IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 82491-6
Respondent,	)	
	)	
v.	)	En Banc
	)	
JAMES ROBERT ESERJOSE,	)	
	)	
Appellant.	)	
_____	)	Filed June 30, 2011

ALEXANDER, J.—We granted direct review of James Eserjose's conviction on a charge of second degree burglary. He assigns error to the trial court's conclusion that a confession he gave to a deputy sheriff was admissible at trial. We affirm the trial court.

I

In the early morning hours of August 29, 2008, the "Latte On Your Way" coffee shop in Kitsap County was burglarized. When Kitsap County Deputy Sheriff Heather Wright responded to the shop's burglar alarm, she discovered signs of forcible entry; however, aside from shards of broken glass on the floor and an opened cash register drawer and freezer door, the shop's interior appeared essentially undisturbed. The shop's manager soon arrived on the scene and discovered that approximately $400

had been taken from a can in the freezer.

Later that day, a man identifying himself as James Kordell called 911 with information about the burglary. Kordell later met with Deputy Wright at the Poulsbo Police Department and informed her that he worked for the coffee shop owners as an electrician. He went on to say that his former roommate, Joseph Paragone, and another man, James Eserjose, had been responsible for burglarizing the coffee shop. Kordell indicated that the men lived at the home of Eserjose's parents in Illahee.

Kordell provided Deputy Wright with the address of Eserjose's parents' house. Deputy Wright, who was assigned to North Kitsap County, then contacted Sergeant Clithero of the Kitsap County Sheriff's Office and requested that deputies assigned to the central area of Kitsap County arrest Paragone and Eserjose. At approximately 1:30 a.m., Clithero, together with Deputies Sapp, Swayze, and Baker, went to the address that had been provided by Kordell. Although the deputies did not possess an arrest warrant or a search warrant, one of them knocked on the front door of the house. When James Eserjose opened the front door, a deputy asked him if Paragone was at the home. Eserjose responded that Paragone was upstairs sleeping and that he would go get him. Eserjose then went upstairs, leaving the door open.

Eserjose's father then came to the door and invited the deputies into the house, saying that he wanted to close the door to keep out the cold air. Once inside, the deputies stood in the entryway at the bottom of the stairs that led to the second floor of the house. From there, the deputies could see a portion of the upstairs hallway. After

waiting about a minute, the deputies talked amongst themselves about the delay and determined that they should ascend the stairs in order to arrest Paragone and Eserjose. Eserjose's father told the deputies to be careful of his dog upstairs because he did not want them to be surprised and harm the animal.

The deputies arrested Paragone in the hallway. Eserjose was arrested just outside the door to his bedroom. After effecting the arrest, the deputies then took the two men outside the house and placed them in separate patrol cars. Deputy Sapp read Eserjose his *Miranda*[1] rights through the open door of his patrol car and then took him to the Silverdale Office of the Kitsap County Sheriff. The deputy did not, however, ask Eserjose any questions about the burglary on the way to that office.

At the sheriff's office, Eserjose was again advised of his *Miranda* rights and he signed a form acknowledging that he understood these rights. Although he initially denied any knowledge of the burglary, he ultimately confessed after being told that Paragone had already done so.

The State charged Eserjose in Kitsap County Superior Court with second degree burglary.[2] Eserjose moved to suppress his confession on the ground that his arrest was unlawful. Following a hearing on Eserjose's motion, the trial court entered findings

---

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

[2] Although the record before us does not disclose what happened to Paragone, it appears that he pleaded guilty to a charge of second degree burglary and was sentenced in 2008. *See State v. Paragone*, No. 08-1-00971-6 (Kitsap County Super. Ct., Wash. Sept. 25, 2008).

of fact and conclusions of law, determining that, although the deputies had probable cause to arrest Paragone and Eserjose and consent to enter the home where the arrest was made, they exceeded the scope of the consent when they entered the upstairs hallway and effected the arrests.[3] The trial court held, therefore, that the arrest of Eserjose was unlawful. The State has not challenged that conclusion. *See* Br. of Resp't at 8 n.1, 15. The trial court, nevertheless, determined that Eserjose's confession was admissible under *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990), a Fourth Amendment case that addressed the admissibility of a confession that a suspect gave at a police station after being unlawfully arrested in his home. It, therefore, denied the suppression motion. On the basis of stipulated facts, the trial court then found Eserjose guilty of second degree burglary. Eserjose petitioned this court for direct review, and we granted the petition.

