NO. 102134-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MALCOLM OTHA MCGEE,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT

SUPPLEMENTAL BRIEF OF PETITIONER

LEESA MANION (she/her)
King County Prosecuting Attorney

GAVRIEL JACOBS
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. INTRODUCTION

On June 3, 2017, Detective Hawley observed a suspected narcotics transaction between Keith Ayson and a man driving a silver sedan. A subsequent traffic stop revealed the sedan's driver to be Malcolm McGee, who admitted to possessing drugs. As a result of this chance encounter, the association between McGee and Ayson was noted in a police database. McGee agreed to cooperate with law enforcement to avoid arrest, but never followed up with Detective Hawley.

Unbeknownst to police in June 2017, however, McGee had convinced himself that Detective Hawley's stop occurred because Ayson was a police informant. Based on this incorrect assumption – Ayson had no connection to law enforcement – McGee lured Ayson to a secluded location, fatally shot him, and left his body to decompose in a wooded ravine.

Detective Hawley's brief report from June 3, 2017, later played an important, but entirely unexpected, role during the investigation into Ayson's murder. After an inquiry of police

records revealed the recent association between McGee and Ayson, evidence from a series of warrants established beyond a reasonable doubt that McGee was the perpetrator.

McGee was charged with both Ayson's murder as well as a drug offense related to the lapsed agreement with Detective Hawley. A superior court judge later concluded that Detective Hawley lacked reasonable suspicion to detain McGee. As a result, the drugs were suppressed, and the narcotics charge was dismissed. However, the court still admitted limited evidence of the association between McGee and Ayson. Although this information was derived from Detective Hawley's stop, the court found that Ayson's murder constituted an attenuating circumstance.

The chronology underpinning the trial court's ruling was atypical in legally relevant ways. In a classic attenuation scenario, a superseding event breaks the chain of legal causation between unlawful police conduct and the discovery of derivative evidence, or "fruit," used to prosecute the crime

under investigation *ab initio*. In this case, however, the sequence of events, the "fruit" at issue, and the purpose of the police investigation, are all different.

A diagram helps illustrate the relevant distinctions:

Typical Attenuation Case (e.g. Wong Sun, *infra*):

Unlawful Search/Seizure →Discovery of Tainted Evidence→ Superseding Event → Discovery of New Derivative Evidence → Prosecution of Initial Criminality Using Derivative Evidence

Atypical Attenuation Case (McGee):

Unlawful Search/Seizure → Discovery of Tainted Evidence → Superseding Event → Discovery of Newly Relevant "Fruit" From Prior Unlawful Search → Prosecution for New Crime

Here, the superseding event occurred between unlawful police conduct and *old* evidence becoming *newly relevant*. Notably, the evidence that was crucial to solving the murder – that an association existed between the two men – was largely immaterial to the earlier drug investigation. Nevertheless, the Court of Appeals reversed, holding that evidence admitted under the attenuation doctrine must have been discovered *after* the superseding event.

The Court of Appeals' analysis focused inordinately on language from State v. Mayfield that was merely incidental to how attenuation cases typically develop. In fact, the indispensable component of attenuation is the presence of an independent and unforeseeable act of freewill between unlawful police conduct and the prosecution's use of tainted information. It is this superseding event, not the discovery of new evidence, nor the timing of that discovery, that satisfies the privacy protections of article I, section 7.

The Court of Appeals erred because McGee's murder of Ayson constituted an intervening, superseding event that was sufficiently (and uniquely) attenuated from any earlier privacy violation.

B. ISSUE PRESENTED

Does the attenuation doctrine allow the use of evidence which, although derived from a prior unlawful seizure, becomes newly relevant due to the defendant's independent and unforeseeable subsequent conduct?

C. STATEMENT OF THE CASE

The State continues to rely on the facts discussed in the Brief of Respondent.

