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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM ALVAREZ-CALO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 13-1-02553-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant raised a meritless *Miranda* challenge to the admissibility of his noncustodial statements to police when it is predicated on long-ago abrogated authority that misperceived probable cause to trigger the warning instead of *custodial* interrogation?
2. Does defendant raise a moot attack on the sufficiency of evidence underlying his already vacated attempted first degree robbery conviction that is also meritless as his guilt for that crime was amply proved and reference to it adequately stricken from his judgment for double jeopardy purposes?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant proceeded to trial charged with firearm enhanced felony first degree murder, conspiracy to commit murder, first degree burglary, attempted first degree robbery and witness tampering. CP 86. The trial court denied his CrR 3.5 motion to suppress statements he made to police during four interviews he participated in *against* the advice of counsel representing

him in cases unrelated to the murder discussed during those interviews.¹ Admissibility of statements he made at the first three interviews conducted February 22, 2013, March 18, 2013, and March 26, 2013, without *Miranda* warnings was attributable to their *noncustodial* nature. CP 233-35. In each instance he participated as a witness hoping to obtain the benefits of being a police informant. *Id.* Although the fourth interview on June 21, 2013, was deemed custodial, the status did not affect admissibility since the statements he made were preceded by a valid and unchallenged *Miranda* waiver. *Id.*

A motion to dismiss the attempted robbery was denied because the evidence proved his accomplices' set out to rob anyone inside an apartment raided for drug contraband. 23RP 2710-12. Well-instructed jurors convicted defendant of all but the conspiracy count, for it had been dismissed by the trial court when the State rested.² The attempted robbery count was vacated based on a finding it merged with his felony murder conviction. 25RP 2830. A standard sentence was imposed for the other counts. CP 210. Defendant's notice of appeal was timely filed. CP 225.

¹ CP 231-36; 1RP 164, 168, 188, 191-92; 3RP 244, 252; 7RP 516-17.

² CP 163-99, 200-04; 23RP 2709-11.

2. FACTS

Cartels control heroin production in Mexico. 14RP 1623-24, 1649-50. "Plaza bosses," comparable to mafia lieutenants, smuggle heroin into our country. *Id.* Traffickers at this level allocate million-dollar shipments among regional "stash" houses. *Id.* 1624-25. Those houses are managed by midlevel dealers with geographical or familial connections to the cartel. *Id.* A distribution network from Michoacán, Mexico, organized in Lakewood. *Id.* The stash house it used to supply dealers from Tacoma to Aberdeen was run by a Michoacán trafficker named Juan Hidalgo-Mendoza (AKA Panzo, Canasta, or Junito). 16RP 1669, 17040-06; 19RP 2508. Hidalgo lived in the house with this case's murder victim, Michoacán native Jaime Diaz-Solis. 12RP 1406-12; 13RP 1525. Hidalgo supplied his Michoacán cousin Alberto Mendoza Ortega (AKA Yeto or Geto), who sold Hidalgo's heroin to lower-level dealers. 14RP 1625-26, 1669-70. Ortega had employed defendant to run drugs and collect money until he fell \$25,000 to \$30,000 into debt. *Id.*

Defendant first worked as a mechanic in Ortega's shop. 16RP 1663-66. Ortega promoted him to debt collection once he earned Ortega's trust. *Id.* Delivering drugs for Ortega came next. *Id.* The kilo or two of Hidalgo's drugs that defendant moved for Ortega a day had a street value of \$10,000 to \$20,000. 19RP 2347. Ortega lost confidence in defendant; his money and

drug debt to Ortega began to mount.³ Ortega ejected him from the shop where he worked and had come to live. 16RP 1667-68; 18RP 2184-85.

Defendant moved in with a couple of drug dealers. 16RP 1672-74. No longer able to secure drugs from Ortega, defendant started dealing for a Lynwood supplier named Marteen.⁴ The quantities moved for Marteen were less than he moved when supplied by Ortega's cousin Hidalgo. 19RP 2348. Then Ortega told defendant not to sell drugs to Ortega's clients or discuss his business. 16RP 1679. Ortega directed his people to avoid defendant. *Id.* Those setbacks were staked upon a kilo's worth of debt defendant owed to Marteen. *Id.*; 18RP 2230. Defendant's solution was to take Ortega out of the game; to rob, then murder, Ortega and his supplier Hidalgo, so defendant could take their place as this region's main supplier.⁵

Defendant's plan evolved over time. 19RP 2342. He initially thought it would be best to run up and shoot Ortega. *Id.* Jumping from a car to "light" him up was considered. *Id.* Defendant settled on raiding Ortega's house and killing him there. *Id.* The same fate was planned for Hidalgo and anyone with him at a stash house located in a part of Lakewood called "Chocolate City"—slang for a place to get black-tar heroin.⁶

³ 16RP 1663-66, 69-70; 19RP 2334-36.

⁴ 16RP 1674-75; 18RP 2226; 19RP 2340-41.

⁵ 18RP 2231-32, 2237-38; 19RP 2345-49, 2508.

⁶ 11RP 1201-02; 14RP 1649-50; 16RP 1911-12; 19RP 2345-46, 2359-64.

Planning progressed to action the evening of November, 12, 2012, when defendant called a meeting in his garage.⁷ It was equipped with a security system and guns to protect his drugs and money from raids. 18RP 2190-91, 2219-20. He issued commands to six "rowdy" henchmen that he assembled in two teams to execute the robberies and murders he planned.⁸ Among them was Mazzar Robinson (AKA Trig) who agreed to rob and murder Hidalgo with anyone present for \$10,000 as well as any drugs or money stolen from Hidalgo's home.⁹ Defendant armed Robinson and another with revolvers for that job. 17RP 2002-03; 19RP 2351-52.

Defendant devised a two-stage plan of attack. In the first stage, a strike team would raid Ortega's house, tie him up, rob him, then withdraw.¹⁰ Defendant would murder Ortega after they left. *Id.* The strike team would next raid Hidalgo's Chocolate City apartment, leaving anyone inside tied up to be murdered in defendant's second wave. *Id.* But their plan unraveled when someone backed out en route to Ortega's house. 19RP 2354-55, 2481. Defendant returned to his garage. 17RP 2027. Others were diverted to raid Hidalgo's apartment. 19RP 2355, 2481.

⁷ 14RP 1627; 16RP 1672, 1913-14; 17RP 1992-2006, 2123-26; 18RP 2143-46, 2181-86, 2237-38; 19RP 2349-52.

⁸ 17RP 1998-2006, 2123-26; 18RP 2186-87, 2238; 19RP 2349-52, 2380-81.

⁹ 16RP 1839, 1911-12; 17RP 1993-05; 19RP 2373-74.

¹⁰ 19RP 2345-47, 2349-51.

Half of those bound for Chocolate City rode in Robinson's Dodge Charger. 17RP 2004-05. They pulled into the rear of the apartment complex where Hidalgo lived with Solis. 17RP 2010-11. It was around 9:00 p.m. 17RP 2012-15. They grabbed duct tape and zip ties to restrain anyone they found inside Hidalgo's apartment. 19RP 2359-60. They donned masks. *Id.* They put on gloves. *Id.* Several huddled outside the apartment's rear door. 17RP 2012-15; 19RP 2359-60. Robinson crept inside.¹¹

It was dark in the living room where Solis sat on a couch.¹² Hidalgo was in a bedroom talking to his wife on the phone. 13RP 1526-29, 1533-34. The raid began. 17RP 2012-15; 19RP 2359-60. Robinson pulled the trigger of the revolver defendant gave him.¹³ It flashed. 17RP 2014-15. A bullet sliced into Solis's side, then tore through his liver, stomach, aorta and blew a "gaping hole" through his spine on its way to his back. 12RP 1436-43. Solis said "No," moaned, called out to Hidalgo.¹⁴ Hidalgo opened a door into the dark living room; there was another voice, so he leapt from a window, then ran to an English speaking neighbor for help.¹⁵ Meanwhile, defendant's men "freaked out," so they fled toward their cars.¹⁶

¹¹ 17RP 2012-15; 19RP 2359-60.

¹² 13RP 1526-29, 1580; 18RP 2244.

¹³ 17RP 2002-03; 18RP 2246; 19RP 2351-52, 2365.

¹⁴ 13RP 1534-35, 1580-81; 19RP 2365-66.

¹⁵ 13RP 1529-32, 1580-85.

¹⁶ 17RP 2015-17; 19RP 2365-66.

Robinson lost the keys to his Charger along the way. 18RP 2246; 19RP 2365-72. He was forced to flee on foot with the people he drove.¹⁷ Defendant sent a car for them. *Id.* Phone records with tower data recorded the effort.¹⁸ Perpetrators convened at defendant's garage. 16RP 2026-28. He took control. 17RP 2123. He said they shot the wrong guy.¹⁹ He tried to ease their concerns. 16RP 2026-27. Guns were given back to him. 19RP 238-84. Defendant told Robinson to have the Charger towed from Chocolate City to a dealership where a key was made.²⁰ Robinson returned for the \$10,000 defendant promised regardless of the plan's success. 19RP 2373-74.

Hidalgo found Solis on the floor, then removed incriminating items from their apartment. 13RP 1532; 15RP 1758-62. Solis was carried to an outside walkway.²¹ An AK-47 rifle was hidden under the patio with heroin. 13RP 1539-40. \$38,000 was hidden in a truck. 13RP 1542-43. But Hidalgo neglected to remove proof of their efforts to cut the heroin with rendered Coca Cola, and the two one-kilo bricks of heroin, and four pounds of meth, and the gun in Solis's closet.²² They were found by police.²³ That discovery will cost Hidalgo 15 years in federal prison. 13RP 1537-38.

¹⁷ *Id.*; 17RP 2015-19; 18RP 2236-37.

¹⁸ 14RP 1848-1908; 15RP 17-15-32; 18RP 2239-44; Ex. 233-35.

¹⁹ 16RP 2026-27; 19RP 2390.

²⁰ 12RP 1321-28; 15RP 1783-95; 18RP 2247.

²¹ 11RP 1162, 1180; 13RP 1535-36.

²² 13RP 1558-61, 1573, 1591; 14RP 1645-47.

²³ 11RP 1199, 1224; 12RP 1341-1359; 14RP 1633.

Police arrived at Hidalgo's apartment by 9:49 p.m. 11RP 1193. Solis was obviously dead with blood pooling beneath him.²⁴ He had a blank stare, no pulse; still, police attempted CPR. *Id.* Medical responders took over. *Id.* Efforts at ventilation forced air from the entry wound. 11RP 1265-67. The EKG flat lined. 11RP 1208. Treatment was terminated. *Id.*; 13RP 1143. Time of death was called on scene. *Id.* The murder investigation went cold. 21RP 2559-60. 2564. Several months passed without a lead. *Id.* In February, 2013, defendant was in jail looking to get out. 21RP 2560.

Defendant had an identity theft charge pending in Pierce County and a misdemeanor case in Lakewood. *Id.* He presented as an informant looking to trade details about the Chocolate City murder for favorable treatment.²⁵ He characterized himself as caught in the middle as a man named Borrego allegedly instructed Ortega to murder Ortega's cousin and supplier Hidalgo for Borrego over a debt. *Id.* Defendant continued to cooperate as a paid informant after his cases were closed; information from people connected to organized crime is essential to law-enforcement countermeasures. *Id.*; 14RP 1619. But inconsistencies emerged as detectives tried to corroborate details defendant provided about the murder.²⁶ He ultimately admitted to orchestrating the hit against Hidalgo that took Solis's life. 16RP 1911-14.

²⁴ 11RP 1180, 1196, 1262-63, 1284, 1293.

²⁵ 14RP 1828-1914; 17RP 1957-58, 1978-79; 21RP 2561-72; Ex.277-281.

²⁶ 14RP 1828-1914; 17RP 1957-58, 1978-79; 21RP 2561-72; Ex.277-281.

C. ARGUMENT.

1. DEFENDANT'S MIRANDA CHALLENGE TO THE ADMISSIBILITY OF HIS NONCUSTODIAL STATEMENTS TO POLICE IS MERITLESS, FOR IT IS BASED ON ABROGATED AUTHORITY THAT MISTREATED PROBABLE CAUSE AS A TRIGGER FOR MIRANDA WARNINGS ONLY REQUIRED WHEN SOMEONE IS SUBJECTED TO CUSTODIAL INTERROGATION.

"Voluntary confessions are not merely a proper element in law enforcement ... they are an unmitigated good ... essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Maryland v. Shatzer*, 599 U.S. 98, 108, 130 S.Ct. 1213 (2010); *Moran v. Burbine*, 457 U.S. 412, 426, 106 S.Ct. 1135 (1986). "[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711 (1977); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The requirement for warnings is only triggered when interviews conducted by state agents transition into custodial interrogation. *State v. Lorenzo*, 152 Wn.2d 22, 36-38, 93 P.3d 133 (2004). Conclusions about an interview's custodial nature are reviewed *de novo*. *Id.*

Defendant's voluntary decisions to repeatedly speak with detectives about Solis's murder *against the advice* of three lawyers representing him

in two unrelated cases resulted in him making different statements at separate noncustodial interviews episodically conducted by police over the course of four months. Defendant's self-determined—poetically just—path to his own undoing began with an ill-conceived scheme to get himself out of jail. The first step along that path was taken on February 11, 2013, when he told attorney Kristin Fay he wanted to exchange information about a homicide for dismissal of the misdemeanor case to which she was assigned as a public defender for the Lakewood Municipal Court.²⁷ Fay told him:

[I]t doesn't make sense to do in [the misdemeanor] case. You have a felony pending. At a minimum if you were going to do this, it would make more sense to try to get your felony to go away, and that it wasn't really going to save him much time....²⁸

Defendant's "end goal was ... to get his case dismissed and get out of custody." 2RP 135, 140. Potential consequences of providing information to police were probably discussed. 2RP 124. By that time, Fay had spent four years as a criminal-defense practitioner. 2RP 129-30, 137.

Fay secured a continuance so she could confer with her supervising attorney Kenneth Harmell as well as Mary Kay High, the Department of Assigned Counsel attorney representing defendant for his pending felony.²⁹ As a preliminary investigative step toward pursuing defendant's stated goal,

²⁷ 2RP 103-05, 107, 115, 131-32, 134-35; CP 232 (FF 1, 3); 236 (CL 1).

²⁸ 2RP 115-16, 120-21, 132.

²⁹ 2RP 103, 116, 119-22, 132-33, 143, 148; CP 232 (FF4).

Fay inquired of a clerk, married to a detective, to ascertain the identity of a police point of contact for discussing the value of would-be informants in gang homicide cases without imparting specifics defendant shared.³⁰

Harmell has been a criminal defense attorney since 1999. 2RP 144. Felonies account for about 20% of his practice. 2RP 145. He personally handled the Lakewood hearing rescheduled by Fay.³¹ Defendant arrived for the in-custody docket handcuffed and shackled with a belly chain from the Pierce County jail where he was held for his felony case.³² He reasserted his decision to trade information about a cartel murder with police. 2RP 153, 188. Harmell only obtained enough detail to assess law enforcement's interest without divulging facts police could pursue without bargaining for defendant's cooperation. 2RP 153, 159-60.

Harmell asked defendant why he would expose himself to legal and safety risks associated with reporting a cartel murder. 2RP 159. Harmell discussed "accomplice liability" or "rendering criminal assistance" with defendant. 2RP 173-74, 177. A Spanish interpreter was on hand to assist. CP 232 (FF 17). Harmell did not perceive the sentences defendant faced for his pending cases to be worth the legal and safety risks of revealing the information defendant was committed to trading that day. 2RP 159-60.

³⁰ 2RP 116-17, 125, 135-37; CP 232 (FF 5).

³¹ 2RP 147-48; CP 232 (FF 7).

³² 2RP 24-26, 151-52, 167, 182-83; CP 232 (FF 2, 6).

Yet defendant remained adamant he only witnessed the murder in his capacity as a mechanic in a garage where the incident occurred and was not in any way involved in its commission.³³ Defendant:

made it clear ... he was not at all concerned about being implicated, that he wanted to get out of jail immediately.³⁴

Based on those representations, Harmell worried more about the cartel retaliating against defendant for cooperating than the risk of cooperation exposing him to prosecution.³⁵ Harmell told defendant his decision to report on a cartel reflected bad judgment. 2RP 158. Harmell said there are "better ways to handle" the matter; yet defendant "had no interest ... in anything other than proceeding that day." 2RP 173.

Still, Harmell tried to talk defendant out of cooperating with police.

2RP 164. Harmell:

expressed ... multiple times that [he] thought it was a very bad idea, and he couldn't convince [defendant] not to go forward with what he was doing.

2RP 167. Harmell "did everything [he] could to try to talk [defendant] out of cutting the deal." 2RP 168. The bulk of their conversation consisted of Harmell "trying to talk [defendant] out of doing the deal." 2RP 176. But Harmell "could not convince him...." 2RP 188; CP 236 (CL 2).

³³ 2RP 155, 159, 171-75.

³⁴ 2RP 172-73, 175.

³⁵ 2RP 153-55, 159.

Harmell responded to defendant's unwavering commitment to strike a deal that day by contacting the prosecutor assigned to his felony case to secure its dismissal.³⁶ Because if Harmell "couldn't talk [defendant] out of ... doing the deal," Harmell sought to have defendant's felony dismissed with the Lakewood misdemeanor before he cooperated with police against the advice of counsel.³⁷ That effort proved successful.³⁸ Based on the negotiated dismissal of defendant's Lakewood misdemeanor and the fact Harmell did not represent him in this then uncharged murder case, Harmell did not accompany him to the police interview February 22, 2013.³⁹ Harmell turned his attention to representing the other clients on his afternoon docket. 2RP 178. It is possible defendant's option of obtaining other counsel for the interview was discussed. 2RP 179.

High represented defendant in the felony case and her representation of him was limited to that case. 3RP 200, 228. She had been notified he wanted to give information to police by Fray shortly after February 11, 2013.⁴⁰ High was in contact with him February 20, 2013, so nine days after the hearing when he revealed his plan to Fray and two days before his

³⁶ 2RP 162; CP 234 (FF 18).

³⁷ 2RP 162-63; CP 234 (FF 18).

³⁸ 2RP 53-54, 169, 171; 4RP 288 (defendant "didn't want a felony on his record ... [a]nd, of course, he wanted out of jail."); CP 234 (FF 19).

³⁹ 2RP 167, 178, 180-81, 193

⁴⁰ 2RP 103, 116, 119-22, 132-33, 143, 148; 3RP 208, 214.

February 22, 2013, police interview.⁴¹ High might have learned of his plan to cooperate with police from him and advised against it February 20, 2013. *Id.* That day she set a plea for February 27, 2013. 3RP 236-37. She recalled telling an attorney she advised defendant against cooperating with police but he circumvented her by cooperating against that advice. 3RP 244.⁴² Defendant made his goal of getting out of jail clear to High. 3RP 249.

Detective Bunton arrived at the Lakewood court on February 22, 2013, with Detective Catlett in response to defendant's relayed desire to provide information about a homicide.⁴³ They alerted attorneys representing him in the unrelated cases of that plan. *Id.* When detectives approached, Harmell moved the conversation to another room to protect defendant from being targeted as a "snitch" by the other inmates. 2RP 150-51.

The detectives took temporary custody of him from officers who brought him from jail for the in-custody docket with other inmates also restrained by handcuffs as well as waist chains.⁴⁴ He was transported to the police station about a mile away in a marked vehicle. *Id.* He was taken to an interview room that might have been locked to exclude the general public that could otherwise access the room. 5RP 387-88. The detectives removed

⁴¹ 2RP 103-05, 107, 115, 131-32, 134-35; 3RP 208-10, 216, 232-34, 236-37; 5RP 437-38, 440; CP 235 (FF 1).

⁴² 2RP 122-23, 127, 137.

⁴³ 2RP 25, 28-30, 33-34, 56-60.

⁴⁴ 2RP 24-27, 56-63, 126, 151-52, 167, 180, 182-83; 5RP 385-87.

his chains once inside. 2RP 61-62. Video of the interview confirmed he was not cuffed as he volunteered information to police. 6RP 462; Ex. 6.

Defendant conveyed the information he wanted to share.⁴⁵ *Miranda* warnings were not provided. 2RP 28. Defendant did not request counsel. 2RP 28. He was considered a witness, not a suspect, when the interview concluded. 2RP 32. He attributed the murder to others. 5RP 420-22; Ex. 6. He named Uscanga as a witness. 2RP 32. He volunteered to become a drug informant. 2RP 96-97. People offer to work as informants for an array of reasons, to include eliminating competition by reporting the activities of rivals. 2RP 97. Others only want money; some "make a great living ... helping [police] get into organizations" that could not be penetrated.⁴⁶ And others work off crimes or sentences. *Id.* Detectives returned him to jailers holding him for the unrelated cases an hour later, then contacted Uscanga.⁴⁷ Information he gave deviated from that provided by defendant. 2RP 35.

February 26, 2013, Detective Bunton sent High an email regarding his intent to re-contact defendant about the murder case as well as called her several times.⁴⁸ She wanted to be present. *Id.* But her representation of defendant effectively ended with the disposition of his Pierce County case

⁴⁵ 2RP 27-28, 30-31; 5RP 381; Ex.6.

⁴⁶ 2RP 97-100; 5RP 356-57.

⁴⁷ 2RP 32, 63-65, 78; 4RP 289.

⁴⁸ 2RP 65-66; 3RP 210-11, 245; Ex. 12.

on March 13, 2013.⁴⁹ As a publically funded DAC attorney, she does not represent clients post-conviction except for violation hearings.⁵⁰ And she could not represent defendant in matters unrelated to her specific-public appointment. 3RP 240-41. She did not attend any of the interviews. 2RP 66-67. Defendant's Lakewood case was dismissed March 5, 2013.⁵¹

Police did not re-contact defendant until March 18, 2013; he was not incarcerated, represented by counsel or exposed to charges.⁵² Defendant was not under a "proffer agreement," which is a term of art for a negotiated resolution in which an offender remains under obligation to cooperate in exchange for receiving favorable treatment from the State in her case at the conclusion of a case for which cooperation is sought.⁵³ Defendant's charges were resolved outright in dispositions that were not contingent on future cooperation.⁵⁴ He remained free to refuse requests for additional assistance. *Id.* But he elected to become a paid informant who received between \$200 and \$400 for his post-disposition cooperation.⁵⁵ So he freely spoke with the detectives at a second interview prompted by discrepancies between the statements he made and those made by Uscanga. *Id.*; 2RP 34-35.

⁴⁹ 2RP 235, 239-41, 256-57; CP 234 (FF 19).

⁵⁰ 3RP 240, 256-57.

⁵¹ 2RP 180; CP 234 (FF 19).

⁵² 2RP 167, 178, 180-81, 193; 3RP 245-46; CP 234 (FF 20); 236 (CL 5).

⁵³ 3RP 254-56, 260-61.

⁵⁴ 3RP 254-55, 258; 5RP 441; CP 236 (CL 5-6).

⁵⁵ 5RP 357, 359-60, 363-69 ("entry March 18th ... payment to [defendant] for a homicide investigation[.]", 400-01; CP 234 (FF 22)).

The March 18th interview took place in the same video-recorded interview room. Defendant was never restrained and Bunton said he was free to leave.⁵⁶ *Miranda* warnings were not given. 2RP 33. "There was no reason to advise him of his rights," for he was volunteering information as a witness. 4RP 289-90. He revised his story when confronted with details provided by Uscanga.⁵⁷ Defendant confirmed knowing people hired to commit the crimes that caused Solis's death, *i.e.*, Robinson (AKA Trig) and Smith (AKA Streezy).⁵⁸ Despite inconsistencies, defendant was still viewed as a witness instead of a suspect. 2RP 36-37.

Defendant next volunteered to meet with detectives at the Lakewood station on March 26, 2013.⁵⁹ He remained free to leave throughout that encounter.⁶⁰ 2RP 40, 42; Ex. 9. Catlett invited him to wait in the lobby, but he declined as he did not want to be seen at the police station. 5RP 327. All he had to do was ask and police would have opened an exit door only locked to keep people from intruding from a publically accessible room connected by the door.⁶¹ *Miranda* warnings were not given.⁶² He provided more details about his cartel work. 2RP 40, 68. Detectives confronted him with more

⁵⁶ 2RP 33, 69-70; 5RP 398; CP 234 (FF 20).

⁵⁷ 2RP 35, 76; 5RP 398-99, 422-23, 428-30; CP 234 (FF 21).

⁵⁸ 2RP 35-36, 76-77.

⁵⁹ 2RP 38-39; 4RP 296; 5RP 402-03; Ex. 9-10; CP 236 (CL 11).

⁶⁰ 2RP 33; 5RP 402; Ex.7; CP 235 (FF 26).

⁶¹ 2RP 39, 46-47; 5RP 325-27.

⁶² 2RP 39; 4RP 297; CP 236 (CL 11, 12).

discrepancies.⁶³ According to him, he delivered a message requesting the murder of Hidalgo and Solis from Borrego to Ortega, showed Uscanga where the victims' apartment was located and directed Uscanga to retrieve people from Chocolate City. 2RP 40-41. Defendant was still perceived to be a witness by the detectives, but it was beginning to seem as if he was involved in a cover up.⁶⁴ He asked for another payment at that meeting.

The detectives re-contacted Uscanga, secured phone records as well as conducted additional interviews with other people to check the veracity of defendant's revised account.⁶⁵ Incriminating discrepancies emerged.⁶⁶ 2RP 75. At the end of that effort probable cause to arrest defendant for the murder materialized. 2RP 44. Defendant volunteered to meet with the detectives June 21, 2013.⁶⁷ Unbeknownst to him, the detectives had secured a warrant for his arrest that would be served regardless of what he said.⁶⁸

They picked defendant up in Catlett's truck.⁶⁹ Defendant sat in the front passenger seat.⁷⁰ Bunton was the rear passenger as Catlett drove. *Id.* A *Miranda* warning was immediately given by Catlett, a fluent Spanish

⁶³ 4RP 310-12; 5RP 324-25, 403-06.

