fair and surely not constitutionally required. Clear evidence supports the jury's verdict to convict Gilberto Ibarra-Cisneros of possession of a controlled substance. The seized cocaine bindle in a public place is more than sufficiently attenuated from the unlawful search of Ibarra-Raya's home and cell phone, occurring far in time and in distance from that search. The attenuation doctrine is consistent with article I, section 7 of the Washington State Constitution, and the jury that heard the evidence properly convicted Ibarra-Cisneros of possession of a controlled substance. I dissent.

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[28] *See State v. Walton*, 67 Wn. App. 127, 130-31, 834 P.2d 624 (1992) (stating a general prohibition against police officers eliciting incriminating responses through deceptive means (citing *State v. Hensler*, 109 Wn.2d 357, 362, 745 P.2d 34 (1987)).

[29] "Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

AUTHOR:
Justice James M. Johnson

WE CONCUR: