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**No. 49794-8-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**WILLIAM ALVAREZ-CALO,**

Appellant.

---

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

The Honorable Frank Cuthbertson, Judge

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**CORRECTED BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting the four audio recordings of Mr. Alvarez-Calo's interviews with Lakewood police detectives.

2. Finding of Fact 20 is in error because Mr. Alvarez-Calo was in custody and not free to leave. (The written findings and conclusions are attached as Appendix.)

3. Finding of Fact 26 is in error because Mr. Alvarez-Calo was in custody and not free to leave.

4. Conclusion of Law 1 is in error to the extent that the court concluded Mr. Alvarez-Calo, in each instance, voluntarily contacted the police and wanted to speak with them.

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**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court commit reversible error by admitting Mr. Alvarez-Calo's four audio recorded interviews with Lakewood police

detectives when the interviews violated Alvarez-Calo's state and federal constitutional rights to remain silent and to counsel?

2. Did the State fail to prove beyond a reasonable doubt all of the essential elements of attempted first degree robbery where the crime requires proof that the defendant or an accomplice intended to take property from or in the presence of another person, and where the State's evidence shows that Mr. Alvarez-Calo or an accomplice believed the apartment they entered was not occupied?

3. Did the trial court err in failing to delete all references to the attempted robbery in the first degree in the judgment and sentence after recognizing it merged as a predicate offense with murder in the first degree?

### **C. STATEMENT OF THE CASE**

#### *1. Procedural History*

The State charged William Alvarez-Calo by a Corrected Third Amended Information with one count each of first degree felony murder (RCW 9A.32.030), conspiracy to commit first degree murder (RCW 9A.28.040), first degree burglary (RCW 9A.28.040), attempted first degree robbery (RCW 9A.52.020), and tampering with a witness (RCW 9A.72.120(1)(a)). CP 86-89. The State alleged too that Mr. Alvarez-Calo was

armed with a firearm during the commission of the murder, burglary, and attempted robbery. CP 86-89.

The trial court dismissed the conspiracy charge at the end of the State's case for lack of sufficient proof. RP<sup>1</sup> 23 2691-2709. The jury acquitted Mr. Alvarez-Calo of the attempting witness tampering. CP 207. But the jury returned guilty verdicts on the felony murder, burglary, and attempted robbery all committed while he or an accomplice was armed with a firearm. CP 200-05. By a special interrogatory, the jury unanimously found both the burglary and the attempted robbery were proven as a predicate offense to the felony murder. CP 206.

At sentencing, the trial court merged the first degree murder with the attempted robbery in the first degree as the robbery was a predicate to the felony murder. RP 25 2380; CP 214. The court invoked the anti-merger doctrine and sentenced the otherwise predicate burglary as a separate offense. RP 25 2820-21, 2828; CP 214. Mr. Alvarez-Calo received a 370 month sentence comprised of 250 months standard range plus two consecutive 60 month firearm enhancements. CP 217. The court also imposed 36 months of community custody. CP 218.

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<sup>1</sup> There are 26 consecutively paginated volumes of verbatim report of proceedings.

In completing the judgment and sentence, the court scratched through, but left visible, reference to count 4, the attempted robbery in the first degree. CP 213, 214.

The court struck all discretionary legal financial obligations. CP 215.

Mr. Alvarez-Calo filed a timely appeal of all portions of his judgment and sentence. CP 225.

## *2. CrR 3.5 hearing*

In February 2013, Mr. Alvarez-Calo was facing criminal charges in two jurisdictions. In Lakewood Municipal Court, Mr. Alvarez-Calo was charged with driving while license suspended in the second degree. RP 2 115. He was represented by defense counsel Kristin Fay and Ken Harmell. RP 2 103-04, 145-46. In Pierce County Superior Court, Mr. Alvarez-Calo was charged with identity theft in the second degree and driving while license suspended in the second degree. RP 3 199, 206. There, he was represented by defense counsel Mary Kay High. RP 3 199, 206.

On February 11, 2013, Mr. Alvarez-Calo met attorney Kristin Fay for the first time at a pretrial hearing. RP 2 105-07. He asked her about offering information to law enforcement with a goal of getting his municipal court charge dismissed. RP 2 115. Mr. Alvarez-Calo claimed to know something about “a cartel murder.” RP 2 115, 117. Ms. Fay was friends with the

Lakewood Municipal Court clerk who is married to Lakewood police detective Les Bunton. RP 2 116. Ms. Fay asked the clerk if any detectives knew something about a cartel murder. RP 2 117. The clerk relayed the question to her husband who, coincidentally, was the lead detective in a recent cartel murder. RP 2 22. Detective Burton was very interested in talking to Mr. Alvarez-Calo as all leads in the homicide had grown cold. RP 2 22.

Ms. Fay had never been asked by a client to exchange information on anything as significant as a homicide. RP 2 115-16. She had never advised a client about whether to give a proffer before, and did not fully understand the implications of providing information about a murder case. RP 2 123. She asked the court to set the pretrial hearing over to give her time to talk to her more learned supervisor, Ken Harmell. RP 2 116. Ms. Fay also left a voicemail with Mary Kay High to suggest that the cases be resolved together. RP 2 116, 119-120.

Ken Harmell spoke with Ms. Fay briefly after the February 11 hearing. RP 2 148. She advised him that a client might want to give police information about a homicide in exchange for a deal on his pending license suspension charge. RP 2 148. Mr. Harmell made no effort to contact felony defender Mary Kay High. RP 2 163. Mr. Harmell did not meet with Mr.

Alvarez-Calo or ascertain any information about what information he could provide between the first conversation he had with Ms. Fay and when he arrived in Lakewood Municipal Court for Mr. Alvarez-Calo's next hearing on February 22, 2013. RP 2 149.

Mr. Harmell walked into the courtroom to find Detective Les Bunton and Lakewood Police Investigator Jason Catlett waiting for him. RP 2 150, 158-61. They were eager to speak with Mr. Alvarez-Calo. RP 2 158. Mr. Alvarez-Calo was in custody and was brought by Pierce County Jail transport staff to the Lakewood court in handcuffs. RP 2 24-25, 58.

Mr. Harmell quickly introduced himself to Mr. Alvarez-Calo and asked him about what information he might have to provide to the detectives. RP 2 152-53. Mr. Harmell spoke with Mr. Alvarez-Calo in a small room without a door adjacent to the courtroom. RP 2 152. The conversation was short. RP 2 152-57.

Mr. Alvarez-Calo is from Puerto Rico, is a native Spanish speaker, and has limited English language skills. RP 1 46; RP 6 482.

Within a few minutes of talking to Mr. Alvarez- Calo, it became clear to Mr. Harmell that Mr. Alvarez-Calo could implicate himself because he claimed to know details from the scene of a murder. RP 2 153-55. Mr. Harmell did not advise Mr. Alvarez-Calo about what an "accomplice"

means, or explain how Mr. Alvarez-Calo might implicate himself if he was at the scene of a crime and did not immediately report it. RP 2 174-76. Mr. Harmell did not discuss the potential consequences or standard sentencing range for an accomplice to murder or rendering criminal assistance charge. RP 2 176-178, 188. Mr. Harmell did not attempt to ascertain additional information to determine whether Mr. Alvarez-Calo would implicate himself. RP 2 176-178, 188. Yet, Mr. Harmell believed that Mr. Alvarez-Calo was telling the truth. RP 2 155.

Mr. Harmell was very concerned about his own safety. RP 2 157. In hearing that the information was about a “cartel murder,” Mr. Harmell was afraid he might be a target. RP 2 155. Therefore, he did not want to know more information. RP 2 155.

Mr. Harmell told detectives that his client would speak to them. RP 2 29, 164. Then, the three of them called the Pierce County deputy prosecutor assigned to Mr. Alvarez-Calo’s felony case, Sven Nelson. RP 2 31, 162. Mr. Harmell knew nothing about Mr. Alvarez-Calo’s felony case, but negotiated a deal anyway. RP 2 163. Mr. Harmell made no effort to secure immunity for Mr. Alvarez-Calo in exchange for his testimony. RP 2 165.

Mr. Nelson agreed to dismiss the felony charges against Mr. Alvarez-Calo in exchange for his information. RP 2 162. Mr. Harmell did not put this agreement in writing in the form of a proffer agreement. RP 2 169. Mr. Harmell did not contact felony defense May Kay High. RP 2 163. The agreement was completed over the phone. RP 2 162-63.

Mr. Harmell spent maybe twenty minutes total on Mr. Alvarez-Calo's case, including speaking with Mr. Alvarez-Calo before the proffer, speaking to the detectives, and negotiating a "deal" with Sven Nelson. RP 168-69.

Detectives Bunton and Investigator Catlett then led Mr. Alvarez-Calo away in handcuffs and transported him to the Lakewood Police Station to give a statement. RP 2 24, 27. He was not advised of his Miranda rights prior to giving the statement. RP 2 27, 33. The interview was audio and video recorded. RP 2 33; Exhibit 277A.

Mr. Alvarez-Calo immediately discussed his knowledge of and involvement in large heroin distribution operations in Pierce County. RP 2 67. Detective Bunton and Investigator Catlett never advised Mr. Alvarez-Calo he may be implicating himself in criminal activity, nor that his statements could be used against him in a later prosecution. RP 2 27, 33; Exh. 277A. The recorded portion of the conversation lasted one hour. RP 2

78; Exh. 277A. With Mr. Alvarez-Calo's admissions about drug distribution, Detective Bunton know the police had probable cause to arrest Mr. Alvarez-Calo. RP 2 78.

On February 26, 2013, after detectives had already interviewed Mr. Alvarez-Calo without an attorney present, Detective Bunton emailed Mary Kay High and relayed the offer to dismiss felony charges from Sven Nelson in agreement for a proffer. RP 2 66. Mary Kay High responded: "I want to be present for any further discussion with Mr. Calo." RP 3 244; Supp. Designation, Motion Exhibit 12.

Mr. Alvarez-Calo was subsequently released from custody on his felony case and his driving with license suspended charge from Lakewood Municipal Court was dismissed. RP 2 54, 171. On March 5, 2013, the felony case was dismissed but Mr. Alvarez-Calo pleaded guilty to driving on a suspended license. RP 2 54.

Detectives asked Mr. Alvarez-Calo to come in for a second interview, which occurred on March 18, 2013, at the Lakewood Municipal Court. RP 2 69. Detectives did not reach out to Mary Kay High, despite her request she be present for any subsequent interview. RP 2 66. Detectives, again, did not advise Mr. Alvarez-Calo of his *Miranda* rights or tell him he could have an attorney present during the interview. RP 2 33. Mr. Alvarez-

Calo implicated himself in the unsolved cartel murder. RP 2 35.

Detectives asked Mr. Alvarez-Calo to submit to a third interrogation. That last interview, on March 26, 2013, was when Mr. Alvarez-Calo fully implicated himself in connection with the cartel murder. RP 240-41. Detectives never read him *Miranda* rights. RP 2 39. Detectives never advised Mr. Alvarez-Calo he could be implicating himself, nor that his statements would be used against him. RP 2 39-42. This was after they knew that Mr. Alvarez-Calo was involved in a crime.

There was no Spanish interpreter assisting Mr. Alvarez-Calo during any of the three interrogations by police. RP 2 36. Both attorney Kristin Fay and Mary Kay High used Spanish interpreters when speaking with Mr. Alvarez-Calo in court. RP 2 109; RP 3 207.

On June 21, 2013, Detectives Bunton and Catlett spoke with Mr. Alvarez-Calo for the final time. They picked up Mr. Alvarez-Calo with the intent to arrest him for first degree murder. In this instance, the detectives did read Mr. Alvarez-Calo his *Miranda* rights which then waived. The detectives questioned him one last time with the benefit of *Miranda* but without Mr. Alvarez-Calo having any sense he was actually under arrest. Trial Exhibit 283A.

Without the confession, the detectives would have had no reason to investigate Mr. Alvarez-Calo. RP 2 91. His statements alone solely incriminated him, allowing investigators to then develop information he gave and corroborate facts in order to charge him with murder in the first degree. See trial exhibits 277A, 278A, 279A, 280A, 281A, 283A.

### *3. Trial testimony*

Juan “Juanito” Hidalgo-Mendoza supplied illegal drugs to several dealers in the Tacoma area. Two of those dealers were Mendoza’s roommate, Jamie Diaz Solis, and Alberto Mendoza Ortega, also known as “Yeto.” RP 13 1559-60, 1576. Yeto had several other men working for him, including William Alvarez-Calo. RP 14 1665; RP 19 2334.

In addition to working for Yeto, Mr. Alvarez-Calo was also a mechanic. RP 14 1663. He ran his mechanic business out of a garage rented by Yeto. RP 19 2334. Over time, Yeto’s relationship with Mr. Alvarez-Calo deteriorated. RP 19 2337. They disagreed about drugs and money Mr. Alvarez-Calo ostensibly owned Yeto. RP 19 2337.

Mr. Alvarez-Calo was arrested in October 2013. RP 19 2338. Yeto and one of Mr. Alvarez-Calo’s good friends, Jiffary Mendez bailed Alvarez-Calo out. Even though Yeto helped Mr. Alvarez-Calo with bail, Mendez

noticed the relationship between Yeto and Alvarez-Calo had changed. Mr. Alvarez-Calo started work for another drug supplier, Marteen. RP 19 2339.

According to Mendez, Mr. Alvarez-Calo told several friends, including Mazzar Robinson, Michael Rowland, Ray Turner, Gaytan "Vinnie" Gutierrez and Robert Smith, to come to his auto repair garage on November 12, 2012, so that they could discuss a plan to rob and kill Yeto and steal his drugs. RP 19 2349. As they were putting the plan into motion, the person who was supposed to shoot Yeto suddenly backed out. RP 19 2355.

Mr. Alvarez-Calo switched the plan to going to Yeto's "stash house," which was Hidalgo-Mendoza's and Solis' apartment in Chocolate City, and steal any money and drugs stored there. RP 14 1669; RP 19 2342. Mr. Alvarez-Calo knew where Hidalgo-Mendoza lived through Yeto. RP 14 1670-71.

Before the men left the garage, Mr. Alvarez-Calo handed guns to Robinson and Vinnie Gutierrez. RP 19 2352. The group drove in two separate cars. RP 19 2352. They headed to Hidalgo-Mendoza's apartment. RP 19 2358. They were all under the impression that Hidalgo-Mendoza and Solis would not be present at the apartment. RP 19 2350.

The men parked the two cars a short distance away from the apartment and approached on foot wearing gloves and masks. RP 19 2359. The sliding glass door to the apartment was unlocked so Robinson, who was holding a gun, opened the door and stepped inside. RP 19 2365. A voice in the apartment yelled "no." RP 19 2365. Robinson shot. RP 19 2365. The men all turned and ran back to their cars. Id.

Hidalgo-Mendoza and Juanito Solis were at the apartment when the men arrived. RP 13 1525-26. Hidalgo-Mendoza testified that he was in his bedroom and Solis was in the living room. RP 13 1525, 1527. Hidalgo-Mendoza went out the bedroom window after hearing the shot. RP 13 1527, 1530. He ran to his neighbor's apartment, and asked them to call the police. RP 13 1531. He then ran back to his apartment, and found Solis lying on the living room floor in a pool of blood. RP 13 1533. He dragged Solis' body out the front door, then proceeded to hide guns, drugs and cash under a neighbor's porch and in his truck so responding police officers would not find them. RP 13 1535, 1539-40.