II

We review conclusions of law relating to the suppression of evidence de novo. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). "Unchallenged findings of fact entered following a suppression hearing are verities on appeal."[4] *Id*. (citing *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003)).

III

[3]The court considered the upstairs hallway a "private area, not normally open to guests" and, therefore, "not an area an occupant would assume a risk that a co-occupant would give consent to another to enter." Clerk's Papers at 90.

[4]The trial court's findings of fact are based entirely on the stipulations of the parties and are unchallenged.

The broad question before us is whether the trial court erred in admitting Eserjose's confession. Eserjose contends that, because he was unlawfully arrested, his confession should have been suppressed. There is no dispute that the arrest was unlawful, the United States Supreme Court having held that, in the absence of exigent circumstances, the Fourth Amendment prohibits police officers from making a warrantless and nonconsensual entry into a suspect's home in order to effect an arrest. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). In the *Harris* case, however, the Court determined that, where the police have probable cause to arrest a suspect, the federal exclusionary rule[5] does not bar statements made by the suspect outside his home, even though those statements were made following an illegal arrest inside the home in violation of *Payton*. *Harris*, 495 U.S. at 21. Because Eserjose has not challenged the trial court's conclusion that the information Kordell provided to the deputies gave them probable cause for his arrest, the confession he

[5]The exclusionary rule requires the suppression of evidence obtained in violation of a defendant's constitutional rights. The exclusionary rule originated in *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), in which the United States Supreme Court held that the admission of private papers seized in violation of the Fourth Amendment, in effect, compelled a person to be a witness against himself in violation of the Fifth Amendment. After reverting 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), the United States Supreme Court revived the 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 v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920). *Boyd*, *Weeks*, and *Silverthorne Lumber Co.* inspired this court to adopt the exclusionary rule in *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922). *See generally* Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459 (1986).

gave at the sheriff's office is admissible under the Fourth Amendment pursuant to *Harris*.

A. Is *Harris* compatible with article I, section 7 of the Washington Constitution?

Eserjose concedes that *Harris* is controlling under the Fourth Amendment. He contends, though, that *Harris* is incompatible with article I, section 7 of the Washington Constitution, it being well settled that this provision is often more protective than the Fourth Amendment in the search and seizure context.[6] *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). Our state's exclusionary rule, moreover, is generally less permissive than its federal counterpart, the rule having been described as "nearly categorical." *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). That rule is intended to protect individual privacy against unreasonable governmental intrusion, to deter police from acting unlawfully, and to preserve the dignity of the judiciary by refusing to consider evidence that has been obtained through illegal means. *State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982).

The State points out that this court has recognized exceptions to Washington's exclusionary rule, such as the independent source exception, which this court has recognized in *State v. Coates*, 107 Wn.2d 882, 887, 735 P.2d 64 (1987), and *Gaines*, 154 Wn.2d 711. Whether the exception carved out in *Harris* is compatible with article I, section 7, however, is an open question.[7] Courts in other states have considered

[6]Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

[7]In *State v. Riley*, 121 Wn.2d 22, 31-32, 846 P.2d 1365 (1993), we declined to

whether *Harris* is compatible with their constitutions, but the results are mixed. The Supreme Court of Arizona, for example, adopted the *Harris* exception in *State v. Cañez*, 202 Ariz. 133, 42 P.3d 564 (2002). Notably, Arizona's article II, section 8 is identical to Washington's article I, section 7. On the other hand, in *State v. Mariano*, 114 Haw. 271, 281, 160 P.3d 1258 (Ct. App. 2007), the Intermediate Court of Appeals of Hawaii said, "We cannot condone the parsimonious Fourth Amendment protection the Supreme Court doled out in *Harris*." It went on to say that article I, section 7 of the Hawaii Constitution[8] is more protective than the Fourth Amendment. Similarly, the Supreme Court of Connecticut concluded that the *Harris* exception falls short of the protection required by that state's constitution. *State v. Geisler*, 222 Conn. 672, 690, 610 A.2d 1225 (1992), *abrogated on other grounds by State v. Brocuglio*, 264 Conn. 778, 826 A.2d 145 (2003); *see also State v. Luurtsema*, 262 Conn. 179, 811 A.2d 223 (2002), *overruled on other grounds by State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008).