⁶⁴ 2RP 42-43; 5RP 324-25, 411-12, 426-27.

⁶⁵ 2RP 42-44; 5RP 329-30.

⁶⁶ 2RP 42-44; 5RP 329-33.

⁶⁷ 2RP 42; 5RP 336-37; CP 236 (CL 11-12).

⁶⁸ 2RP 43; 5RP 335, 393.

⁶⁹ 2RP 44, 73; 5RP 337, 339-40; CP 235 (FF 27).

⁷⁰ 5RP 349, 394-95; CP 235 (FF 27).

speaker who had no difficulty communicating with defendant.⁷¹ Defendant waived his rights without expressed confusion.⁷² He was not cuffed. 2RP 73. There was no indication given to him that he was not free to leave or would be arrested. 2RP 73-74; 5RP 395-96. He repeated the version of events where he passed the murder order from requestor to perpetrator, but admitted to helping plan the "hit" against Hidalgo and Solis. 2RP 45-46; Ex.11. He denied targeting Ortega. 2RP 46. The detectives placed defendant under arrest. 2RP 46; 5RP 350.

Defendant's statements were ruled admissible. CP 236. Relying on *State v. Dictado*,⁷³ the court first misperceived un-*Mirandized* statements made March 26th and June 21st were inadmissible, believing pre-interview probable cause triggered the need to *Mirandize* him and reveal he was a suspect.⁷⁴ That error was corrected when *Dictado's* abrogation, the legality of ruses and the "custodial interrogation test" were clarified.⁷⁵

A trial court's CrR 3.5 rulings are reviewed by determining whether substantial evidence supports the findings of fact and whether those findings support the conclusions of law. *State v. Rosas-Miranda*, 176 Wn.App. 773, 779, 309 P.3d 728 (2013). The label applied to them is not determinative,

⁷¹ 2RP 44-47, 73-75, 85-86; 5RP 337-38, 393-94.

⁷² 2RP 45; 5RP 337-38; Ex.11; CP 235 30.

⁷³ *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984).

⁷⁴ 7RP 515-25; CP 234 (FF 24); 235 (FF 31).

⁷⁵ CP 236 (CL 11-12); 10RP 1109; 11RP 1115-17.

for reviewing courts treat them according to their nature. *The-Anh Nguyen v. City of Seattle*, 179 Wn.App. 155, 163, 317 P.3d 518 (2014). Trial courts are affirmed on any basis supported by the record and prevailing law. *State v. Kelley*, 64 Wn.App. 755, 764, 828 P.2d 1106 (1992).

- a. Although defendant was incarcerated for an unrelated case on February 22nd, he was not "interrogated," for detectives were present to listen to information he wanted to share; nor was he "in custody," as standard restraints were removed throughout the interview.

A police interview must be "interrogation" and "custodial" in order to trigger an obligatory *Miranda* warning. *State v. Warner*, 125 Wn.2d 884, 884-85, 889 P.2d 479 (1995). "Interrogation involves some ... compulsion." *Id.* Belief cooperation might lead to leniency is not compulsion. *Id.* When dealing with an incarcerated person, "custodial means more than ... normal restrictions on freedom incident to incarceration." *Id.*; *Howes v. Fields*, 565 U.S. 499, 509, 132 S.Ct. 1181 (2012). Taking inmates aside for questioning does make the contact "custodial" under *Miranda*. *Howes*, 565 U.S. at 512. Isolation from general population is often in the inmate's best interest; it does not create the coercive atmosphere *Miranda* addressed. *Id.*; *United States v. Conley*, 779 F.2d 970, 971-72 (9th Cir. 1985) (inmate was not in custody despite being handcuffed in small conference room).

An inmate may be removed from jail "under close guard, to a room where the interview is to be held. But such procedures are an ordinary ... attribute of life behind bars. Escorts and special security precautions may be standard procedures regardless of the purpose for which an inmate is removed from his regular routine and taken to a special location." *Id.* at 513. The determination of custody focuses on an interview's features like words used to summon the inmate and the manner in which the interview proceeds. *Id.* at 514. Removing restraints can create a noncustodial atmosphere by conveying an inmate's freedom to terminate the encounter. *Id.* at 515.

The record reveals the February 22, 2013, interview was undertaken without *Miranda*-triggering "interrogation" because the detectives were an interactive audience for information defendant wanted to share. There was no police-dominated "compulsion" for self-incrimination. Detectives were there at his invitation to assess information he sought to trade for favorable treatment in unrelated cases. There was no "custodial" quality to the contact. He was incarcerated incident to an unrelated case. The restraints he wore before the interview were standard precautions attending transport from jail to an in-custody docket. They were removed once he was secured in an interview room locked to avoid inadvertent intrusions by a public otherwise able to access the room. As the restraints removal did not increase, but reduced his level of confinement, his interview remained "noncustodial" for

Miranda purposes. Because the interview was neither "interrogation" nor "custodial," statements he made during that interaction were correctly ruled admissible despite the absence of an antecedent *Miranda* warning.

- b. Defendant mischaracterizes his autonomous decision to invite police to speak with him against the advice of counsel February 22nd as ineffective assistance of counsel.

Unless an individual is incompetent, the Court has "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case." *Michigan v. Mosely*, 432 U.S. 96, 109, 96 S.Ct. 321 (1975) (White, J., concurring) (*Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975)). For such a rule would "imprison a man in his privileges" and "disregard that respect for the individual which is the lifeblood of the law." *Id.* "[I]t is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those ... charged with other offenses." *Texas v. Cobb*, 532 U.S. 162, 172, 121 S.Ct. 1335 (2001). The Sixth Amendment right to counsel is offense specific at attachment, which occurs when adversarial criminal proceedings are initiated. *Id.* at 167; *McNeil v. Wisconsin*, 501 U.S. 171, 175-76, 111 S.Ct. 2204 (1991).

Police have a recognized interest in investigating new or unsolved crimes. *Id.* To exclude evidence pertaining to charges as to which the Sixth

Amendment right to counsel had not attached because other charges were pending would needlessly frustrate the public's interest in the investigation of criminal activities. *Id.* (citing *Main v. Moulton*, 474 U.S. 159, 179-880, 106 S.Ct. 477 (1985)). Police may contact people represented for offenses different from those for which they are contacted. *Cobb*, 532 U.S. at 172. (fact Cobb had counsel in burglary case did not bar police from interviewing him about an unrelated murder). Statements made during those contacts are admissible. *McNeil*, 501 U.S. at 175.