D. ARGUMENT

1. WASHINGTON HAS A STATE-SPECIFIC ATTENUATION DOCTRINE.

The attenuation doctrine is an exception to the exclusionary rule that allows the State to use tainted information "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" Utah v. Strieff, 579 U.S. 232, 238, 136 S. Ct. 2056, 195 L.Ed.2d 400 (2016).

There was once little separation between state and federal law on this point, and the federal attenuation doctrine, as originally formulated, remains compatible with article I, section

7. Nardone v. U.S., 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307 (1939); State v. Mayfield, 192 Wn.2d 871, 891, 434 P.3d 58 (2019) (citing Wong Sun v. U.S., 371 U.S. 471, 491, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963)). But the Fourth Amendment's relatively permissive focus on deterrence has caused its protections to erode over time, an outcome lamented both in Mayfield and by dissenting justices in the Supreme Court. 192 Wn.2d at 894; Hudson v. Michigan, 547 U.S. 586, 619, 126 S. Ct. 2159, 165 L.Ed.2d 56 (2006) (Breyer, J., dissenting).

Unlike the Fourth Amendment, article I, section 7, is designed primarily to protect individual privacy, with deterrence a secondary goal. State v. Eserjose, 171 Wn.2d 907, 918, 259 P.3d 172 (2011) (lead opinion). In accounting for this broader purpose, Mayfield established the following state-specific attenuation rule:

> We now explicitly adopt a state attenuation doctrine that is satisfied if, and only if, an unforeseeable intervening act genuinely severs the causal connection between official misconduct and the discovery of evidence. If such a superseding cause is present, then the

> evidence is not properly viewed as "fruit of the poisonous tree" but, instead, as "fruit" of the superseding cause. In such a case, the State derives no benefit from its officers' unconstitutional actions. And because a superseding cause must, by definition, be unforeseeable, this narrow attenuation doctrine will not encourage officials to violate article I, section 7 in the hopes of discovering evidence.

Id. at 898.

2. CONDITIONING ATTENUATION ON THE DISCOVERY OF NEW EVIDENCE (OR "FRUIT") DOES NOT FURTHER THE INTERESTS PROTECTED BY ARTICLE I, SECTION 7.

In the Court of Appeals' view, McGee's murder of Ayson could not be "an intervening act amounting to a superseding cause" because it "was not a cause of the discovery of evidence in the June 3 stop." State v. McGee, 26 Wn. App. 2d 849, 860, 530 P.3d 211 (2023). McGee reached this conclusion based on a literal reading of Mayfield's statement that any superseding event must sever "the causal connection 'between' the official misconduct and '**the discovery**' of the

evidence." Id. (quoting 192 Wn.2d at 895-96) (emphasis added).

This inflexible standard failed to consider how the variant facts below impacted the analysis given that Mayfield considered an entirely different sequence of events. Mayfield presumably said that an attenuating act must precede the "discovery of [] evidence" because that is how attenuation fact patterns develop in the vast majority of cases. However, nothing in the theoretical foundation of Washington's attenuation doctrine requires this temporal limitation. Furthermore, the typical analysis fails to account for the fact that the original "fruit" of the illegal stop (narcotics) differs from the "fruit" used to prosecute McGee for murdering Ayson (their social connection).

Perhaps most notably, the "discovery of evidence" is not integral to attenuation in tort, from where the criminal doctrine originated. Mayfield, 192 Wn.2d at 892. Rather, civil law considers whether an intervening act broke "the causal

connection between the defendant's negligence and the plaintiff's injury." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 482, 951 P.2d 749 (1998). An injury in tort is a violation of another's legal right or the infliction of an actionable wrong. Black's Law Dictionary, 785 (6th ed. 1990). Detective Hawley's unlawful detention is analogous to a tortious act. The injury in this case could probably be defined several ways but includes the arrest and charging of McGee for Ayson's murder. Accordingly, it would be legally proper to ask whether a superseding event broke the chain of legal causation between these two events.

