No. 44168-3-II
Mason County Superior Court No. 12-1-00123-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

TRAVIS C. BAZE,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finley, Judge

APPELLANT'S OPENING BRIEF

David B. Zuckerman
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

I.
ASSIGNMENTS OF ERROR

A. ERRORS REGARDING CRR 3.5 HEARING FINDINGS AND CONCLUSIONS

Finding of Fact 10: The trial court found that Mr. Baze "understood his rights as advised." It appears that the court is referring here to the initial reading of rights. To the extent this finding might suggest that Baze understood his rights *after* the ensuing colloquy with the detectives, Baze assigns error. Further, such a finding should be treated as a legal conclusion.

Finding of Fact 12: The trial court found that, after Mr. Baze made an equivocal request for an attorney, the detectives limited their discussion to "clarifying" the defendant's wishes. This is actually a legal conclusion based on the undisputed facts, which are the words said during the recorded interrogation. In the alternative, if this could be characterized as a factual finding then the trial court erred in **Finding of Fact 1,** which states that there are no disputed facts, since the defense did dispute that the detectives limited their questioning to clarification.

Conclusions of Law 4-10: These paragraphs essentially explain why the court believes Mr. Baze's recorded statement to be admissible. Baze assigns error to all these conclusions.

B. ERROR REGARDING JUDGMENT AND SENTENCE

The trial court should have granted Baze's request to vacate his convictions for assault and robbery because they are barred by the Double Jeopardy Clause.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Before speaking to the detectives about the crime, Mr. Baze asked "do I need an attorney?" In response, the detectives told him he could not have an attorney that night, and that an attorney would in any event tell him not to talk. The detectives also strongly implied that if he did not present his side of the story that night, they would assume the worst when filing charges. They also told him that his "honesty" was important for bail determinations and that he would feel better if he talked. Under those circumstances was Baze's relinquishment of his right to counsel made knowingly, intelligently, and voluntarily?

2. Did the detectives' misleading statements violate CrR 3.1(c)?

3. Should the Court find that under Article I, section 9 of the Washington Constitution, the detectives were required to limit their questioning to clarifying Baze's wishes after he made an equivocal request for an attorney? The Washington Supreme Court has recently decided *sua sponte* to decide this issue in *State v. Pianitsky*, No. 87904-4.

4. Did the detectives limit their questioning to clarification?

5. Mr. Baze was convicted of assault, robbery, and felony murder based on robbery. Does the Double Jeopardy clause require the assault and robbery charges to be vacated?

III.
STATEMENT OF THE CASE

This case involves an assault on Shawn Morrow by Stephen Churchill, which took place on March 26, 2012 in Shelton, Washington. At the time of the incident, Travis Baze was a 28-year-old man, working full time at his father's restaurant in Shelton. RP 478-79. He and his girlfriend, Ashley McCord, had recently moved into a cabin on the grounds of the home Churchill shared with his girlfriend, Jennifer Hansen. Tr. Ex. 70 at 12[1]; RP 335.

Hansen and Churchill were drug dealers. RP 326-27. On February 8, 2012, they were arrested based on information provided by Shawn Morrow, who was working as a confidential informant for the police. RP 171, 176-78, 329. Morrow had a long history of drug abuse and burglary. RP 131 (testimony of Morrow's mother); RP 341 (testimony of detective

---

[1] "Tr. Ex." stands for Trial Exhibit, and "PTr. Ex." stands for pretrial exhibit. Tr. Ex. 70 is the transcript of the redacted recording of Baze's statement to the detectives, which was presented to the jury when it heard the recording. The CD of the redacted recording is Tr. Ex. 69.

Ledford). After Hansen and Churchill likewise agreed to be informants, they were released. RP 329-31. When they returned home, they learned that Morrow had broken into the house and stolen their property. RP 332. They contacted the detective working with Morrow but he declined to assist in recovering the property. RP 329, 332-33.

Baze was not living with Churchill and Hansen at the time of these events. RP 343. He and Ashley McCord moved there in the first or second week of March, 2012. RP 382; Tr. Ex. 70 at 1.

After some unsuccessful attempts to confront Morrow, (RP 133-34) Churchill and Hansen decided to arrange a drug deal with Morrow, who was a heroin addict. Tr. Ex. 70 at 1. To disguise their identity they used Baze's cell phone, since Baze and Morrow did not know each other. *Id.* at 1-2; RP 385-86. *See also* RP 434-58. Detective Rhoades conceded that he could not determine who was using Baze's phone. RP 465. Ultimately, a deal was arranged to take place on August 26, 2012, at a public fishing park. Tr. Ex. 70 at 2-3.

At Churchill's request, Baze drove the two of them to the park. Tr. Ex. 70 at 2-3. Baze did not know what Churchill planned to do (*id.* at 2), but began to get concerned after they arrived because Churchill was becoming "antsy." *Id.* at 4. When Morrow showed up, Churchill jumped out of the car and hit him in the head with a baseball bat. *Id.* at 4-5.

Morrow fell to the ground. *Id.* Churchill picked up the $45 Morrow brought for the heroin. *Id.* at 11. He then ran back into the car and yelled for Baze to drive away, but Baze did not leave until he saw Morrow stand up and seem to be okay. *Id.* at 5. Baze never left the driver's seat of his car. *Id.* at 19; RP 430. Ms. Hansen confirmed that Churchill was the one who assaulted Morrow. RP 468-69.

Baze and Churchill then returned home. Morrow managed to drive a short way before pulling into a gas station. RP 146. He was taken away in an ambulance after a passerby called for help. RP 147; 168. Morrow died from his injury several days later. RP 129.

Baze was charged with assault in the first degree, robbery in the first degree and felony murder in the first degree based on the underlying felony of robbery. He was also charged in the alternative with felony murder in the second degree based on assault. All three counts carried a deadly weapon enhancement. The State's case turned on accomplice liability. There was no dispute that Churchill committed the assault and robbery. *See, e.g.*, RP 568-600 (State's closing argument).

The primary evidence of Baze's complicity came from his recorded statement to the Mason County detectives. At one point in the interview, the detectives asked Baze what he thought Churchill would do when Morrow showed up to buy heroin. In the original transcript of the

recording, which was presented to the court at the suppression hearing, Baze's answer reads as follows:

> Um maybe (inaudible) did I think he was gonna crack him in the skull like that with a baseball bat, no. And I and like I said if that were me I would not I would not have hit somebody in the head with a baseball bat that's. [sic]

PTr. Ex. 1 at 33.[2]

During the trial, however, the prosecutor prepared a revised transcript, which quotes the previously inaudible portion as follows: "Rough him up and take his money." Tr. Ex. 70 at 22. Over defense objection, the Court permitted the revised transcript to be shown to the jury while they listened to the recording. RP 379, 421.[3]

Baze was convicted as charged. At sentencing, the court vacated the second-degree felony murder charge based on double jeopardy (RP 643) but, over defense objection (RP 665), let the assault and robbery convictions stand (RP 672-73). The total sentence was 332 months. RP 670. CP 4-17.

---

[2] The text of PTr. Ex. 1 and Tr. Ex. 70 is in all capital letters. Throughout this brief, for ease of reading, I have altered the text by applying standard conventions for capitalization.

[3] The recording and transcript played to the jury were redacted in some ways at the request of the defense. The primary redaction was the beginning portion in which Baze and the detectives discussed whether he would waive his *Miranda* rights. RP 335-59.

IV.
ARGUMENT

A. BAZE'S STATEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE THE POLICE VIOLATED HIS RIGHT TO COUNSEL

1. Relevant Facts

According to testimony at a CrR 3.5 suppression hearing, Detective Rhoades investigated the assault against Shawn Morrow, which took place on March 26th, 2012. RP 16-17. He suspected Stephen Churchill was the perpetrator because he and his girlfriend, Jennifer Hansen, previously alleged that Morrow burglarized their house. RP 16-17.

Based on information from Hansen, Detective Rhoades arrested Baze as well as Churchill on March 27. RP 18-19. After reading Baze his *Miranda*[4] rights, he told Baze he wanted to speak with him later. RP 19. Baze asked Detective Rhoades how Shawn Morrow was doing. *Id.* Baze was then transported to the Mason County jail. RP 19-20.

Later that evening, Detectives Rhoades and Matt Ledford brought Baze from the jail to the Mason County Sheriff's Office for questioning. RP 20, 30. The detectives recorded the interview. RP 20-21.

---

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

Before beginning to question Baze, Detective Rhoades read Baze a *Miranda* warning and asked Baze if he would waive his rights. PTr. Ex. 1 at 2-3. Baze was hesitant.

> **Detective Rhoades**: Travis having been advised of your rights do you wish to answer questions?
>
> **Baze**: Well uh to be honest with you uh like as as of right now um I'm not sure can you tell me like I I've got no problem telling you guys what what went down.
>
> **Detective Rhoades**: Okay.
>
> **Baze**: How it went down.
>
> **Detective Rhoades**: Okay.
>
> **Baze**: And I've got I've got no problem being honest with you but did you am I *do I need an attorney?* [sic] (emphasis added)

Id. at 3. Detective Rhoades answered that it was Baze's decision. *Id.* Rhoades then said that if Baze decided he wanted an attorney, they would "not be able to do a statement tonight." *Id.*

Baze asked what this meant for him. *Id.* Detective Rhoades advised Baze that an attorney would tell him not to talk and that this put Baze in a "dilemma":

> **Detective Rhoades**: . . . I can pretty much guarantee you with great certainty that an attorney's gonna tell you not to make any statements or not to say anything to the police. That's their blanket their blanket statement that's the advice they give everybody.
>
> **Baze:** Um, hm.

> **Detective Rhoades:** But the dilemma that puts that puts you in or that puts us in is we've gotta go forward with this case then with the evidence that we already have and statements of the other people involved. So I mean it's up it's up to you right now if you want to tell your story in your own words. . . .

Id. at 4. Detective Rhoades then immediately advised Baze that while he had the right to talk to an attorney, he would not be able to talk to one that night because the court, rather than the detective, appoints an attorney. He also reiterated his opinion that an attorney would not let Baze talk to them in any event:

> **Detective Rhoades**: . . . [W]e can do that or if you'd like to talk to an attorney by all means you have that right okay. But the issue is the court is gonna appoint you an attorney I don't I don't appoint an attorney I'm not gonna be able to appoint an attorney tonight, there's not gonna be an attorney who's gonna come down here and talk to you and then let you talk to us tonight. That's just that just doesn't happen okay. Like I said an attorney's gonna say you know don't say anything. But at that point you know it's a roll of the dice as as far as you're concerned at that point.

PTr. Ex. 1 at 4.

The detectives continued to encourage Baze to waive his rights and talk. Detective Rhoades opined that from his experience, "people will tend to feel better after they've told their story." *Id.* at 7. Detective Ledford said that Baze was "a normal person . . . not some you know psychopath with no conscience." *Id.* at 8. Baze expressed concern about being in custody and about what was going to happen. *Id.* at 8-9. While

the detectives did not make any explicit promises and informed Baze that he was going to remain in custody regardless of what he said, Detective Ledford suggested to Baze that his "honesty" would serve him well. *Id.* at 9. Ledford said a judge or a prosecutor can see whether someone is honest, and implied that Baze's honesty would lead to more favorable bail conditions. *Id.*

After many long pauses, Baze ultimately signed a waiver and spoke with the detectives about the crime. *Id.* at 11.

Before trial, the court held a CrR 3.5 hearing to decide whether to admit Baze's statements. RP 12-71. Detective Rhoades was the sole testifying witness. RP 15-47. After the testimony, Baze argued that the *Miranda* warnings became defective in light of the detectives' later statements and that his waiver was invalid. RP 57-60.

The court rejected Baze's argument and admitted the statements. The court found that Baze's question about Morrow's condition was a voluntary statement which was not made in response to interrogation. RP 65. (Baze does not contest that ruling.) The court found that the *Miranda* warnings given to Baze, both at arrest and before the recorded interrogation, were adequate. RP 66. The court determined that Baze had not invoked his right to counsel because his statement asking if he needed an attorney was equivocal. RP 66-67. Finally, the court ruled that the

detective's statements to Baze about the availability of an attorney, and the advice that an attorney would give, did not render the *Miranda* warning defective or Baze's waiver involuntary. RP 70.

2. Standard of Review

In confession cases, findings of fact entered following a CrR 3.5 hearing are verities on appeal if unchallenged. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363, 371 (1997). Challenged findings are reviewed for substantial evidence. *Broadaway*, 133 Wn.2d at 131. Washington appellate courts review de novo whether the trial court derived proper conclusions of law from its findings of fact. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025, 291 P.3d 253 (2012).

In this case, the trial court correctly stated that there are no disputed facts relevant to the suppression issue. Finding of Fact 1, Supp. CP[5] ___. The recorded interrogation speaks for itself. The Court then erred, however, by including a disputed legal conclusion in the findings of fact:

> 12. After the defendant's question regarding whether he needs an attorney, the detectives entered into a colloquy

---

[5] Baze is filing a Supplemental Designation of Clerk's Papers with the Mason County Superior Court on the same date he files this brief with the Court of Appeals.

> with the defendant that was limited to clarifying his decision whether to request an attorney in light of his possible equivocation. During this time, the detectives asked no questions about the circumstances of the investigation, nor did the defendant make any statements about the circumstances of the investigation.

Whether the detectives limited the colloquy to clarifying the defendant's wishes is a key issue in this case, particularly under the Article I, section 9 analysis. (*See* heading 6, below.) It is clearly a legal conclusion. A finding of fact is defined as an "assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P.2d 968, 970 (1978) (citation and internal quotation marks omitted). In *Moulden*, whether the plaintiff had provided new cinders to the defendant was properly designated a finding of fact, but whether that act "cured" plaintiff's breach of contract should have been labeled a legal conclusion. *Id.* Similarly, the words spoken by the detectives to Mr. Baze are facts, but whether they merely "clarified" defendant's desire for an attorney, rather than encouraging him to speak without an attorney, is a legal conclusion.

"A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law." *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45, 49 (1986).

In the alternative, if the issue is treated as a finding of fact, it is not supported by substantial evidence. As noted above, the detectives encouraged Baze to talk by telling him it would make him "feel better," that it might help him regarding the charges that would be filed, and that it could improve his chances of release on bail. Such talk went far beyond clarifying Baze's wishes. Further, although a discussion of how counsel could be obtained might in some cases fall within the topic of clarification, it was presented here in such a way as to encourage Baze to talk without a lawyer. *See* section 4, below.

The trial court's Finding of Fact 10 (that Baze understood his *Miranda* rights) appears to refer only to the *Miranda* warnings as initially read to Baze. If it were interpreted as a ruling that Baze understood his rights *after* his colloquy with the detectives, then it too should be treated as a legal conclusion. Once again, the words spoken by Baze and the detectives are not in dispute, but the legal effect of those words is at issue.[6]

3. Legal Standards

Under both the Constitution of the United States and the Washington State Constitution, there is a right against self-incrimination.

---

[6] Alternatively, if the Court treats Finding of Fact 10 as a factual finding that Baze understood his rights even after his colloquy with the detectives, such a finding would not be supported by substantial evidence. *See* sections 4-6, below.

U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."); Wash. Const. art. I, § 9 ("No person shall be compelled in any criminal case to give evidence against himself. . . ."); *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). To secure the privilege against self-incrimination, a person in custody must be advised before questioning begins that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. *Miranda*, 384 U.S. at 479. There is no requirement that the warnings be given in the precise language stated in *Miranda*. *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). The question is whether the warnings reasonably and effectively conveyed to a suspect his rights. *Brown*, 132 Wn.2d at 582. However, a "*Miranda* warning is constitutionally defective if it misleads a suspect into believing his or her right to counsel only arises in the future or is conditioned on some future event." *State v. Teller*, 72 Wn. App. 49, 52, 863 P.2d 590 (1993), *review denied*, 123 Wn.2d 1029, 877 P.2d 695 (1994).

"The right to the presence of an attorney includes the right to consultation with counsel both *before and during* questioning." *Brown*,

132 Wn.2d at 582 (emphasis in original). A person may waive these rights, but the waiver must be made voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at 444.

The "relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). The waiver is made knowingly and intelligently if the suspect had "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Burbine*, 475 U.S. at 421. The validity of a waiver is "a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378, *reh'g denied*, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981) (internal quotation omitted). "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Burbine*, 475 U.S. at 421 (internal quotations omitted). The State has the "heavy burden" of establishing the defendant's waiver. *Miranda*, 384 U.S. at 475.

4. Baze's Waiver Was Invalid Because The Detectives Qualified And Contradicted The *Miranda* Warning, And Misled Him About The Availability And Usefulness Of A Lawyer, While Urging Baze To Give A Statement Before Contacting A Lawyer

The warning initially given by Officer Rhoades to Baze, standing alone, was adequate:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and to have him present with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights, not answer any questions or make any statements.

PTr. Ex. 1 at 2-3. When Baze asked if he needed a lawyer, however, the two detectives qualified and contradicted these rights, made affirmative misrepresentations regarding access to a lawyer, and convinced Baze that consulting with a lawyer would not be in his best interest.

First, Detective Rhoades flatly stated that if Baze sought advice from an attorney they could not take a statement that night, contrary to the prior assurance that Baze could have a lawyer "at this time." Rhoades's statement was misleading because Baze most likely could have spoken with a lawyer that night. It may be true that Mason County has no mechanism for providing free legal advice prior to the first appearance in court. But the detectives could have permitted Baze to use the telephone

at the station to contact a private lawyer. RP 40-41.[7] In even a brief telephone consultation, Baze would likely have learned that any discussion of his conduct could make him liable as an accomplice for Churchill's crime. *See* RP 589 (in closing argument prosecutor suggests that Baze likely did not realize he was admitting to accomplice liability when he gave his statement).

Second, Detective Rhoades did his best to convince Baze that it was in his interest to make a statement that very night, rather than waiting until a lawyer was appointed the next day. Rhoades told Baze that his failure to speak would create a "dilemma" because the detectives would "go forward with the case" based on the information they had obtained from others. This strongly implied that Baze would face a more severe charge if he did not speak. Further, the detectives claimed that it was in Baze's interest to make a statement that night because the judge and prosecutor would take his forthrightness into account when deciding on bail the next morning. In truth, there is no reason that a defendant who gives a statement is any more likely to make bail. In addition, the

---

[7] Many private lawyers provide a free initial consultation. Further, Baze could presumably have paid for some legal advice since he was working full-time at his father's restaurant. RP 479. Between the father and son, some funds were likely available.

detectives told Baze that he would feel better if he promptly came clean because he was a "normal person" rather than a "psychopath."[8]

Third, the detectives coupled these supposed benefits of giving a prompt statement with their assurance that any lawyer would invariably tell his client not to speak, regardless of the circumstances. The implication was that a lawyer would insist that Baze remain silent even if he could help himself by speaking. That characterization of attorneys is false. Lawyers base their advice on their clients' best interests. In some cases, a lawyer will determine that a prompt statement will help his client. *See Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979)[9] (lawyer would "not necessarily" advise client to remain silent; "counsel's advice about what is best for the suspect to do is for counsel, not the interrogator, to give").

To be sure, in *this* case a lawyer would likely have recognized Baze's potential liability for assault, robbery, and perhaps felony murder. He or she would probably have cautioned Baze to remain silent. The lawyer would also likely have explained why the supposed benefits of giving a statement that night were illusory. But the message Baze received

---

[8] Detective Rhoades acknowledged that he was trained in techniques for convincing suspects to talk. RP 33.

[9] Overruled on other grounds by *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

from the detectives was that a lawyer would only hinder his efforts to clear himself.

The detectives' actions contravened the purpose of *Miranda* warnings.

> [T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.

Miranda, 384 U.S. at 469.

Baze's case is similar to *State v. Tetzlaff*, 75 Wn.2d 649, 652, 453 P.2d 638 (1969). In *Tetzlaff,* the indigent defendant was properly informed in writing that he had the right to "talk to an attorney before making any statement and to have him present at the time of making a statement." *Tetzlaff*, 75 Wn.2d at 650. Unfortunately, he was also told by a detective that he could not obtain an appointed attorney until he appeared in court. This suggested that, contrary to the written advice, he would not have a lawyer at the time of questioning. *Id.* at 652. Similarly, in this case, the detectives vitiated the written warning by telling Baze he could not talk to a lawyer before his court hearing (even though he was not clearly indigent) and by denigrating the value of speaking to a lawyer.

Thus, the totality of the circumstances shows that Baze did not make a knowing, voluntary and intelligent waiver of his Fifth Amendment right to counsel during questioning.

The State, in arguing below that Baze's waiver was effective, relied largely on the United States Supreme Court's decision in *Duckworth v. Eagan*, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). In *Duckworth* the defendant was advised in part that "'[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.'" *Id.*, 492 U.S. at 198. The Court found the warnings adequate. *Id.* at 203.

Baze's case is materially distinguishable, however, because the detectives provided misleading statements about the availability and desirability of counsel. The United States Supreme Court "has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver." *Colorado v. Spring*, 479 U.S. 564, 576 n. 8, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987). In *Duckworth*, on the other hand, the police accurately explained the procedures for obtaining counsel under Indiana law and did not try to convince the defendant that a lawyer would harm his interests. Further, as discussed in the next section, Washington provides for the assistance of an attorney much earlier than Indiana does.

5. The Detective's Statements About The Availability Of A Lawyer Were Contrary To CrR 3.1(c) And Misleading, Thereby Making Baze's Waiver Of His Right To Counsel Invalid

CrR 3.1(c) reads as follows:

> Explaining the Availability of a Lawyer.
>
> (1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.
>
> (2) At the earliest opportunity a person in custody who desires a lawyer
>
> shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1 goes beyond the requirements of *Miranda* and is designed to provide a meaningful opportunity to contact a lawyer. *State v. Kirkpatrick*, 89 Wn. App. 407, 413-414, 948 P.2d 882 (1997), *review denied*, 135 Wn.2d 1012, 960 P.2d 938 (1998); *State v. Templeton*, 148 Wn.2d 193, 218, 59 P.3d 632 (2002). The remedy for violation of the court rule right to counsel is suppression of the evidence tainted by the violation. *State v. Copeland*, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996).

Here, Detective Rhoades affirmatively misled Baze by telling him he would have to wait until the next morning to speak with a lawyer. In fact, under CrR 3.1(c) Baze had a right to seek immediate contact with a

lawyer through "any . . . means necessary," including "access to a telephone." In other words, Baze was not truly facing the "dilemma" the detectives described to him. He could have requested a lawyer without losing the option of speaking to the detectives that night. Because the detectives misled Baze about his rights under CrR 3.1, his waiver of those rights was invalid.

The State may rely on *State v. Teller*, 72 Wn. App. at 54, which holds that the police need not specifically inform a suspect of access to a telephone unless she has requested to speak with a lawyer prior to interrogation. In *Teller*, however, the police officer did not mislead the suspect by telling her that she could not speak with a lawyer until the next day. He properly informed her of her right to the presence of a lawyer before and during questioning, and she then waived that right. *Id.* at 51. The *Teller* court did not find it necessary for a suspect to be told all the details of how she might be put in contact with a lawyer before she expressed an interest in such contact.

Mr. Baze, however, did express some interest in talking to a lawyer. Further, the detectives did not merely decline to explain how he could contact a lawyer, but affirmatively misled him regarding the requirements of CrR 3.1.

Thus, even if the Court finds that Baze's Fifth Amendment right to counsel was not violated, it should find a violation of the right to counsel under CrR 3.1.

6. Under Article I, Section 9, If A Suspect Makes An Equivocal Request For Counsel, Further Questions Must Be Limited To Clarifying The Assertion

(a) The Washington Supreme Court Will Soon Decide This Issue

Under the analysis of *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982), there would be little question that Mr. Baze's statement must be suppressed. That case held that when a suspect makes an equivocal or ambiguous request for counsel, any further questioning must be limited to clarifying his wishes. *Id.* at 38-39.

> [W]henever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified.

Id. at 39, quoting *Thompson v. Wainwright*, 601 F.2d at 771. "[A]n interrogating officer may not utilize the guise of clarification as a subterfuge for eliciting a waiver of the previously asserted request for counsel." *Id.*, citing *Nash v. Estelle*, 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed.2d 409 (1979), and *State v. Cody*, 293 N.W.2d 440, 446 (S.D. 1980).

Unfortunately, in *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the U.S. Supreme Court ruled in a five to four decision that the Fifth Amendment did not preclude continued questioning after an equivocal request for counsel. In view of that, the Washington Supreme Court recognized in *State v. Radclilffe*, supra, that *Robtoy*'s analysis of the Fifth Amendment was no longer valid. The Court expressly declined to consider a separate analysis under Article 1, section 9 of the Washington Constitution because it was not raised properly.

Recently, in *State v. Pianitsky*, No. 87904-4, the Washington Supreme Court ordered, on its own motion, that the parties brief the same state constitutional issue, even though the issue was not addressed in the trial court or the court of appeals. *See* App. 1. If this Court believes that issue may be dispositive in this case, it could stay the appeal until *Pianitsky* is decided.[10]

As the Supreme Court apparently recognized, it can be appropriate to address a state constitutional issue for the first time on appeal as long as both sides have a fair opportunity for briefing. *See State v. Hendrickson*, 129 Wn.2d 61, 70 n.1, 917 P.2d 563 (1996) (deciding case under article I,

---

[10] Undersigned counsel thanks Mr. Pianitsky's lawyer, Lila Silverstein, for sharing her briefing.

section 7 even though petitioner argued for application of state constitution for the first time in his supplemental brief).

(b) A Gunwall Analysis Demonstrates That Article I, Section 9 Is More Protective Than The Fifth Amendment In This Context, And That Only Clarifying Questions May Be Asked Following An Equivocal Invocation Of The Right To Counsel

To determine whether a state constitutional provision supplies different or broader protections than its federal counterpart, this Court evaluates six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

As for the first two factors, it is "well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980). Doing so "is particularly appropriate when the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that this difference was intended by the framers." *Id.*

Article I, section 9 of the Washington Constitution provides: "No person shall be compelled in any criminal case to give evidence against himself...." The language is significantly different from that of the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself."

In using the word "witness," the federal constitution's focus is on guaranteeing the right not to testify against oneself at trial. *See Michigan v. Tucker*, 417 U.S. 433, 440, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) (although caselaw has extended its meaning, the language of the Fifth Amendment "might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify"); *Cf. Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (a "witness" is a person who "bears testimony"). But our framers explicitly rejected a proposed version of article I, section 9 that would have merely protected the right of a person not to "testify against himself." *Journal of the Washington State Constitutional Convention, 1889*, at 498 (B. Rosenow ed. 1962).[11] Instead, they favored the broader "give evidence"

---

[11] The Journal is now available online through the Washington State Constitutional Law Project. *See* https://lib.law.washington.edu/content/guides/waconst#section-6.

language. *Id.* In so doing, our founders expressly provided strong protection against self-incrimination at the investigatory stage.[12]

The Massachusetts Constitution uses language similar to Washington's: "No subject shall ... be compelled to accuse, or furnish evidence against himself." Mass. Const. art. 12. Applying factors similar to our *Gunwall* factors, that state's Supreme Court has held that article 12 is more protective than the Fifth Amendment in the context of equivocal invocations of the right to silence. *Commonwealth v. Clarke*, 461 Mass. 336, 345-46, 350, 960 N.E.2d 306 (Mass. 2012). In light of the differences in text between the Fifth Amendment and article I, section 9, this Court should similarly hold that our state constitution provides broader protection in this context.

In sum, the text of article I, section 9 and the differences in language between that provision and the Fifth Amendment demonstrate that the framers of our constitution intended to confer stronger protection against self-incrimination upon Washingtonians than that provided by the federal constitution. *See Gunwall*, 106 Wn.2d at 65 (difference in

---

[12] The framers also changed the order of the clauses, placing the protection against self-incrimination first and double jeopardy second. It is reasonable to conclude this rearrangement is another sign of the importance our founders attached to the right not to be compelled to give evidence against oneself. *See Rosenow* at 498.

language between Fourth Amendment and article I, section 7 is "material," and suggests state constitution provides broader protection).

The third and fourth *Gunwall* factors, constitutional and common-law history and pre-existing state law, also demonstrate that article I, section 9 provides stronger protection than the Fifth Amendment. As discussed above, the delegates to the Constitutional Convention who served on the Declaration of Rights Committee rejected language that was similar to that of the federal constitution in favor of language which more broadly protects persons against compelled self-incrimination.

Further, this Court's decisions pre-dating *Davis* provided greater protection in this context than the U.S. Supreme Court later endorsed under the federal constitution. *See Robtoy*, 98 Wn.2d at 39, discussed above. At the same time that the Washington Supreme Court endorsed the rule protecting equivocating suspects from compelled self-incrimination, some other courts were denying such protection, instead requiring unequivocal assertions of the rights to silence or to counsel. *See Smith v. Illinois*, 469 U.S. 91, 96 n.3, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (describing three different approaches state and federal courts had taken with respect to equivocal invocations; *Robtoy* fell in the middle, while the U.S. Supreme Court later adopted the least-protective rule). Limiting detectives to asking clarifying questions after suspects invoke their rights

in an equivocal manner "gives a suspect the proper amount of protection to his rights without unduly burdening the police from taking voluntary statements." *Robtoy*, 98 Wn.2d at 39.

In *Radcliffe*, this Court noted that *Robtoy* was no longer good law as to the Fifth Amendment in light of *Davis*, but it declined to reach the state constitutional issue because it was not properly raised. *Radcliffe*, 164 Wn.2d at 907. Other state courts have reached the issue and applied the *Robtoy* rule under their state constitutions. *See, e.g., State v. Diaz-Bridges*, 208 N.J. 544, 34 A.3d 748 (N.J. 2012); *State v. Hoey*, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (Haw. 1994). It is appropriate to review those cases to help determine the scope of protection under our state constitution. *See Gunwall*, 106 Wn.2d at 67-68 (reviewing state constitutional cases from Colorado and New Jersey in determining scope of protection under article I, section 7).

Even though the language of Hawaii's self-incrimination clause is the same as that of the Fifth Amendment, the Hawaii Supreme Court held it was appropriate "to afford our citizens broader protection under article I, section 10 of the Hawai'i Constitution than that recognized by the *Davis* majority under the United States Constitution." *Hoey*, 881 P.2d at 523. In so holding, the Court was persuaded by the reasoning of the concurring opinion in *Davis*:

> A rule barring government agents from further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel ... assures that a suspect's choice ... will be scrupulously honored, and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

Id. (quoting *Davis*, 512 U.S. at 469 (Souter, J., concurring in the judgment)). The Hawaii Court accordingly held:

> (1) When a suspect makes an ambiguous or equivocal request for counsel during custodial interrogation, the police must either cease all questioning or seek non-substantive clarification of the suspect's request, and
>
> (2) If, upon clarification, the defendant unambiguously and unequivocally invokes the right to counsel, all substantive questioning must cease until counsel is present.

Hoey, 881 P.2d at 523.

Other supreme courts have adopted the same rule under their respective state constitutions. For example, the Minnesota Supreme Court held:

> in order to protect an accused's right to counsel under the state constitution, police must stop questioning and must clarify an accused's intentions if the accused makes a statement during custodial interrogation that could reasonably be construed as an expression of a desire to deal with the police only through counsel.

State v. Risk, 598 N.W.2d 642, 644 (Minn. 1999); *accord Steckel v. State*, 711 A.2d 5, 10-11 (Del. 1998) (announcing same rule under article I, section 7 of Delaware Constitution); *State v. Holcomb*, 213 Or. App. 168,

159 P.3d 1271 (Or. Ct. App.), *review denied*, 343 Or. 224, 168 P.3d 1155 (2007) (adopting same rule as to invocations of right to counsel and of right to remain silent). *See also State v. Effler*, 769 N.W.2d 880, 895-96 (Iowa), *cert. denied*, 558 U.S. 1096, 130 S.Ct. 1024, 175 L.Ed.2d 627 (2009) (Appel, J., specially concurring) (suggesting that upon proper briefing, Iowa Supreme Court would decline to follow *Davis* under state constitution).

The above state constitutional decisions are consistent with this Court's decision in *Robtoy*. That *Robtoy* was the law in this State for over a decade, and that it provided stronger protection than that ultimately afforded by the U.S. Supreme Court under the federal Fifth Amendment, weighs in favor of a broader interpretation of the related rights under article I, section 9.

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

As for the sixth factor, state law enforcement measures are a matter of state or local concern. *Id.* The U.S. Supreme Court has recognized as much in the specific context of custodial interrogations. *Miranda*, 384

U.S. at 467 ("We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws").

The State may point out that in *State v. Earls*, 116 Wn.2d 364, 375, 805 P.2d 211 (1991), the Supreme Court rejected a *Gunwall* analysis for Article I, section 9, because it had already determined that provision to be co-extensive with the Fifth Amendment. The Court later clarified, however, that *Earls* should not be read too broadly. *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). "[W]hen the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context." *Id.* While the Washington Supreme Court has found Article I, section 9 to be co-extensive to the Fifth Amendment in some settings unrelated to this case,[13] it has yet to address it in the context of an equivocal waiver of the right to counsel during interrogation. Presumably, that is the very

---

[13] *See, e.g., State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971) (rejecting broader protection as to production of physical evidence); *State v. Earls, supra*, (rejecting claim that right to counsel was violated when suspect waived rights without knowledge that a lawyer had attempted to call him at the jail); *State v. Wheeler*, 108 Wn.2d 230, 240, 737 P.2d 1005 (1987) (rejecting argument that juveniles are invariably incompetent to waive *Miranda* rights).

reason the Supreme Court has called for briefing on the state constitutional issue in the *Pianitsky* case.

(c) Under The Robtoy Standards, Baze's Interrogation Was Clearly Unlawful

In this case, Mr. Baze made an equivocal statement regarding his desire for a lawyer. He asked "do I need an attorney?" and then spent about 15 minutes discussing the matter with the detectives before ultimately waiving his rights. Clearly, the detectives' comments following the equivocal statement were not limited to clarifying Baze's wishes. Rather, the detectives aggressively worked to persuade Baze to waive his rights. As discussed above, they suggested various reasons why it was in his best interest to talk that night, they maintained that he could not obtain legal advice until the following day, and they advised him that a lawyer would in any event prevent him from talking.

Baze's case is quite similar to *Thompson v. Wainwright*, supra. At the time, the Fifth Circuit applied the same standard as *State v. Robtoy*. *See Thompson*, 601 F.2d at 771.[14] In *Thompson*, the suspect signed a waiver card and announced his desire to make a statement, but added that he first wanted to tell his story to an attorney. *Id.* at 769. The police

---

[14] *Thompson* has been implicitly overruled to some extent by the U.S. Supreme Court's decision in *Davis*, supra.

responded that an attorney could not relate Thompson's story to the police, and that an attorney would probably advise Thompson to say nothing. The police also told Thompson that "not only were we seeking evidence against him but anything he told us, if it would clear him, we would use it." *Id.* at n.2. Thompson then gave a statement. As discussed above, the detectives likewise told Baze that his statement might help him and that a lawyer would surely tell him to remain silent.

The *Thompson* Court found that the suspect's request for a lawyer was equivocal and that the police did not limit their questioning to clarifying Thompson's wishes. In particular, the police should not have given an opinion about whether seeking counsel was in Thompson's interest, and should not have made the incorrect statement that a lawyer would definitely tell his client to remain silent. *Id.* at 772.

> The point is that counsel's advice about what is best for the suspect to do is for counsel, not the interrogator, to give. And it is for him to give after consultation with his client and after weighing where the suspect's best interests lie from the point of view of the suspect, not from that of a policeman be he ever so well intentioned. Until this occurs, it is simply impossible to predict what counsel's advice would be; and even if it were, the right to advice of counsel surely is the right to advice from counsel, not from the interrogator.

Id. at 772. The Court therefore found that Thompson "was misled into abandoning his equivocal request for counsel," and his waiver was therefore invalid. *Id.*

It follows with greater force that Baze's waiver was invalid. Not only did the detectives presume to know what advice an attorney would give, they also misrepresented the opportunities for access to an attorney. Further, the detectives in Baze's case went much further than the police in Thompson's case in their efforts to convince their suspect that giving a statement would be in his best interest. Clearly, the detectives did not limit their discussion to clarifying Baze's wishes.

7. The Error Was Prejudicial

If this Court determines that Baze's right to counsel was violated, it must consider whether the error was harmless. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). If the court decides that only Baze's court-rule-based right to counsel was violated, then the test is whether there is a reasonable probability that the error materially affected the

outcome of the trial. *Pierce*, 169 Wn. App. at 550. Under either standard, the error here was not harmless.

As the U.S. Supreme Court has noted, an improperly admitted confession is rarely harmless. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991) (internal quotation omitted).

Without Baze's statement, the evidence showed only that his cell phone was involved in calls and text messages with Morrow, and that he and Churchill drove away from their home around the time Morrow was assaulted. Even if the evidence supported the inference that Baze knew of Churchill's dispute with Morrow, it would be mere speculation to assume that Baze knew that Churchill would commit an assault. A reasonable alternative would be that Churchill merely wished to convince Morrow to return Churchill's property to him. Further, without Baze's statement there was no evidence at all that Baze knew Churchill might commit a robbery. Without that knowledge, Baze could not be an accomplice to the robbery, and therefore could not be guilty of first-degree felony murder. *See State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000) ("the

culpability of an accomplice does not extend beyond the crimes of which the accomplice actually has 'knowledge'").