None of the attorneys representing defendant on February 22, 2013, were counsel as to the murder discussed in the meeting held at his request. His Sixth Amendment right to their assistance was specific to offenses that are not before this Court. Defendant wrongly tries to transfer the obligation they owed him in unrelated cases to this case. *Id.* at 177; *State v. Stewart*, 113 Wn.2d 462, 478, 780 P.2d 844 (1989). That error manifests in his misapplication of *Com. v. Celester*, 473 Mass. 533, 45 N.E.3d 539 (2016).

The first problem with borrowing from *Celester* is it depends on a *Miranda* right augmented by Article 12 of the Massachusetts Declaration of Rights. *Id.* at 563, 567-70 ("we agree that the advice ... was constitutionally ineffective under art.12."). Article 1 § 9 of Washington's Constitution is coextensive with the Fifth Amendment in the context of un-*Mirandized* confessions. *State v. Russell*, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). The

same is true of our Article 1 § 22 and the Sixth Amendment. *State v. Long*, 104 Wn.2d 285, 287, 705 P.2d 245 (1985). In any event, the absence of a *Gunwall* analysis in the opening brief bars review on those state grounds. *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).

A second flaw in drawing from *Celester* is factual. For the attorney there was present at the police interview based on Celester's assertion of a Fifth Amendment as well as a Massachusetts' art. 12 right to counsel and, under Massachusetts' law, counsel deficiently directed Celester to disclose his role in a murder. *Id.* at 557-58, 571. Defendant's challenged counsel did not provide Fifth Amendment representation at the February 22nd interview and did not tell defendant to make incriminating statements. To the contrary, the record reveals defendant pressed forward with the interview against the adamant advice of counsel assigned to his unrelated cases. *E.g.*, *State v. Furman*, 122 Wn.2d 440, 450-51, 858 P.2d 1092 (1993) (remarks made against counsel's advice). Unlike *Celester* there was no Fifth Amendment (much less a Massachusetts art. 12) right to a *Miranda* warning let alone effective assistance of counsel triggered by the interview, for "custodial" "interrogation" did not occur and, different from *Celester*, defendant never asked for counsel to assist him with the February interview.

Defendant repeatedly disclaimed involvement in the murder counsel tried to dissuade him from reporting. The exculpatory quality of the tale he told counsel places defendant's case far closer to *Kesting*, than *Celester*, for in *Kesting* counsel was not ineffective in apprising a client of his right to provide detectives an exculpatory account in which he blamed another for a murder under investigation. *Com. v. Kesting*, 274 Pa. Super. 79, 86, 417 A.2d 1262 (1979). That defendant was undone by his attempt to blame another for the murder he directed is nothing to lament.

Defendant's *post hoc* assessment he did not get a good enough price for the exculpatory lies he sold to detectives for dismissal of his unrelated cases February 22nd is not a basis for suppressing those lies in this case, as no right to counsel was activated by the interview. *Bradshaw v. Stump*, 545 U.S. 175, 186, 125 S.Ct. 2398 (2004) (bad deal is not a recognized claim). An attorney who represented him in an unrelated case opined the interview was something she would not have "allowed." 2RP 226. The court had a clearer sense of her limited ability to control competent clients. 3RP 260; *Stano v. Dugger*, 921 F.2d 1125, 1145-47 (11th Cir. 1991) ("an attorney, however expert, is ... an assistant."). Counsel representing him in unrelated cases had no authority to stop him from talking to police about a murder beyond the scope of their appointment. *Mosely*, 432 U.S. at 109; 3RP 244, 259. Admissibility of the exculpatory statements he made at the interview

was also incapable of the outcome-determinative prejudice needed to win an ineffective assistance claim where applicable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Here, there is no relevant deficiency nor a remedy *in this case* for the type of deficiency alleged.

- c. The independent will exercised by defendant and other witnesses after the February 22nd interview severs subsequently acquired facts from that interview.

Evidence is not suppressible as fruit of a poison tree simply because it would not have come to light but for police conduct alleged to be illegal. *State v. Eserjose*, 171 Wn.2d 907, 920-21, 259 P.3d 172 (2011). Witnesses identified by a defendant amid unlawful interrogation will not be suppressed where their free will attenuates the taint of their discovery. *State v. Hilton*, 164 Wn.App. 81, 89, 261 P.3d 683 (2011); *State v. West*, 49 Wn.App. 166, 168-71, 741 P.2d 563 (1987); *United States v. Ceccolini*, 435 U.S. 268, 280, 98 S.Ct. 1054 (1978); *Michigan v. Tucker*, 417 U.S. 433, 450, 94 S.Ct. 2357 (1974)); *State v. Childress*, 35 Wn.App. 314, 666 P.2d 941 (1983).

Witnesses are not:

mechanically equated with ... inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, *per se*, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.

Ceccolini, 435 U.S. at 277.

Whatever one thinks of the February 22nd interview conducted at defendant's request, it provides no basis to suppress anything people he identified had to say about the murder he reported to police. People like Uscanaga (who defendant identified amid a failed profit-motivated scheme to blame the murder he orchestrated on others) could not be forever silenced by the circumstances attending the February 22nd interview. Their decision to divulge defendant's role in Solis' murder to detectives and jurors was an act of free will that left defendant to reap what his scheme sowed. *See State v. Smith*, 117 Wn.2d 533, 544, 303 P.3d 1047 (2013).

Defendant is also unable to bury his post-release statements to police under the February 22nd interview. If one assumed a *Miranda* warning was wrongly withheld and that he would have invoked his right to counsel despite deciding to proceed with the interview against the advice of counsel, the error could not cause suppression of what he said to detectives after his release. *State v. Jones*, 102 Wn.App. 89, 96-97, 6 P.3d 58 (2000). A 14-day break in custody disables the rule barring police from re-contacting those who assert their right to counsel amid custodial interrogation. *Shatzer*, 559 U.S. at 110; *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981). Following the break a change of heart about cooperating in an investigation is deemed a product of free will not to be second guessed by courts. *Id.* at 108; *Michigan v. Mosely*, 423 U.S. 96, 102-05, 96 S.Ct. 321 (1975).

Defendant was a free man without pending charges 24 days after the February 22nd interview when he met detectives March 18, 2013. The case-specific appointment of the attorney who asked to attend had run its course with the resolution of her case. Had defendant invoked a Fifth Amendment right to counsel February 22nd, *Shatzer's* 14-day period would have expired 10 days before the March 18th interview. So he attended that interview, and all the rest, free of legal entanglements and associated representation.