The police and medical responders found Solis deceased on the ground outside of the apartment. RP 11 1197. In searching the area, officers found an AK 47 rifle and what appeared to be a large amount of heroin under the neighbor's patio. RP 11 1199, 1221-24. Investigators also

found \$37,800 in cash and evidence of a cutting and distributing operation in the apartment and in Hidalgo-Mendoza's car. RP 12 1342, 1353, 1357, 1391; RP 14 1633.

While fleeing the shooting, Robinson, who had driven one of the two cars to the apartment, could not find his car keys and thus could not drive away. Mr. Alvarez-Calo got a phone call that things had gone wrong at the apartment. RP 18 2241-42. Mr. Alvarez-Calo asked another one of his associates, Jacinto Uscanga-Fernandez, to drive to the area of the apartment and pick up two men left behind and bring them to his garage. RP 18 2242. Fernandez testified that he picked up Robinson and another man near Hidalgo-Mendoza's apartment. RP 18 2243.

The next day, a towing company towed Robinson's car to a Dodge dealership in Tacoma at Robinson's request. RP 17 2048. The dealership's service department made a new key for Robinson's vehicle and Robinson drove away. RP 12 1326.

The police had no suspects in the murder and the case grew cold. Mr. Alvarez-Calo coming forward with information was the key that opened up and unraveled the Solis murder investigation. RP 14 1654.

Mr. Alvarez-Calo did not testify and presented no defense witnesses. However, the jury heard all four of Mr. Alvarez-Calo's recorded

statements taken by Detectives Bunton and Catlett. In each recorded statement. Mr. Alvarez-Calo give detail about his involvement in the planning of the robbery at the Chocolate City apartment. Exhibits 277A, 278A, 279A, 280A, 281A, 283A.

#### **D. ARGUMENT**

**Issue 1. Mr. Alvarez-Calo's convictions should be reversed because the trial court erred in admitting Mr. Alvarez-Calo's four recorded statements made to police detectives.**

**1. Mr. Alvarez-Calo's statements were obtained in violation of his constitutional rights.**

The Fifth Amendment to the United States Constitution states that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. Article I, § 9 of the Washington State Constitution states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The protection provided by the state provision is coextensive with that provided by the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). *Miranda v. Arizona* sets forth the ground rules for determining if a statement is admissible. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 16 L.Ed.2d 694 (1966). If a criminal defendant is in custody and subject to interrogation at the time he made a statement, the statement is not

admissible unless he received his *Miranda* warnings: Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Miranda*, 383 U.S. at 443.

[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his right to remain silent and have the assistance of counsel. *Miranda*, 384 U.S. 436. Because the Fifth Amendment protects a person from being compelled to give evidence against himself, the question whether admission of a confession constituted a violation of the Fifth Amendment does not depend solely on whether the confession was voluntary, rather, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’” *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant's ability to resist

the pressure are important. *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir. 2005).

Self-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege." *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). The *Miranda* rule creates a presumption of coercion in custodial interrogations, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief. *United States v. Patane*, 542 U.S. 630, 631, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004). The law puts the burden on the State to show that *Miranda* warnings were given, and that an intelligent and voluntary waiver followed. *State v. Coles*, 28 Wn. App. 563, 567, 625 P.2d 713 (1981).

a. Mr. Alvarez-Calo was in custody at the time of questioning and thus *Miranda* warnings were required.

*Miranda* warnings are required prior to any custodial interrogation. *Miranda*, 384 U.S. 436. Whether an interrogation is custodial is determined by an objective test – “whether a reasonable person in a suspect’s position would have felt that his or her freedom was curtailed to

the degree associated with a formal arrest.” See *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004), citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Custodial interrogation means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in a significant manner.” *State v. Hawkins*, 27 Wn. App. 78, 81, 615 P.2d 1327 (1980), citing *State v. Boggs*, 16 Wn. App. 682, 685, 559 P.2d 11 (1977). When a person is questioned in a police station, *Miranda* warnings are standard procedure.

Here, Mr. Alvarez-Calo was in custody of the Pierce County Jail when he was first questioned on February 22, 2013. He was transported from the jail and taken, handcuffed and in custody, to Lakewood Municipal Court to appear on his pending criminal driving charge. RP 2 30. Lakewood Detective Bunton and Investigator Catlett led him away, still in handcuffs, and transported him to the Lakewood Police Department for an interview. RP 2 27. There, Bunton and Catlett questioned him for over an hour while Mr. Alvarez-Calo was held in an interrogation room, with audio recording capabilities.

Although Mr. Alvarez-Calo wanted to speak with law enforcement about the cartel murder, and agreed to go to the Lakewood police station

for an interview, he was still “in custody” for purposes of custodial interrogation. He was still in custody of the Pierce County Jail pending resolution of his felony identify theft matter and had come from Lakewood Municipal Court in handcuffs. Importantly, the only way Mr. Alvarez-Calo could negotiate his way out of custody on those two cases was to give a statement and cooperate with Lakewood detectives. The critical inquiry was whether Mr. Alvarez-Calo’s freedom of movement was restricted. *Sargent*, 111 Wn. 2d at 649. Mr. Alvarez-Calo could not simply walk away from the detectives and terminate the conversation. He was in custody, and thus, *Miranda* warnings were required.

b. *Miranda* warnings were required when Mr. Alvarez-Calo first began incriminating himself.