In order to determine whether the *Harris* exception is compatible with article I, section 7 of our state's constitution, it is necessary to consider the Court's rationale in *Harris* very carefully. As noted above, the United States Supreme Court rested its

---

address that question because it was raised for the first time on appeal and the record was inadequate.

[8]Hawaii's article I, section 7 provides as follows: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted."

decision in that case on the fact that the police officers there had probable cause to believe that the suspect had committed a felony before they made their warrantless entry into the suspect's home. The Court emphasized that a warrantless arrest is generally permissible so long as it is supported by probable cause. *Harris*, 495 U.S. at 17-18 (citing *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)). In distinguishing its decision in *Harris* from its earlier decision in *Payton*, which "drew a line at the entrance to the home," the Court said, "Nothing in the reasoning of that case suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house." *Id*. at 18. The Court was expressing the view that, once the suspect was outside the constitutionally protected space of his home, the police had the legal authority to keep him in custody and question him. In that regard, it explained that, "[b]ecause the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Id*. Having decided that the suspect was in legal custody, the Court went on to hold that the suspect's confession was properly admissible.

The United States Supreme Court also distinguished its decision in *Harris* from that in *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). In *Brown*, the record showed that the police officers did not have probable cause to effect an arrest, let alone obtain an arrest warrant, when they entered the suspect's home.

However, after removing the suspect from his home and transporting him to the police station, the police officers informed him of his *Miranda* rights and obtained a confession. The Supreme Court held that the giving of *Miranda* warnings does not automatically "purge the taint of an illegal arrest." *Id.* at 605. In rejecting the notion that *Miranda* warnings, by themselves, necessarily break the causal connection between the illegal arrest and the subsequent confession for Fourth Amendment purposes, the Court also rejected a "but for" rule that would regard all evidence as "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. *Id.* at 599, 603. Rather, to ensure that police had not exploited the Fourth Amendment violation, the Court reaffirmed the attenuation analysis of *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963): "In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.'" *Brown*, 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486).

In *Harris*, the United States Supreme Court did not engage in the attenuation analysis it employed in *Brown*, stating that "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.'" *Harris*, 495 U.S. at 19 (quoting *United States v. Crews*, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)). The Court went on to determine that the "challenged evidence" in *Harris* was not the

"product of illegal governmental activity" because, unlike the circumstances in *Brown*, the police in *Harris* had probable cause and, for that reason, the legal authority to keep the defendant in custody once he was outside the home. *Id.* Thus, as we have seen, the Court concluded that the suspect's subsequent confession was not the product of unlawful custody.

Nor, in the Court's view, was the confession the "fruit of having been arrested in the home rather than someplace else." *Id*. The Court analogized the situation in *Harris* to that in *Crews*, where the defendant sought the suppression of a witness's in-court identification on the ground that his presence in the courtroom was precipitated by an illegal arrest. His theory was that he was the "fruit" of the illegal arrest, and that *he* should have been "suppressed," rendering in-court identification impossible. The Court held that the in-court identification was not "'come at by exploitation' of the violation of the defendant's Fourth Amendment rights." *Crews*, 445 U.S. at 471 (quoting *Wong Sun*, 371 U.S. at 488). It explained that the exclusionary rule "delimits what proof the Government may offer against the accused at trial" by "closing the courtroom door to evidence secured by official lawlessness," but the defendant was "not himself a suppressible 'fruit,'" since "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." *Id*. at 474 (citing *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952); *Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886)).

The Court in *Harris* did not elaborate on its analogy to *Crews* except to say that, because "the police had a justification to question Harris prior to his arrest," his subsequent confession "was not an exploitation of the illegal entry into [his] home." *Harris*, 495 U.S. at 19. The Court, it seems, reasoned that, because the police had the legal authority to hold the suspect regardless of his illegal arrest, they were not exploiting the illegality of that arrest (i.e., "the fact that the arrest was made in the house rather than someplace else") any more than the State exploited the illegality of the arrest in *Crews*, which, under the rule derived from the *Ker* and *Frisbie* cases, did not require the suspect's release or "suppression" at trial. *Id.* at 18-19. In this way, the Court in *Harris* divided the arrest from its illegal nature, leaving only the fact of arrest in the chain of causation leading to the challenged confession. *See id*. at 20 ("We . . . hold that the station house statement in this case was admissible because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else."). Hence, according to the Court, the legal issue was the same, for Fourth Amendment purposes, as it would have been had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated him at the police station.