Only his hope of becoming a paid informant, and perhaps framing a rival along the way, accounts for his voluntary decision to meet with police March 18th, then again 8 days later on March 26th, then again 87 days later on June 21st when he finally revealed something nearer to the truth of how he coordinated the hit that took Solis's life. Each subsequent decision to cooperate severed any legal link to the February interview. But again, the 14-day break deemed enough to enable reinitiated contact of someone who sought counsel amid custodial interrogation did not apply as defendant was not "in custody" or "interrogated," nor did he request counsel February 22nd.

The exculpatory quality of the version of events defendant conveyed to police February 22nd further attenuates the link to inculpatory accounts he gave at subsequent interviews. His first version cast him as a mechanic

merely present when the reported murder occurred.⁷⁶ Mere presence amid crime does not make one accomplice to crime. *State v. Jackson*, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999). The exculpatory fiction he conveyed on February 22nd was not the type of revelation that could be deemed capable of compelling him to think it futile to refrain from confessing to murder after receiving a *Miranda* warning June 21st. *State v. Baruso*, 72 Wn.App. 603, 611, 865 P.2d 512 (1993); ("cat out-of-the bag doctrine" inapplicable if pre-*Miranda* statements are exculpatory).⁷⁷ Pre-*Miranda* statements are only deemed to be capable of compelling post-*Miranda* confessions if the warning is given amid a two-part interview aimed at defeating *Miranda's* prophylactic purpose. *Id.* So statements defendant made after the February 22nd interview were properly admitted irrespective of its legality.

- d. The un-Mirandized remarks defendant made to police after the February interview were rightly admitted, for at least the predicate of a "custodial" interaction was absent.

Miranda warnings are only required if police "interrogate" a suspect "in custody." *Lorenzo*, 152 Wn.2d at 36. "Interrogation" is questioning reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980). "Custody" is restraint that would lead

⁷⁶ 2RP 155, 159, 171-75; Ex. 6.

⁷⁷ Compare *State v. Hickman*, 157 Wn.App. 767, 775-76, 238 P.3d 1240 (2010) ("mid-stream" *Miranda* warning amid two-part interview); *State v. Grogan*, 147 Wn.App. 511, 519, 195 P.3d 1017 (2008); *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004).

a reasonable person to believe he was under formal arrest. *Id.* Those seeking suppression of un-*Mirandized* statements must prove both conditions were present. *See Id.*; *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172 (1992); *Berkemer v. McCarty*, 468 U.S. 420, 441, 104 S.Ct. 3138 (1984).⁷⁸

Defendant has not proved he was "in custody" for *Miranda* purposes or subjected to "interrogation," which is enough for his claims to fail. His brief proceeds from the outdated premise that detectives were obliged to *Mirandize* him when they developed probable cause for his arrest. Yet that has not been the law since *Dictado* was replaced by *Berkemer*. In *Harris*, our Supreme Court correctly observed:

The United States Supreme Court recently has elucidated the test for determining when *Miranda* safeguards exist. The safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to the degree associated with formal arrest... Th[is] *Berkemer* test modifies the "probable cause to arrest" standard used by this court to determine when *Miranda* safeguards are required. ... *Dictado, supra*. Thus, persons voluntarily accompanying police to the police station as material witnesses are not under custodial interrogation if their freedom of action is not curtailed to a degree associated with formal arrest.

State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). In 2004, our Supreme Court dispelled any doubt *Dictado's* probable cause standard is no longer good law:

⁷⁸ *Id.* ("[r]espondent has failed to demonstrate ... he was subjected to restraints...."); *State v. Read*, 132 Conn. App. 17, 19, 29 A.3d 919 (2011); *People v. Colon*, 5 Misc. 3d 365, 374, 784 N.Y.S.2d 316 (Sup. Ct. 2004).

Lorenzo argues that following ... *Dictado* ..., we should hold that she was under custodial interrogation at the time the written statement was made because the police developed probable cause to arrest her for the crimes she was later charged, and had not given her *Miranda* warnings. However, this court explicitly rejected the *Dictado* approach in ... *Harris* when this court adopted the U.S. Supreme Court's approach in *Berkemer*....

Lorenzo, 152 Wn.2d at 37. That case explained why the trial court in this case wrongly concluded the warning defendant received on June 21st was required, for he sat unrestrained and unaware of his impending arrest:

It is irrelevant whether the officer's unstated plan was to take Lorenzo into custody or that Lorenzo was the focus of the police investigation Thus it is, as the State contends, irrelevant whether the police had probable cause to arrest Lorenzo (before or during the interview).

Lorenzo, 152 Wn.2d 37 (emphasis added). It does not even matter if the environment was coercive provided a reasonable person would nonetheless believe his freedom of action was not curtailed to a degree associated with formal arrest. *State v. Ustimenko*, 137 Wn.App. 109, 116, 151 P.3d 256 (2007). The law could not be clearer on these points. Defendant avoids them by relying on factually dissimilar cases citing to pre-*Berkemer* authority.⁷⁹

There was no "custodial" component to interviews defendant freely participated in for profit on March 18th and 26th. He accepted the detectives'

⁷⁹ E.g., App.Br. at 21-22 (citing *State v. France*, 129 Wn.App. 907, 911, 120 P.3d 907 (2005) (suspect told he was not free to leave until domestic matter was "cleared up.") (citing see *State v. Creach*, 77 Wn.2d 194, 198, 461 P.2d 329 (1969)); *State v. Lewis*, 32 Wn.App. 13, 645 P.2d 722 (1982); *State v. Hawkins*, 27 Wn.App. 78, 615 P.2d 1327 (1980)).

invitation to the station so he could exchange information for cash. Without physical restraints, he answered questions in a room only locked to prevent the public from stumbling in, which was consistent with his preference not to be seen with police. Release after the February 22nd interview conveyed he would be released from the March 18th interview. He carried the same paradigm into interviews on March 26th and June 21st. Although an accurate *Miranda* warning was given before he confessed at the June 21st interview, a need for the warning never arose as he remained unrestrained in the front seat of a truck talking to detectives as he had before. Their plan to arrest him after the interview regardless of what he said was not revealed.

His final post-*Miranda* inculpatory statements are attenuated from his antecedent pre-*Miranda* statements as his post-*Miranda* statements were informed acts of volition. His unchallenged waiver was given by a fluent Spanish speaker who successfully communicated with him over the course of at least four meetings. *E.g.*, Ex. 7-11. There is no possibility of harm in the admission of his mostly exculpatory un-*Mirandized* statements as his guilt was proved by physical evidence and the testimony of his accomplices.