When the investigative process becomes accusatorial, the need for *Miranda* warnings is triggered at the moment the inquiry “focuses” on an accused in custody and the questioning is intended to elicit incriminating statements. *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Further, once probable cause to arrest exists, any further interrogation becomes custodial and *Miranda* warnings are required. *State v. Wood*, 45 Wn. App. 299, 309, 725 P.2d 435 (1986), citing *State v. Creach*,

77 Wn.2d 194, 198, 461 P.2d 329 (1969). Police cannot avoid *Miranda* by delaying arrest. *State v. Dictado*, 102 Wn.2d 277, 291, 687 P.2d 172 (1984).

In *State v. Hawkins*, 27 Wn. App. 78, defendant Hawkins entered a police station on his own volition and volunteered information incriminating himself in robbery. Officers also knew Hawkins had a warrant in another state. *Miranda* warnings were not given, and the State disputed that Hawkins was in police custody. *Id.* at 82. Instead, the State argued that because Hawkins entered the police station on his own and voluntarily gave statements, *Miranda* warnings were not required. Additionally, the police did not expressly question Hawkins about the robbery. Instead, Hawkins provided the information on his own. The Court held that when a defendant is in police custody and provides incriminating information, *Miranda* warnings are required. *Id.* (“defendant’s actions in coming to police station on his own volition may have demonstrated that he wanted to turn himself in but his actions did not necessarily indicate that he wished to confess to [a separate crime] and relinquish his constitutional rights” and thus his statements made in response to custodial interrogation are inadmissible because they were obtained without benefit of *Miranda* warnings.)

In *State v. Lewis*, defendant Lewis voluntarily came to the prosecutor's office to answer questions about alleged securities violations. *State v. Lewis*, 32 Wn. App. 13, 645 P.2d 722 (1982). At the time Lewis entered the office, prosecutors had probable cause to believe violations occurred. The Court called the interrogation a "subterfuge interview whose sole purpose was to obtain additional incriminating information to facilitate a conviction before formally arresting" the suspect. *Id.* at 18. Further, the Court called the conduct "deceptive and manipulative police practices" that allowed "a perversion of Miranda." *Id.* "The police cannot manipulate the invocation of Miranda rights by simply delaying the time of formal arrest." *Id.*

In *State v. France*, law enforcement stopped a suspect on a sidewalk and questioned him about possibly violating a no contact order. *State v. France*, 129 Wn. App. 907, 909, 120 P.3d 654 (2005). Officers told him they "needed to clear it up" before he could leave. France almost immediately incriminated himself. *Id.* The Court held that Miranda warnings were required because "police had probable cause to make and arrest but delayed doing so to avoid giving a Miranda warning." *Id.* at 911. As Frances's statements were not harmless errors, his for violating the order was reversed. *Id.* at 911.

Here, Mr. Alvarez-Calo wanted to speak with law enforcement about his knowledge of a crime, but nothing suggested he understood, nor was advised, he could be incriminating himself. Probable cause to arrest him developed almost immediately during the questioning. Probable cause exists if “the facts and circumstances within the arresting officer’s knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.” *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). The determination rests on “the totality of facts and circumstances within the officer’s knowledge at the time of the arrest.” *State v. Barron*, 170 Wn. App. 742, 750, 285 P.3d 231 (2012).

Within the first few minutes, Mr. Alvarez-Calo implicated himself as an accomplice in large-scale heroin deals in Pierce and surrounding counties. Exhibit 277A at 10:36-10:37. Investigator Catlett, an extremely experienced drug detective with unique knowledge of large-volume drug dealing in Pierce and surrounding counties, who was on loan to the DEA, knew who and what Mr. Alvarez-Calo was talking about. RP 2 84-86. As the lead detective on the cartel murder, Detective Bunton knew the stash house where the cartel murder occurred concealed approximately a million dollars in illicit drugs and drug money. RP 14 1618.

In later questioning, Mr. Alvarez-Calo clearly implicated himself as an accomplice in the cartel murder, admitting that he connected his boss to people he believed would carry out the murder. Exhibit 277A 10:18-10:19. At no time did police advise Mr. Alvarez-Calo he was implicating himself, nor did they advise him of his constitutional rights, including the right to speak with an attorney. Exhibit 277A. Instead, law enforcement delayed arrest and continued to gather incriminating information from Mr. Alvarez-Calo.

The practices employed by Detectives Bunton and Catlett at this first interview were deceptive and manipulative as were the practices at the other three interviews. Exhibits 278A, 279A, 280A, 281A, 283A. Detectives knew they would later arrest Mr. Alvarez-Calo and cause him to be charged with first degree murder. They knew this charge could land Mr. Alvarez-Calo in prison for many years. And they continued to draw out incriminating information over the course of several interviews, delaying the formal arrest until they were confident they had everything needed to convict Mr. Alvarez-Calo. Exhibits 277A, 278A, 279A, 280A, 281A, 283A. Not once during the interviews on February 22, March 18, March 22, or March 26, did detectives ever communicate *Miranda* warnings or otherwise ask Mr. Alvarez-Calo whether he wanted to proceed without an

attorney. Miranda warnings were required the moment the detectives had probable cause to arrest Mr. Alvarez-Calo. Because the detectives proceeded to interview Mr. Alvarez-Calo without the required warnings, the trial court erred in not suppressing Mr. Alvarez-Calo's statements.

c. Law enforcement circumvented Mr. Alvarez-Calo's right to counsel.