In summary, the reason attenuation analysis was considered appropriate in *Brown* but not in *Harris* is that the police officers in *Harris* had probable cause to believe the suspect was guilty of a felony before their unlawful entry into his house. It

was probable cause that furnished the legal authority for the police to keep the suspect in custody once he was outside his house. Because the *Payton* violation ended at the suspect's door, the United States Supreme Court considered the suspect's confession at the police station properly admissible.

In analyzing article I, section 7 of our state constitution, we do not attach the same significance to the fact that the police officers possess probable cause before their unlawful entry. In our judgment, a rule that makes the admissibility of a confession depend entirely on the legality of custody is incompatible with the purposes of our state's exclusionary rule because it completely ignores the illegality of the preceding arrest. Our state's exclusionary rule, like its federal counterpart, aims to deter unlawful police conduct, but "its paramount concern is protecting an individual's right of privacy." *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). It accomplishes this by closing the courtroom door to evidence gathered through illegal means. By design, then, it is concerned with the way evidence is obtained, with the legality of each link in the causal chain, not merely the last. While the rule authorizing warrantless arrests in a public place may be indifferent to how the suspect came to be outside his home, it does not follow that the exclusionary rule is equally indifferent. The question of the legality of custody following an illegal arrest and the question of the admissibility of the suspect's confession should be kept separate. A rule that treats the answer to the first as dispositive of the second falls short of the protection afforded by our state constitution.

That is not to say that the legality of custody is unimportant, only that it does not necessarily break the causal chain between an illegal arrest and a subsequent confession. Article I, section 7 requires courts to consider the connection between the arrest and the confession. In our view, the proper inquiry is whether the confession is "'sufficiently an act of free will to purge the primary taint.'" *Brown*, 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486). In *Brown*, the United States Supreme Court identified three factors, aside from the giving of *Miranda* warnings, that courts should consider in determining if a confession was sufficiently attenuated from an illegal arrest: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Id*. at 603-04 (footnote and citation omitted). After applying these factors, the Court concluded that the suspect's confession was inadmissible: "The illegality here . . . had a quality of purposefulness. The impropriety of the arrest was obvious . . . . The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id*. at 605.

Although we have not explicitly adopted the attenuation doctrine under article I, section 7, we have employed it time and again in prior decisions to determine whether, in the time-worn metaphor of *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939), the challenged evidence was "fruit of the poisonous tree" or so "attenuated as to dissipate the taint." *See*, *e.g.*, *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995); *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968);

State v. Vangen, 72 Wn.2d 548, 433 P.2d 691 (1967). For instance, in *State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997), we applied the *Brown* factors to determine whether a suspect's confession was tainted by a prior illegal seizure.[9] While we have expressed the exclusionary prohibition in broad terms, our cases do not stand for the proposition that the exclusionary rule under article I, section 7 operates on a "but for" basis.[1] Rather, we have consistently adhered to the "fruit of the poisonous tree" doctrine as articulated in *Nardone* and *Wong Sun*. *See*, *e.g.*, *Gaines*, 154 Wn.2d at 717; *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967); *McNear v. Rhay*, 65 Wn.2d 530, 541, 398 P.2d 732 (1965), *abrogated on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). In doing so, we have, at least, implicitly adopted the attenuation doctrine, that doctrine being intimately related to the "fruit of the poisonous tree" doctrine.

In fact, the "fruit of the poisonous tree" doctrine and the attenuation doctrine

---

[9]We noted that, while the defendants cited the state constitution in their briefs, they did not allege pursuant to *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), that we should interpret article I, section 7 independently of the Fourth Amendment. Accordingly, we confined our analysis to the Fourth Amendment. *See Armenta*, 134 Wn.2d at 10 n.7.