Mayfield also stated that "[t]here must be some proximate causal connection between official misconduct and the discovery of evidence for the exclusionary rule to apply." 192 Wn.2d at 889-91, 897. Typically a civil law concept, Mayfield imported proximate causation into the criminal attenuation doctrine wholesale. Id. at 899. But while Mayfield's analysis of proximate cause was correct given the facts before

it, doctrinal inflexibility should not prevail when confronted with unique and materially different situations.

Doctrinal flexibility is especially important when a legal concept is being applied within a new context. As this case illustrates, the differences between civil and criminal practice mean that proximate cause will not always operate in the same manner. In tort law, attenuation is used to determine whether breaching a duty of care was the proximate cause of the plaintiff's injury, a principle largely absent from criminal law. Meyers v. Ferndale School District, 197 Wn.2d 281, 287, 481 P.3d 1084 (2021). Tort law did not evolve alongside the exclusionary rule. And, unlike the suppression of evidence in a criminal proceeding, foreseeability is a question of fact determined by the jury in civil cases. M.H. v. Corporation of Catholic Archbishop of Seattle, 162 Wn. App. 183, 193, 252 P.3d 914 (2011).

Proximate cause represents, fundamentally, a policy choice as to how far the consequences of a tortfeasor's actions

should extend. Schooley, 134 Wn.2d at 479. Courts recognize several factors to consider in making this judgment, including "logic, common sense, justice, policy, and precedent." Id. Weighing these factors, the court must determine whether "the act of the defendant" – here, Detective Hawley's unlawful detention of McGee – "is too remote or insubstantial to impose liability" – meaning, in this case, suppression and reversal of McGee's murder conviction. Id. at 479-80.

Deterring police misconduct is the *raison d'etre* of the federal exclusionary rule. State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982). While the primary goal of article I, section 7, is instead the protection of individual privacy, deterrence remains a secondary objective. Id. Thus, it is worth noting that suppression in this case would serve no deterrent purpose whatsoever. There is no deterrent value in suppressing evidence related to an unforeseeable crime that had not even occurred at the time of the unlawful stop. Taylor v. State, 92 Nev. 158, 162, 547 P.2d 674 (1976).

California courts have previously grappled with similar scenarios. In People v. McInnis, 6 Cal.3d 821, 494 P.2d 690 (1972), detectives identified the defendant as the perpetrator of a liquor store robbery by showing witnesses a booking photograph from an unrelated arrest. However, the seizure that produced the photograph was later deemed unlawful. Id. at 824. The trial court for the robbery charge excluded physical evidence obtained from the tainted arrest, but nonetheless permitted the photograph-based identification into evidence. Id.

On appeal, the McInnis Court explained why applying the exclusionary rule under these circumstances would be unsound:

> To hold that all such pictures resulting from illegal arrests are inadmissible forever because they are "fruits of the poisonous tree" would not merely permit the criminal "to go free because the constable has blundered" but would…in effect be giving a crime insurance policy in perpetuity to all persons once illegally arrested: if the photograph of a person obtained because of such an arrest becomes instrumental in the identification of that person for a crime committed many years later, it could be urged that *but for* the old illegal arrest the criminal would not have been identified. Rationally, however, a

> "but for" relationship alone is insufficient to render the photograph inadmissible since it cannot be said that many years later the illegality of the earlier arrest was being "exploited."
>
> …
>
> In the case at bar, while the time span between the illegal arrest and the robbery was not one of years but only a month, nevertheless the principle remains the same…

Id. at 826 (internal citations omitted).

In People v. Marquez, 31 Cal. App.5th 402, 242 Cal.Rptr.3d 530 (2019), the defendant was arrested for drug possession in 2006. Id. at 405. Because of this arrest, Marquez's DNA was collected without a warrant or consent and entered into a police database. Id. The State never filed any charges related to this arrest, however, and the underlying detention was later found to be unlawful. Id. at 409.

The DNA collected from the illegal 2006 drug arrest subsequently connected Marquez to a robbery he committed years later in 2008. Id. at 406. Based on this information, detectives confronted Marquez who then consented to provide another DNA sample. Id. The trial court in the robbery case

refused to exclude the DNA evidence and Marquez was duly convicted. Id. at 407-08.