Mr. Alvarez-Calo had a right to counsel under the Fifth Amendment as well as the Sixth Amendment. Both rights to counsel were circumvented by Lakewood detectives.

The right to counsel protected by the Sixth Amendment does not come into play until the State initiates adversarial proceedings against a defendant. *United States v. Gouveia*, 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984); *State v. Everybodytalksabout*, 161 Wn.2d 702, 707, 166 P.3d 693 (2007). However, a defendant is entitled to the assistance of counsel under the Fifth Amendment to protect his right against self-incrimination. In *Miranda*, the Court recognized that the right to have counsel present during a custodial interrogation is "indispensable to the protection of the Fifth Amendment privilege." *Miranda*, 384 U.S. at 469; *See Johnson v. New Jersey*, 384 U.S. 719, 729, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) ("Our opinion in *Miranda* makes it clear that the prime purpose of

these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice.”)

Here, the Lakewood detectives never once in the initial three interviews advised Mr. Alvarez-Calo that he had a right to remain silent nor that he had a right to an attorney. Exhibits 277A, 278A, 279A, 280A, 281A. They did not advise him that anything he said to detectives would be used against him. Detectives did this despite the fact that Mr. Alvarez-Calo was subjected to custodial interrogation at the Lakewood Police Department. Their excuse was because “he was not a suspect” at the time of questioning. RP 2 52. But, detectives learned in the first few minutes that Mr. Alvarez-Calo was implicating himself in large scale drug distribution and as an accomplice in the murder. Exhibit 277A 10:14-15, 10:18-21, 10:23-25. They did not stop to advise Mr. Alvarez-Calo of his right to seek advice from an attorney prior to continuing to implicate himself in very serious crimes. Detectives intentionally circumvented Mr. Alvarez-Calo’s Fifth Amendment right to counsel by never advising him of his *Miranda* rights. Further, detectives knew that Mr. Alvarez-Calo was represented by Mary Kay High and that Ms. High did not want her client to be questioned without her present. Motion Exhibit 12. Yet, they questioned him anyway.

Once the right to counsel has attached, the State is prohibited from knowingly circumventing that requirement, and from deliberately eliciting information in contravention of that requirement. *State v. Everybodytalksabout*, 161 Wn.2d at 708. The Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached.” *Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). However, when a state agent knows that an accused is represented by counsel and obtains statements directly related to a crime without the benefit of counsel such conduct violates the Sixth Amendment right to counsel. *Everybodytalksabout*, 161 Wn.2d 702 (unrepresented defendant's presentence interview with community corrections officer (CCO) violated Sixth Amendment guaranty of assistance of counsel, where CCO expressly asked defendant about circumstances of crime and defendant's statements were subsequently used for the adversarial purpose of convicting him in a subsequent retrial).

Here, the detectives knew that Mr. Alvarez-Calo had two different attorneys, Mr. Harmell and Ms. High, representing him in the two separate courts. RP 2 31. They knowingly circumvented his right to counsel by pressuring him to provide information by telling him that cooperating

would get him released from jail. They did not notify his counsel, Mary Kay High, prior to questioning him. Instead, they deliberately elicited incriminating statements without ever explaining that Mr. Alvarez-Calo had the right to have his attorney present for any interviews. In doing so, law enforcement obtained statements in violation of Mr. Alvarez-Calo's Sixth Amendment rights. Thus, the remedy is suppression of all statements given without his attorney present. *State v. Pierce*, 169 Wn. App. 533, 551, 280 P.3d 1158 (2012).

d. Mr. Alvarez-Calo's statements must be suppressed because his attorney was ineffective.

Mr. Alvarez-Calo had a Fifth Amendment right to effective assistance of counsel during custodial interrogation. An attorney's advice to make inculpatory statements to police is deficient performance. Mr. Alvarez-Calo's Lakewood attorney, Mr. Harmell, was ineffective in his representation of Mr. Alvarez-Calo when he allowed him to make a proffer about an alleged cartel murder without properly advising him of the risks prior to doing so, and allowed him to be questioned by the detectives without counsel present.

In a recent case of first impression, the Massachusetts Supreme Court held that a person's Fifth Amendment right to speak with counsel is

not actualized or substantively meaningful if counsel fails to provide at least minimally competent advice. *Com v. Celester*, 473 Mass. 553, 45 N.E.3d 539 (2016). The facts here are exceptionally similar to *Celester*. In that case, police sought an interview with a suspect for a murder. The suspect thought that he was being questioned as a witness. The suspect obtained counsel. Counsel accompanied him to the custodial interrogation. *Miranda* warnings were given, and the suspect acknowledged those rights and waived them in front of counsel. Counsel then allowed his client to confess. The defendant later signed an affidavit saying that he would have never made a statement had he known that he was a suspect in the murder investigation and not simply a witness. After the statement, the suspect was arrested and charged with murder.