[1]In *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999), we said, "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Ladson* relied on *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986), but in that case, we expressed the "fruit of the poisonous tree" doctrine differently. We said, "If the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree." *Id*. *Kennedy*, in turn, relied on the authority of *Wong Sun*, in which the United States Supreme Court said, "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.

stem from the same source. In the very opinion in which he described evidence derived from the "'Government's own wrong'" as "fruit of the poisonous tree," Justice Felix Frankfurter said, "Sophisticated argument may prove a causal connection," but "[a]s a matter of good sense, . . . such connection may have become so attenuated as to dissipate the taint." *Nardone*, 308 U.S. at 341 (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920)). The United States Supreme Court then relied on this language in *Wong Sun*, stating, "[T]his [is not] a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Wong Sun*, 371 U.S. at 487 (quoting *Nardone*, 308 U.S. at 341). The Court went on to say,

> 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. Rather, the more apt question in such a case is "whether, granting 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."

Id. at 487-88 (quoting John MacArthur Maquire, Evidence of Guilt 221 (1959)). Thus, the attenuation doctrine defines the parameters of the "fruit of the poisonous tree" doctrine. Evidence is not "fruit of the poisonous tree" if the connection between the challenged evidence and the illegal actions of the police is "so attenuated as to dissipate the taint."

This court's decision in *Vangen*, which the State cited in its brief, illustrates the

appropriateness of applying the attenuation doctrine under article I, section 7. There, police officers arrested a person who was suspected of defrauding an innkeeper of $200 through the use of credit cards bearing a false name. The police officers erroneously believed that what was in fact only a misdemeanor constituted a felony. Because they had no warrant for the person's arrest, and the misdemeanor had not been committed in their presence, the arrest was unlawful. "This circumstance," we said, had "'ballooned' into a 'false arrest' and a 'poisoned tree,'" which the defendant contended rendered his subsequent confession at the police station inadmissible as "fruit of the poisonous tree." *Vangen*, 72 Wn.2d at 552. We disagreed, holding that his confession was properly admitted.

> [I]t is clear that the confession was not the result of that arrest or of information procured solely therefrom. The appellant—arrested late on October 21, and taken to his cell at 12:05 a.m. on October 22—at all times stoutly maintained that he was Elmer J. Johnson and that the credit cards in his possession were his. He insisted that he was Elmer J. Johnson through a second interrogation on the morning of October 22. Not until after the police had contacted the real Elmer J. Johnson in Minneapolis by telephone would the appellant admit that he was not Elmer J. Johnson, but Dean Allen Vangen. He then gave an entirely voluntary statement to Detective Homer Hall, after being advised of his constitutional rights, including his right to counsel and to remain silent.

Id. at 553. We observed that "an illegal detention does not ipso facto make a confession involuntary" and quoted with approval a portion of the opinion of the Supreme Court of Errors of Connecticut in *State v. Traub*, 151 Conn. 246, 196 A.2d 755 (1963). *Vangen*, 72 Wn.2d at 555.

> As the Connecticut court said,
>
> > Even though a detention is illegal, if the confession is truly voluntary and the causation factor of the illegal detention is

> so weak, or has been so attenuated, as not to have been an operative factor in causing or bringing about the confession, then the connection between any illegality of detention and the confession may be found so lacking in force or intensity that the confession would not be the fruit of the illegal detention. [*Traub*, 151 Conn. at 250.]
>
> We think the foregoing quotation fits the present situation with tailor-like exactness . . . .
>
> The appellant persisted in his claim that he was Elmer J. Johnson until contacts with the real Elmer J. Jonson in Minneapolis removed his claim to that name, which makes it clear that it was this information—and not his arrest, legal or illegal—that induced the confession.

Id. We are still convinced that this is the right approach. When a court determines that evidence is not the "fruit of the poisonous tree," a defendant's privacy rights are respected, the deterrent value of suppressing the evidence is minimal, and the dignity of the judiciary is not offended by its admission. An alternative "but for" principle would make it virtually impossible to rehabilitate an investigation once misconduct has occurred, granting suspected criminals a permanent immunity unless, by chance, other law enforcement officers initiate an independent investigation. The factors the United States Supreme Court identified in *Brown* are designed to aid courts in determining whether an illegal arrest was, as was said in *Vangen*, the "operative factor in causing or bringing the confession about." *Id*. For that reason, we again embrace the *Brown* factors as the proper analytical framework for determining whether a confession is sufficiently an act of free will to purge the taint of an illegal arrest.

B. Is Eserjose's confession admissible under article I, section 7?

Turning to the confession at issue in this case, we note that the circumstances surrounding Eserjose's confession are significantly different from those in *Harris*.