The California Court of Appeals agreed that the 2006 drug arrest was illegal, but found the connection it established to the robbery admissible under the attenuation doctrine. Id. at 413. Applying the Supreme Court's standard from Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L.Ed.2d 416 (1975), the Marquez Court noted, *inter alia*, that Marquez had pled guilty to a crime between the 2006 and 2008 convictions and been placed on probation, the terms of which required him to submit a DNA sample. Id. at 407. Although this order was never actually fulfilled, the court found it attenuating since it would have required the entry of a DNA sample in any event. Id. at 407.

State v. Booker, 212 Ariz. 502, 135 P.3d 57 (2006), is also helpful. The victim in that case summoned police to Booker's apartment because he believed his son was inside. Responding officers conducted a warrantless search of the

premises and, while they did not locate the victim's son, they did seize Booker's "bong." Id. Blaming the victim for the loss of his bong, Booker later stabbed him in retaliation. Id. The trial court found the warrantless search of Booker's apartment improper but nonetheless admitted the bong as evidence of motive. Id.

The appellate court affirmed, finding suppression unwarranted because there was no "cognitive nexus between the officers' unlawful conduct and the subsequent police investigation or trial." Id. at 506. Thus, while the bong would have been intolerably tainted in the context of a drug prosecution, there was no policy justification for suppression with regard to the subsequent assault.

Finally, a similar situation occurred in U.S. v. Turk, 526 F.2d 654 (5th Cir. 1976). There, the police stopped a vehicle suspected of trafficking narcotics and later listened to cassette tapes found inside. Id. at 656-57. The tapes allowed the police to identify Turk, but the warrantless search which produced this

evidence was found to be illegal. Id. Turk was nonetheless later summoned to give immunized testimony before a grand jury, during which he committed perjury. Id. at 666. Turk argued on appeal that his resulting perjury charge was invalid because it ultimately derived from the warrantless search of the tapes. Id.

The Fifth Circuit disagreed, reasoning that:

> For suppression of the tape at the perjury trial to have any significant deterrent effect, we would have to assume that the police could be so confident that an immunized search victim would prevaricate before a grand jury that they would be willing to seize evidence of a crime illegally, and thus to forego the possibility of direct prosecution. We refuse to make such an assumption…
> …
> The usual factor that the evidence is probative and reliable is present, but another factor is also apparent. This is perhaps best stated in the negative – a holding that the tape should be suppressed in these circumstances would in effect give the victim of an illegal search a license to commit any new crimes he cared to, free from the concern that the illegally seized evidence might be used against him in prosecutions for these subsequent crimes.

Id. at 667; see also U.S. v. Raftery, 534 F.2d 854, 857 (9th Cir. 1976) ("The purpose of the [exclusionary] rule would not be

served by forbidding the Government from using the evidence to prove the entirely separate offense of perjury…occurring after the illegal search…").

The State acknowledges that the result in these cases was based primarily on a deterrence rationale, which complicates their application here given Washington's focus on individual privacy. Mayfield, 192 Wn.2d at 882. But a foreign analysis based on deterrence is not *per se* incompatible with article I, section 7; it simply must be re-evaluated with greater protections in mind. These cases helpfully illustrate why the attenuation doctrine exists – to ensure that the exclusionary rule does not exceed the boundaries of sound policy and common sense.

In Eserjose, *supra*, a 4-justice plurality suggested the attenuation doctrine would not apply to situations like this one:

> 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.

171 Wn.2d at 927-28 (lead opinion).

"A plurality has little precedential value and is not binding." State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591 (2012). Eserjose has also long been supplanted by Mayfield as the leading Washington case on attenuation. Furthermore, the analytical importance of "temporal proximity" discussed in Eserjose was taken from Brown, which Mayfield declined to adopt. 422 U.S. at 602; 192 Wn.2d at 894. Nonetheless, it is prudent to note this language and consider its impact.