The Court held that the Fifth Amendment right to counsel during a custodial interrogation includes the right to effective assistance of counsel. 473 Mass. at 569. The defendant argued that his prior attorney provided ineffective assistance when the attorney advised him to make a statement to police that had an inculpatory effect – at a minimum it placed the defendant at the scene of a crime – and by providing such advice without conducting any investigation of the case. The Court agreed: “in this context, as the defendant’s lawyer, [he] had an obligation at the very least

to discuss with his client the self-incrimination privilege and the potential consequences of giving a statement to police.” *Id.* at 571.

The same is true here. Mr. Alvarez-Calo was never advised about the fact that his statements to the Lakewood detectives could be used against him, or establish the probable cause to charge him with a crime in a subsequent proceeding. Attorney Harmell never discussed qualified immunity, nor secured any type of proffer agreement. He never discussed what an accomplice meant, nor advised that Mr. Alvarez-Calo could be held accountable for someone else’s actions under the accomplice statute. RP 1 173. This is despite the fact that attorney Harmell was aware that Mr. Alvarez-Calo was admitting that he was at the scene of a murder. RP 2 155. Mr. Harmell knew that Mr. Alvarez-Calo was likely implicating himself, and yet he spent no more than twenty minutes gathering information from Mr. Alvarez-Calo to provide to detectives to facilitate the proffer. RP 1 168. He never actually advised Mr. Alvarez-Calo of his rights or the risks associated with providing information to the police. RP 1 173.

Further, unlike in *Celester*, where the defendant actually had the benefit of counsel present during the interview, here Mr. Harmell sent Mr. Alvarez-Calo away to be interrogated by detectives without counsel

present. In *Celester*, the defendant could have asked clarifying questions or received some assistance from counsel during the interview.

Here, however, Mr. Alvarez-Calo was abandoned without counsel's assistance during the interview.

Here, it is clear that Mr. Harmell's performance was deficient. He failed to properly investigate and advise Mr. Alvarez-Calo prior to allowing detectives to interrogate him. Further, he did not attend the questioning, nor contact Mr. Alvarez-Calo's felony attorney to inquire whether she could attend the questioning on behalf of Mr. Alvarez-Calo. This has been found to be deficient performance by another court, and this Court should find the same.

Mr. Harmell's failure to advise or properly represent Mr. Alvarez-Calo resulted in enormous prejudice to Mr. Alvarez-Calo's rights. The interrogations became the entire basis for the charges against Mr. Alvarez-Calo. Without his own incriminating statements, detectives would have never known about Mr. Alvarez-Calo or his supposed connection to this crime. It was a cold case. RP 2 23. Given the information Mr. Alvarez-Calo claimed to have, and the fact that this information caused Mr. Harmell to feel fearful for his own safety, RP 2 157, Mr. Harmell had a duty to his client to ensure that he was adequately protected from self-incrimination. Mr.

Harmell never advised Mr. Alvarez-Calo about the potential to be charged under accomplice liability. RP 2 173. This is despite Mr. Alvarez-Calo giving enough information for Mr. Harmell to believe that he might have been at the scene of the crime. RP 2 153-57. Knowing that Mr. Alvarez-Calo would likely implicate himself, Mr. Harmell allowed him to be escorted away by two Lakewood detectives in handcuffs to be interrogated. Had an attorney been present for this interview, Mr. Alvarez-Calo would have been properly advised that he was incriminating himself. He would have been able to consult with his attorney.

No competent attorney would allow his client to implicate himself in a murder without an immunity agreement. Thus, Mr. Harmell's failure to advise Mr. Alvarez-Calo properly or attend the interrogation of his client is ineffective assistance. Under the limited but analogous case law, the proper remedy is suppression of the statements.

e. All subsequent evidence gathered that flows from Mr. Alvarez-Calo's statements should be suppressed as fruit of the poisonous tree.

When custodial interrogation occurs, and *Miranda* warnings are not given, the only sufficient remedy is exclusion of unwarned statements. *Patane*, 542 U.S. at 631-32. Further, any and all derivative evidence obtained as a result of Mr. Alvarez-Calo's statements must be suppressed.

Our state's exclusionary rule, like its federal counterpart, aims to deter unlawful police conduct, but “its paramount concern is protecting an individual's right of privacy.” *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). It accomplishes this by closing the courtroom door to evidence gathered through illegal means. By design, then, it is concerned with the way evidence is obtained, with the legality of each link in the causal chain, not merely the last. *State v. Eserjose*, 171 Wn.2d 907, 918, 259 P.3d 172 (2011). Thus, any investigation and subsequent evidence gathered against Mr. Alvarez-Calo that was based on his illegally obtained statements to police must be suppressed. Trial court erred in refusing to do so.

**Issue 2. Calo’s attempted robbery conviction must be vacated and dismissed.**

a. The State did not prove beyond a reasonable doubt all of the elements of attempted first degree robbery.

The State did not prove that Mr. Calo, or an accomplice, intended to take property from or in the presence of another person, as required to support a conviction for attempted robbery. “Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Evidence is sufficient to support a conviction

only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* at 201.