Notably, in *Harris*, the suspect first confessed in his home, at a time when the Fourth Amendment violation was ongoing. *See Harris*, 495 U.S. at 16. Although the confession was determined to be inadmissible, the suspect "had 'let the cat out of the bag by confessing' and was not 'thereafter free of the psychological and practical disadvantages of having confessed.'" *State v. Erho*, 77 Wn.2d 553, 561, 463 P.2d 779 (1970) (quoting *United States v. Bayer*, 331 U.S. 532, 540, 67 S. Ct. 1394, 91 L. Ed. 1654 (1947)). The United States Supreme Court did not consider what effect the suspect's first confession might have had on his willingness to sign a second confession at the police station because, as we have seen, it determined that he was in lawful custody at that point. Eserjose, on the other hand, was not questioned in his home, and so the "voluntariness and admissibility" of his confession at the sheriff's office was not "compromised" by a prior confession. *Id*. Like the defendant in *Vangen*, Eserjose maintained his innocence until he was informed that Paragone had confessed, which suggests that it was this information, not the illegal arrest, that induced the confession.

The constitutional violation in this case, moreover, was much less flagrant than the violation in *Harris*. The record in *Harris* disclosed that the New York City police routinely violated *Payton* as a matter of departmental policy in order to circumvent state law, which provided that an arrest warrant could not be issued until an "accusatory instrument" was filed and prohibited police from questioning a suspect without an attorney once such an instrument had been filed. *See Harris*, 495 U.S. at 25 n.2.

Here, by contrast, the arresting officers entered Eserjose's home with consent, and only exceeded the scope of consent when they entered the upstairs hallway.

The circumstances of Eserjose's arrest are also noticeably different from those in *Mariano*, the case from Hawaii, where the court held that the suspect's confession was "'fruit of the poisonous tree'" because the record of his interrogation revealed "an unsophisticated suspect still crying and emotional and *still viscerally impressed by the circumstances of his illegal arrest*." *Mariano*, 114 Haw. at 282 (emphasis added). Unlike the situation in *Mariano*, here there is no indication that Eserjose was "viscerally impressed by the circumstances of his illegal arrest." Indeed, given that Eserjose's father invited the deputies into the house, the fact that the deputies did not have an arrest warrant might have made no impression at all. Their illegal entry certainly lacked the "quality of purposefulness" and the "obvious" impropriety identified in *Brown. Brown*, 422 U.S. at 605. The application of the *Brown* factors here leads to the conclusion that Eserjose's confession was "'sufficiently an act of free will to purge the primary taint.'" *Id*. at 602 (quoting *Wong Sun*, 371 U.S. at 486).

The dissent asserts, however, that Eserjose's confession must be suppressed in order to remedy the constitutional violation that occurred, i.e., the unlawful arrest. The problem with this argument is that it assumes that the confession is a product of the violation. The dissent takes this for granted with its erroneous view that the "legality of the arrest determines the legality of custody" and says that "a confession obtained *during an illegal seizure* should be excluded." Dissent at 4 (emphasis added). The flaw

in the dissent's position is that Eserjose did not confess during the course of an illegal seizure. Rather, he confessed during the lawful custodial interrogation that occurred after the illegal seizure had ended. As we have observed, the Fourth Amendment allows police to detain a suspect outside his home on the basis of probable cause alone. *Watson*, 423 U.S. at 424. Thus, while the warrantless arrest was illegal, once Eserjose was outside his home, the ensuing custody was lawful because the arresting officers had probable cause to believe that he had committed a felony. *See Harris*, 495 U.S. at 17-18. As the United States Supreme Court said in *Harris*, there "could be no valid claim here . . . that the warrantless arrest required the police to release [the suspect] or that [the suspect] could not be immediately rearrested if momentarily released." *Id*. at 18.[11] Since the officers had probable cause before the arrest, that probable cause, not being based on anything they observed during the arrest, was untainted by the warrantless arrest.