Any attenuation scenario can be distilled to a few base components. There will always, of course, be some manner of unlawful state action. This misconduct must be followed by a superseding event. Finally, the superseding event must break the causal chain between the initial illegality and X, with the value of X essentially holding the resolution of this case. According to the Court of Appeals, the value of X is the

discovery of *new* evidence. McGee, 26 Wn. App. 2d at 860. This interpretation, however, is problematic in several respects.

Restricting attenuation to novel evidence may render previously obtained information "sacred and inaccessible" for all time and for all purposes, a result that has long been contrary to both state and federal law. Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 392, 40 S. Ct. 182, 64 L.Ed. 319 (1920); State v. O'Bremski, 70 Wn.2d 425, 429, 423 P.2d 530 (1967). More to the point, this is precisely what the attenuation doctrine aims to prevent. Mayfield, 192 Wn.2d at 891. The present case is illustrative – the Court of Appeals' ruling would effectively immunize McGee from prosecution in perpetuity even though Detective Hawley's error occurred before the murder was even committed.

This Court should instead follow those jurisdictions that have recognized the passage of time as merely a potential indicator of attenuation, not a doctrinal prerequisite. See U.S. v. Goodrich, 183 F. Supp.2d 135, 145 (D. Mass. 2001)

(attenuation applies "where the causal connection has been weakened by the passage of time or by the intervention of other factors); In re Leroy M., 16 N.Y.3d 243, 247, 944 N.E.2d 1123 (2011) ("The mere fact that, in other situations, the passage of time has supported a finding of attenuation does not mean that the absence of that factor precludes attenuation").

This naturally segues into the dispositive question – determining which aspect of the procedure used in Mayfield protects the state constitutional privacy interest at stake, and thus must be duplicated in every successful instance of attenuation. One thing is certain – a requirement that new evidence be discovered would do nothing to protect individual privacy. Rather, the discovery of evidence is simply one potential trigger for the attenuation analysis, from which a reviewing court works backwards to determine if admission is warranted.

Instead, this Court should hold that the privacy protections of article I, section 7, are guaranteed in this context

by the requirement that any superseding cause derive from an "unforeseeable act[] of independent free will." Mayfield, 192 Wn.2d at 892. This strikes an appropriate balance between Mayfield's tensile statements that the exclusionary rule is nearly "categorical," but also that it does not act on a principle of but-for causation. Id. at 888-89.

In practice, this will constitute a very narrow exception to the exclusionary rule because "unforeseeability" is a heavy burden. An act is "unforeseeable" only if it is "incapable of being…anticipated." Webster's Third New International Dictionary, 2496 (1993). In the investigatory context, this definition will apply only to consequences that could not reasonably be expected to result from an officer's illegal conduct. Intervening acts of a third-party, even those as egregious as murder, will often fail to meet this standard. See N.L. v. Bethel School Dist., 186 Wn.2d 422, 438, 378 P.3d 162 (2016) ("[s]exual assault by a registered sex offender is foreseeable"); see also Michaels v. CH2M Hill, Inc., 171

Wn.2d 587, 613, 257 P.3d 532 (2011) (third party conduct is not a superseding cause if "the actor at the time of his negligent conduct should have realized that a third person might so act").

In addition to being unforeseeable, an intervening event must also be an act of independent free will. Rogers v. U.S., 330 F.2d 535, 541 (5th Cir. 1964); U.S. v. Scios, 590 F.2d 956, 960 (D.C. Cir. 1978). This means that, in a very real sense, the attenuation doctrine will often be subject to the defendant's discretion. In this case, for example, the evidence from Detective Hawley's traffic stop was unsalvageable until McGee made the decision, free from any police influence, to murder Ayson.