Some irony exists in defendant criticizing the detectives' decision to withhold the truth of their suspicions as he plotted to profit from his crimes while deceptively, perhaps preemptively, deflecting blame to others. As the trial court rightly came to realize, there is nothing problematic about police

employing a ruse provided it does not overbear the will. *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973) (e.g., confessions voluntary despite falsely informing suspect his polygraph revealed deception, or a co-suspect named him); *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711 (1977). The detectives in this case merely withheld what they knew and confronted defendant with suppositions. Their payments to him reflect the reality that paid informants "play a vital role in the ... prosecution of ... drug syndicates" *United States v. Ihatenko*, 482 F.3d 1097, 1100 (9th Cir. 2007). That defendant fell into his own ill-fated web of deception was nothing but a just return on his investment.

2. DEFENDANT RAISES A MOOT ATTACK ON THE SUFFICIENCY OF PROOF UNDERLYING HIS ALREADY VACATED ATTEMPTED FIRST DEGREE ROBBERY CONVICTION THAT IS ALSO MERITLESS AS HIS GUILT WAS AMPLY ESTABLISHED AT TRIAL AND INVALIDATED IN HIS JUDGMENT TO AVOID THE DOUBLE JEOPARDY PROBLEM WRONGLY CLAIMED.

An issue is moot if effective relief is not possible. *State v. C.B.*, 165 Wn.App. 88, 94, 265 P.3d 951 (2011). Justiciability is typically confined to existing matters; it does not extend to the potential, theoretical, or academic. *Superior Asphalt Concrete Co., Inc. v. Washington Dept. of Labor and Industries*, 121 Wn.App. 601, 606, 89 P.3d 316 (2004). Only moot claims of substantial public importance are reviewed. *C.B.*, 165 Wn.App. at 94.

Defendant seeks reversal of a merged attempted robbery conviction by challenging its proof. App.Br. at 35; 25RP 2838; CP 213. But a merged conviction no longer exists. *State v. Turner*, 169 Wn.2d 448, 466, 238 P.3d 461 (2010). He did not challenge the felony murder into which the robbery merged, so the murder is beyond review. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a). And undermining the robbery would not affect the murder since a special verdict declared the alternative predicate of burglary was proved. CP 182; 201;⁸⁰ *State v. Boiko*, 131 Wn.App. 595, 599, 128 P.3d 143 (2006).

Defendant's attack on the robbery relies on an untenable theory of impossibility, *i.e.*, it was not certain the victims targeted for robbery would actually be present. "Neither factual nor legal impossibility is a defense to criminal attempt." *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012); RCW 9A.28.020(2). A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she, or an accomplice, does any act toward the commission of that crime. *Id.* *State v. Johnson*, 173 Wn.2d at 899; RCW 9A.08.020; RCW 9A.28.020(1).

⁸⁰ QUESTION 1: Did the defendant, acting as a principal or an accomplice, commit or attempt to commit robbery in the first degree? ANSWER: yes (Write "yes" or "no" or "not unanimous")

QUESTION 2: Did the defendant, acting as a principal or an accomplice, commit or attempt to commit burglary in the first degree? ANSWER: yes (Write "yes" or "no" or "not unanimous").

The attempted first degree robbery conviction required proof he or an accomplice took a substantial step toward taking property against the will of a person by use or threatened force while armed with or displaying what appeared to be a deadly weapon.⁸¹ Admitted evidence established he armed henchmen who were to rob anyone at the Chocolate City apartment, bind them and leave them to be murdered.⁸² That substantial step was followed by the substantial steps his henchmen took at the apartment when they donned masks, grabbed duct tape to restrain anyone present, then stepped off toward their objective. *Id.*

Their final substantial steps were taken as they entered the targeted apartment and fired the fatal shot. *Id.* All of which was enough to support the merged attempted robbery conviction when all inferences are properly drawn in its favor. *E.g., In re Pers. Restraint of Francis*, 170 Wn.2d 517, 529, 242 P.3d 886 (2010) (intended to take \$2,000 from whomever had it); *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017); *State v. Newbern*, 95 Wn.App. 277, 287, 975 P.2d 1041 (1999).⁸³

⁸¹ CP 179 (Inst. 14), 189-91 (Inst. 25-26); RCW 9A.56.190, .200.

⁸² 11RP 1201-02; 13RP 1526-29, 1533-34, 1580; 14RP 1627, 1649-50; 16RP 1839, 1911-14; 17RP 1992-2006, 2010-15, 2027, 2123-2618; 18RP 2143-46, 2181-87, 2190-91, 2219-20, 2237-38; 18RP 2244, 2246; 19RP 2342, 2345-46, 2349-52, 2354-55, 2359-65, 2373-74, 2380-81.

⁸³ Conditional intent is sufficient. *E.g., Wayne R. LaFave, Criminal Law* §5.2(d) at 251-52 (4th ed. 2003) ("A" breaks into "B's" house intending to rape her if she is home).

Defendant's claim the crossed-out reference to the merged robbery violates double jeopardy is meritless. The effect of a judgment is produced by its approved text. *Elliot Bay Adjustment Co., Inc. v. Dacumos*, 200 Wn.App. 208, 215, 401 P.3d 473 (2017). Approved text can be signified as much by addition as redaction. *Id.*; *In re Marriage of Holmes*, 128 Wn.App. 727, 733, 117 P.3d 370 (2005). Double jeopardy is violated if a merged count is reduced to judgment. *Turner*, 169 Wn.2d at 466.

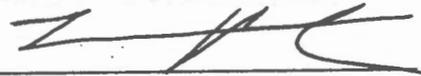
The merged robbery's invalidation was signified by the lines drawn through it and a note clarifying that it merged. CP 213. That invalidating redaction is not analogous to the order reversed in *Turner*, which withheld sentence on a count kept "alive" by a clause providing for reinstatement. *Turner*, 466 Wn.2d at 466. Defendant reasons his robbery remains in effect because its history may be inferred by one who assumes the crossed-out reference to it reflects more than a scrivener's error. But it is a judgment's legal effect not the visibility of its stricken terms that can implicate double jeopardy. The procedural history of merged counts live on in verdict forms and trial transcripts. *E.g.*, *Id.* at 466; *see also* RCW 40.16.010 (records retention). There is no double jeopardy problem in being able to discern the court's invalidation of a merged count in a judgment and sentence.

D. CONCLUSION.

Defendant's statements were correctly admitted. No un-*Mirandized* statement was the product of custodial interrogation or an infringed right to counsel. His claim *Miranda* is triggered by development of probable cause is wrong. A valid *Miranda* waiver preceded his confession. Overwhelming proof of his guilt is either untainted or too attenuated from error to warrant relief. The judgment reflects invalidation of his merged robbery conviction. The trial court should be affirmed.

RESPECTFULLY SUBMITTED: February 13, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2.14.18 Therese Ke
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

February 14, 2018 - 11:35 AM

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