The dissent suggests that the "status of custody is . . . different" under article I, section 7 because of its "authority of law" requirement. Dissent at 4, 3. Like the United States Supreme Court, however, this court has held that police may detain a suspect in a public place on the basis of probable cause alone. *State v. Solberg*, 122 Wn.2d 688, 696, 861 P.2d 460 (1993) ("An arrest warrant is not required in such circumstances

[11]Notably, even the dissenting opinion in *Harris* acknowledges that the "violation ends" once the suspect is outside his house, at which point the suspect is "lawfully detained." *Harris*, 495 U.S. at 28, 27 (Marshall, J., dissenting). This "proposition," said Justice Marshall, is "self-evident" and "unexceptionable." *Id*. at 27.

under either the federal or state constitutions."). Thus, if police officers have probable cause to believe that a person has committed a felony, they have the "authority of law" required by article I, section 7 to keep that person in custody.[12]

C. Is the attenuation doctrine compatible with article I, section 7?

The dissent contends that the attenuation doctrine is incompatible with article I, section 7 for a number of reasons. It says that the attenuation doctrine fails to "infuse the fruits of an illegal seizure with the authority of law." Dissent at 9. This argument overlooks the fact that, as we have just noted, Eserjose's confession was obtained with the requisite "authority of law," the deputies having the legal authority based on probable cause developed independently of the illegal arrest to keep Eserjose in custody and to question him about the burglary. Under *Harris*, our analysis would end there; but to satisfy article I, section 7, it is necessary to determine whether the confession, though the direct product of lawful custodial interrogation, was the indirect product of the prior arrest, which lacked the "authority of law." As we said in *Gaines*, the exclusionary rule applies equally to "evidence seized *during* an illegal search [or seizure]," and "evidence *derived from* an illegal search [or seizure] under the fruit of the poisonous tree doctrine." *Gaines*, 154 Wn.2d at 716, 717 (emphasis added). The

[12]The dissent assures us that it is not saying "that officers must release a suspect whom they otherwise may keep in custody *pursuant to probable cause*." Dissent at 4 (emphasis added). But if, as the dissent admits, probable cause gives officers the authority to keep the suspect in custody, the custody must be legal. If the custody was illegal, the suspect would have the right to be released. *See*, *e.g.*, *Brown*, 422 U.S. at 601 n.6 (a person has a Fourth Amendment right "to be released from unlawful custody" following an arrest without a warrant or probable cause).

dissent maintains that Eserjose's confession was the "fruit[] of an illegal seizure," dissent at 9; but a suspect's confession is not the "fruit" of an illegal arrest simply because the suspect would not have been in custody "but for" that arrest. The "fruit of the poisonous tree" doctrine does not operate on a "but for" basis. *Wong Sun*, 371 U.S. at 488. As we explained in *Vangen*, the illegal seizure must "'have been an operative factor in causing or bringing about the confession.'" *Vangen*, 72 Wn.2d at 555 (quoting *Traub*, 151 Conn. at 250).[13] The record shows that it was not in this case.

The dissent also says that we are duty bound to reject the attenuation doctrine in order to preserve the "heightened protections of article I, section 7." Dissent at 5.[14] It compares the attenuation doctrine to the inevitable discovery doctrine and the "good faith" exception to the exclusionary rule, which we have rejected under article I, section 7. *See Winterstein*, 167 Wn.2d at 631; *Afana*, 169 Wn.2d at 184. Those doctrines,

---

[13]The dissent supposes, relying on *Ladson*, that "'[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree.'" Dissent at 9 (quoting *Ladson*, 138 Wn.2d at 359). As we noted earlier, *Ladson* misstated the "fruit of the poisonous tree" doctrine. In *Kennedy*, which *Ladson* cited, we said, "If the initial stop was unlawful, the subsequent search and *fruits of that search* are inadmissible as fruits of the poisonous tree." *Kennedy*, 107 Wn.2d at 4 (emphasis added). *Kennedy* is perfectly consistent with the conventional view that, "[a]s a matter of good sense," the connection between police misconduct and the discovery of the challenged evidence "may have become so attenuated as to dissipate the taint." *Nardone*, 308 U.S. at 341. There is no justification for applying the "fruit of the poisonous tree" doctrine differently under article I, section 7 than under the Fourth Amendment.