These factors essentially guarantee that State actors cannot use the attenuation doctrine to rehabilitate their own tainted evidence. If a police officer knows of an investigation, any action they take to further it will be foreseeable, and thus incapable of being attenuated. An exception to the exclusionary rule relying on unforeseeable events is thus more restrictive

than rejected doctrines like inevitable discovery, and even previously accepted ones like independent source.

This interpretation is consistent with the general principle that legal causation is "a much more fluid concept" than causation-in-fact. Tyner v. State Dept. of Social and Health Services, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); see Boone v. State Dept. of Social and Health Services, 200 Wn. App. 723, 738, 403 P.3d 873 (2017) (noting fluidity of legal causation and finding defendant's actions "too attenuated"). An inflexible bright-line rule requiring the discovery of new evidence before applying attenuation is difficult to reconcile with an approach that incorporates considerations of policy, justice, and common sense. Kim v. Budget Rent A Car Systems, Inc., 143 Wn.2d 190, 204, 15 P.3d 1283 (2001).

Furthermore, most courts nationwide, including those in Washington, have accepted in principle that evidence can be rehabilitated through the defendant's subsequent misconduct. See State v. Rousseau, 40 Wn.2d 92, 93-96, 241 P.2d 447

(1952) (overruled on other grounds by State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997) (evidence recovered during search incident to arrest for assault on police officer was admissible even though the assault was prompted by earlier illegal discovery of the same evidence); see State v. Suppah, 358 Or. 565, 576, 369 P.3d 1108 (2016) ("…state and federal courts consistently have held that a defendant's decision to commit a new crime in response to an unlawful seizure ordinarily will attenuate the taint of the seizure").

This Court should clarify that the attenuation doctrine applies if a superseding event disrupts the causal connection "between unconstitutional police conduct and the evidence." Strieff, 579 U.S. at 238. The terminus of the causal chain can be the discovery of new evidence, but it can also be the re-discovery of newly relevant facts, which will often be a different "fruit" than was targeted by the initial tainted investigation. The latter theory of admission is equally compatible with the greater privacy protections of article I,

section 7, because it still requires a break in the chain of legal causation.

If the court's broader goal is to prevent the dilution of Washington's unique privacy protections, it makes little sense to require the presentation of evidence for which the underlying constitutional violation was the cause-in-fact. Regardless of whether novel evidence is found, the privacy violation with which the constitution is concerned will have already occurred. Thus, this Court should hold that attenuation requires a superseding event, which must be an independent act of free will, that either leads to the discovery of new evidence *or* materially changes the character of previously known information.

3. AYSON'S MURDER CONSTITUTED A SUPERSEDING EVENT BETWEEN DETECTIVE HAWLEY'S IDENTIFICATION OF MCGEE AND ITS RELEVANCE TO THE PROSECUTION.

a. Facts from June 3, 2017, Admitted at Trial.[1]

Detective Belford testified that after identifying the decedent as Ayson, he began to "learn as much as we [could] about …who [Ayson's] contacts were…" RP 1942. Detective Belford researched "King County Sheriff's Office records" during this process, which led him to Detective Hawley. RP 1942-43.

Detective Hawley gave a limited accounting of the traffic stop on June 3, 2017. RP 2308. He recalled seeing Ayson pacing nervously before getting into the front passenger seat of a silver Chrysler Sebring. RP 2309. Detective Hawley continued to observe the Sebring as it drove a short distance

[1] The transcript pagination reset following the 2019 mistrial. Unless otherwise noted, all citations refer to the 2021 re-trial.

and pulled over. RP 2308, 2314. Ayson had a brief conversation with the as-yet unidentified driver before exiting the car, "put[ting] something small into his pants pocket," and walking away. RP 2316.

Detective Hawley then followed the Sebring to a nearby apartment complex where he "made contact" with the driver, who identified himself as McGee. RP 2317-19. After a "conversation," McGee agreed to become a confidential informant (CI) vis-à-vis Ayson. RP 2319-20. Detective Hawley and McGee then exchanged phone numbers, after which the two men parted ways. RP 2321-22. Despite their agreement, Detective Hawley never heard from McGee again. RP 2322.