Thus, the admission of Baze's statement was not harmless.

B. MR. BAZE'S CONVICTIONS FOR ROBBERY AND ASSAULT MUST BE VACATED BECAUSE THEY SUBJECT HIM TO DOUBLE JEOPARDY

At sentencing, the prosecutor recognized that the court must vacate the conviction for felony murder in the second degree in view of the conviction for felony murder in the first degree. RP 643. The State also conceded that the convictions for assault and robbery encompassed the "same criminal conduct" as the felony murder conviction. RP 644. This meant that the robbery and assault counts ran concurrently to the murder count and that they did not increase the criminal history score on the murder count. On the other hand, the assault and robbery counts each carried 24-month deadly weapon enhancements, which must run consecutively to all other counts. RP 662.

Defense counsel maintained that the assault and robbery counts must be vacated based on concepts of merger and Double Jeopardy. RP 665. That would invalidate the deadly weapon enhancements on those counts as well. *Id.* The trial court disagreed. RP 672-73. *See also* CP 4-17 (judgment and sentence).

The trial court erred. The sentencing issues in this case are controlled by *In re Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010), which is directly on point.

Shawn Francis attacked Jason Lucas and D'Ann Jacobsen with a baseball bat in an unsuccessful attempt to steal their money. Lucas died from his injuries. Francis ultimately pled guilty to first-degree felony murder of Lucas, second degree assault of Jacobsen, and attempted first degree robbery of Jacobsen. *Id.* at 521-22.

As the *Francis* Court explained, multiple convictions for the same offense result in double jeopardy. Because the legislature has the power to define offenses, whether two crimes are separate offenses hinges upon whether the legislature intended them to be separate. *Id.* at 523 (citations omitted). Here, as in *Francis*, the legislature has made no explicit or implicit representations on this issue. *Francis*, 170 Wn.2d at 523. The court must therefore move to other considerations, including the nature of the offenses as charged and the merger doctrine. *Id.* at 524-25.

In Francis's case, the assault conduct was encompassed by the robbery charge, which specified that Francis "inflicted bodily injury" upon Jacobsen. *Id.* at 524. In fact, the assault raised the degree of the attempted robbery. *Id.*

> Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. We thus presume here that the legislature intended to punish Francis' second degree assault through a greater sentence for the attempted first degree robbery.

Id. at 525 (citations and internal quotation marks omitted).

The same reasoning applies to Baze's assault conviction. Count I of the third amended information charged him with assault in the first degree, based on the infliction of "great bodily harm" and the use of a deadly weapon. Count II charged Baze with robbery, which was elevated to first degree by the elements of "bodily injury" and the use of a deadly weapon. CP 98. Thus, as in *Francis*, the court must presume that the legislature did not intend to punish both crimes.

The *Francis* Court rejected the defendant's contention that the robbery merged with the felony murder because the defendant pled guilty to the felony murder of Lucas and the attempted robbery of Jacobsen. However,

> [i]f Francis had pleaded to the attempted robbery *of Lucas* and felony murder *of Lucas*, double jeopardy would preclude conviction on the attempted robbery count. The killing "had no purpose or intent outside of accomplishing the robbery" and therefore the attempted robbery would merge into the felony murder. *State v. Williams*, 131 Wn. App. 488, 499, 128 P.3d 98 (2006) (addressing the merger of attempted robbery and felony murder of the same victim); see also *State v. Vladovic*, 99 Wash.2d 413, 421,

662 P.2d 853 (1983) (mirroring the above analysis in the context of kidnapping and robbery).

Id. at 527-28 (emphasis in original).

Here, of course, the robbery and felony murder charge involved the same victim. CP 99. Because the underlying felony for the murder charge was the robbery, Double Jeopardy prohibits conviction on both charges.

Thus, if Baze's convictions are not reversed for other reasons, the Court must remand for vacation of the assault and robbery convictions, along with their associated deadly weapon enhancements.

V.
CONCLUSION

The Court should find that Baze's statement should have been suppressed and remand for a new trial. In the alternative, it should vacate the convictions for assault and robbery based on double jeopardy.

DATED this 31st day of May, 2013.

Respectfully submitted,

David B. Zuckerman, WSBA #18221
Attorney for Travis C. Baze

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Mr. Michael Dorcy
Mason County Prosecutor's Office
Appellate Unit
PO Box 639
Shelton, WA 98584

Mr. Travis C. Baze #345757
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

31 May 2013
Date

William Hackney

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SAMUEL M. PIATNITSKY, Petitioner.	)	NO. 87904-4 **ORDER** C/A NO. 66442-5-I

This matter came before the Court on its March 7, 2013, En Banc Conference. The Court considered the Petition and the files herein. A majority of the Court voted in favor of the following result:

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is granted only as to the issue of whether the trial court admission of the Petitioner's written statement violated his right to remain silent. Any party may serve and file a supplemental brief within 30 days of the date of this order, see RAP 13.7(d). In any event, the parties are directed to serve and file by not later than April 8, 2013, a special supplemental brief that does not exceed 15 pages in length and addresses the applicability of Article 1, Section 9, to the issue accepted for review in this matter.

659/12

DATED at Olympia, Washington this 7th day of March, 2013.

For the Court

Madsen, C. J.
CHIEF JUSTICE