[14]The dissent declares, "With every encroachment upon Fourth Amendment protections by the United States Supreme Court, this court has reacted by rejecting such changes." Dissent at 5. The United States Supreme Court decided *Wong Sun* during the high water mark of Fourth Amendment protections under the Warren Court. The attenuation doctrine is certainly not a fresh assault on the Fourth Amendment.

however, are fundamentally different from the attenuation doctrine. The inevitable discovery doctrine allows the admission of evidence that was seized illegally if it would have been seized legally eventually. *See Nix v. Williams*, 467 U.S. 431, 443-44, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). The "good faith" exception to the exclusionary rule permits evidence that was seized illegally to be admitted if the seizure was objectively reasonable at the time. *See United States v. Leon*, 468 U.S. 897, 926, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In both contexts, the evidence is obtained "without authority of law," in violation of article I, section 7 and, consequently, we have not approved of the doctrines under our state constitution. In contrast, the attenuation doctrine admits evidence that is obtained *with* the "authority of law," provided that the evidence was not "'come at by the exploitation'" of a prior illegal act. *Wong Sun*, 371 U.S. at 488 (quoting Maquire, *supra*, at 221). Two of the attenuation factors are the passage of time and the presence of intervening circumstances. If evidence is obtained "without authority of law," i.e., while the violation is ongoing, no time will have passed and no circumstances will have intervened, in which case the evidence will not be attenuated. Thus, the attenuation doctrine applies only to evidence obtained legally. Unlike the inevitable discovery doctrine and "good faith" exception, the attenuation doctrine complies with article I, section 7's "authority of law" requirement.

The dissent claims, finally, that the attenuation doctrine, like the "inevitable discovery" exception, is too "speculative" to pass constitutional muster. Dissent at 8. But unlike "inevitable discovery," the attenuation doctrine focuses on events as they

actually happened in order to determine whether police misconduct produced the evidence in question. There is nothing troublesome about this sort of causal analysis. The "independent source" exception, which this court has repeatedly upheld under article I, section 7, is, if anything, more speculative. Under that exception, evidence obtained pursuant to a warrant is admissible, even though the warrant recites information tainted by an unconstitutional search, provided the warrant contains enough untainted information to establish probable cause. *See Gaines*, 154 Wn.2d at 719. Before a court can pronounce the warrant lawful, however, it must find that police would have sought the warrant anyway, even without knowing the information revealed by the unconstitutional search. *Id*. at 721 (citing *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)).

The dissent accuses us of abandoning the rule that "'whenever the right of privacy is violated, the remedy [of exclusion] follows automatically.'" Dissent at 3 (quoting *Afana*, 169 Wn.2d at 180). The rule assumes, however, that the violation produced the evidence the defendant seeks to exclude. If, after applying the attenuation factors, it appears that the evidence is not the product of the violation, it should not be suppressed. Properly understood, the attenuation doctrine is perfectly consistent with our rule.[15] While we share the dissent's concern for the warrant

[15]Rather than applying the attenuation factors in order to determine whether Eserjose's confession was the "fruit" of the unlawful arrest, the dissent begins with the premise that the confession is the "fruit[] of an illegal seizure" and *then* applies the attenuation factors, asking how they can "infuse" such "fruit" with the authority of law. Dissent at 9. The dissent's approach begs the question the attenuation doctrine is intended to answer.

requirement, our decision in no way "removes the incentive for police officers to secure a warrant before invading a citizen's home." Dissent at 1. The attenuation doctrine considers the "purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 604. If the record shows that police disregarded the warrant requirement for the purpose of securing a confession, the confession will be suppressed. Similarly, if the record shows that an illegal arrest induced the confession, the confession will be excluded. The dissent would replace the categorical rule adopted in *Harris* with an equally categorical rule and exclude a suspect's confession solely on the basis that the suspect would not have been in custody but for an illegal arrest. Such a rule would be unprecedented. Even the states that have rejected *Harris* have done so in favor of attenuation. *See*, *e.g.*, *Mariano*, 114 Haw. at 281-82. No jurisdiction has applied the exclusionary rule on a "but for" basis. Such an approach is not only inappropriate; it far exceeds anything article I, section 7 requires.

Conclusion

In sum, we hold that the *Harris* exception is incompatible with the exclusionary rule under article I, section 7 of the Washington Constitution but that Eserjose's confession was not attributable to the illegal arrest. Thus, the trial court did not err in determining that Eserjose's confession was admissible under article I, section 7 of our state constitution as well as the Fourth Amendment to the United States Constitution. Eserjose's conviction is accordingly affirmed.

AUTHOR:

Justice Gerry L. Alexander

WE CONCUR:

Justice Mary E. Fairhurst, result only

Justice James M. Johnson

Justice Debra L. Stephens