On cross-examination, defense counsel clarified that Detective Hawley had been conducting a narcotics investigation and moved to admit the contract signed by McGee, which counsel used to impeach several aspects of Hawley's testimony. RP 2336-38.

The connection between McGee and Ayson established by Detective Hawley became a foundational element in several subsequent search warrants that ultimately established McGee as the perpetrator of Ayson's murder.

b. The Trial Court Properly Admitted These Facts and Evidence from the Derivative Warrants under the Attenuation Doctrine.

For purposes of this appeal, the State does not dispute that Detective Hawley's June 3, 2017, detention was improper, nor that it was a cause-in-fact of McGee's murder conviction. This rendered any derivative evidence from the seizure presumptively inadmissible. And, given Washington's interest in protecting individual privacy, this status quo would have persisted through any future events that bore a foreseeable relationship with Detective Hawley's conduct. Mayfield, 192 Wn.2d at 899.

The attenuation doctrine applies here, however, because McGee's murder of Ayson constituted a superseding event that recharacterized the tainted evidence in an unforeseeable way.

McGee believed that Detective Hawley's stop occurred because Ayson was working as an informant. This information did not come from Detective Hawley; McGee told an associate that Ayson had "snitched on him." RP 2236. McGee faced a lengthy prison sentence if convicted of a drug offense. CP 540. Police informants are sometimes targeted for retaliation by other criminals, and such reprisals might be a foreseeable result in some cases. See Bethel School Dist., *supra*.

However, McGee's conduct was unforeseeable because Ayson was not, nor had he ever been, a police informant. Detective Hawley never made any statements that might have suggested otherwise, and initially believed Ayson to be the seller and McGee the buyer. RP 503 (2019). In fact, McGee offered to inform on Ayson, an arrangement that Detective Hawley had accepted in writing. RP 500-02 (2019). The murder

was also an independent act of free will. McGee was at liberty when he committed the murder, and thus could not have been subjected to police coercion as in the case of a detainee who consents to a search. Mayfield, 192 Wn.2d at 899.

In short, McGee's actions were based on a paranoid response peculiar to his personality and circumstances, none of which was known or knowable to any state agent. His decision to murder Ayson was not a rational response to Detective Hawley's conduct, and thus was not predictable in any sense. McGee's conduct completely changed the character of the tainted evidence. No longer indicative merely of narcotics use, it now implicated McGee in a murder that had not even occurred at the time the information was gathered.

On June 3, 2017, Detective Hawley considered the "fruit" of his search to be the drugs found on McGee's person; the CI contract was to "work off" a possession charge. RP 502 (2019). For purposes of the murder trial, however, the relevant "fruit" was entirely different – McGee's identity, and thus his

association with Ayson. But-for the murder, McGee's connection to Ayson was largely immaterial. That this evidence was initially unimportant supports the conclusion that McGee's subsequent actions were unforeseeable.

McGee's independent act of free will thus broke the chain of legal causation between the illegally gathered evidence and its relevance to the prosecution at the murder trial. Suppression is not required under the Fourth Amendment because it offers no deterrence value, and is likewise unwarranted under article I, section 7, because McGee's privacy was sufficiently protected by the dismissal of the drug charge and exclusion of narcotics evidence during the murder trial. RP 554, 1186, 1191 (2019).

Applying the exclusionary rule to the murder charge allows McGee to wield article I, section 7, as a sword, leveraging past police misconduct to immunize his subsequent criminal act. While this works an obvious injustice to Ayson's family, it also commits this Court to poor policy by rendering

past facts "sacred and inaccessible" regardless of future developments. Mayfield, 192 Wn.2d at 891. This Court should instead hold that attenuation can apply regardless of whether new evidence was discovered, so long as a superseding event exists.

E. CONCLUSION

The State respectfully requests this Court reinstate McGee's conviction for second-degree murder.

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Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney

By: _____
GAVRIEL JACOBS, WSBA #46394
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

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