To convict a defendant of attempted robbery, the State must prove that the defendant, or an accomplice, had the intent to commit the crime of robbery. RCW 9A.28.020. A robbery conviction requires taking property “from the person of another or in his or her presence[.]” RCW 9A.56.190. Accordingly, to convict Mr. Alvarez-Calo of attempted robbery, the State was required to prove that he intended to take property from, or in the presence of, another person. But the evidence presented by the State showed that Mr. Alvarez-Calo and the other men thought the apartment would be unoccupied. RP 19 2350. They did not expect or intend to take the money and drugs from or in the presence of Mendoza and Solis. They also did not attempt to take any property from either of the men in the apartment. RP 17 2017.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable

doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because no rational trier of fact could have found that Mr. Alvarez-Calo's accomplices intended to take property from or in the presence of another person, Alvarez-Calo's attempted first degree robbery conviction and its associated firearm special verdict must be reversed and dismissed with prejudice.

**Issue 3: Because the court merged count 1, murder in the first degree, with count 4, attempted robbery in the first degree, all references to count 4 should be stricken from the judgment and sentence.**

Mr. Alvarez-Calo is entitled to have all references to his attempted robbery in the first degree deleted from the judgment and sentence.

Our state constitution provides, "No person shall be twice put in jeopardy for the same offense." Art. I, § 9; accord, U.S. Const. Amend. V. If double jeopardy results from a conviction for more than one crime, the remedy is vacation of the lesser offense. *State v. Weber*, 159 Wn.2d 252, 265-66, 149 P.3d 646 (2006).

The trial court found the murder in the first degree and the predicate offense of attempted robbery in the first degree merged for jeopardy purposes. *In re Francis*, 170 Wn.2d 517, 527, 242 P.3d 866 (2010); RP 25 2830; CP 212-213. But a court may still violate double jeopardy

either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form, that the conviction nonetheless remains valid. *State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010). To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction. *Id.* A conviction that retains validity may cause adverse consequences and so constitutes punishment; at a minimum a conviction carries a societal stigma. *Ball v. United States*, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *State v. Calle*, 125 Wn.2d 769, 773-75, 888 P.2d 155 (1995).

Here the trial court only scratched over references to the attempted robbery on the judgment and sentence and left fully exposed reference to the jury having returned a special verdict on count 4, the attempted robbery conviction. The court's failure to excise all references to the attempted robbery in the first degree conviction still leaves Mr. Calo in jeopardy. Mr. Calo's case must be remanded to strike all references to count 4.

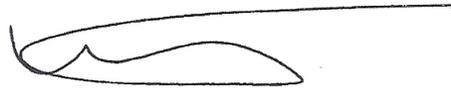
**E. CONCLUSION**

All of Mr. Alvarez-Calo's statements to Detective Bunton and Inspector Catlett should be suppressed and the case remanded for retrial.

The attempted robbery conviction should be dismissed for insufficient evidence.

In the alternative to reversal for a new trial, case should be remanded to strike any reference to the attempted robbery in first degree.

Respectfully submitted November 7, 2017.



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LISA E. TABBUT/WSBA 21344  
Attorney for William Alvarez-Calo

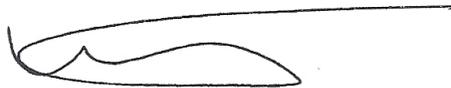
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Pierce County Prosecutor's Office, at [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us); (2) the Court of Appeals, Division II; and (3) I mailed it to William Alvarez-Calo/DOC# 395946, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362.

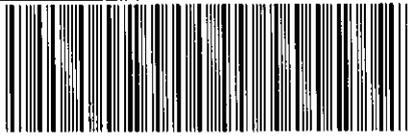
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 7, 2017, in Winthrop, Washington.

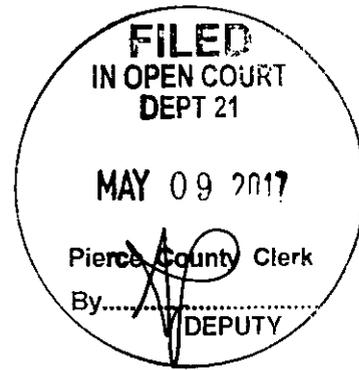
A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for William Alvarez-Calo, Appellant

# APPENDIX



13-1-02553-3 49200096 ORDYMT 05-09-17



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

WILLIAM MANUEL ALVAREZ CALO,

Defendant.

CAUSE NO. 13-1-025<sup>5</sup>3-3

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER having come on for hearing before the Honorable Judge Cuthbertson on September 22, 2016 to address defendant's motion regarding the admissibility of statements pursuant to court rule 3.5. The defendant waived his attorney client privilege with his prior attorneys for the purposes of the CrR 3.5 motion. The court heard testimony from Mr. Alvarez Calo's prior attorneys Kristin Fay, Ken Harmell, and Mary Kay High, as well as witnesses Detective Les Bunton, Investigator Jason Catlett, and Deputy Prosecuting Attorney Sven Nelson. The court also reviewed court documents and watched the audio/video recordings of the interviews made on February 22, 2013, March 18, 2013, March 26<sup>th</sup>, 2013 and June 21<sup>st</sup>, 2013 at the Lakewood Police Department.

The court made its initial ruling on October 6, 2016, finding that the interviews from February 22, 2013 and March 18, 2013 were admissible but that the interviews from March 26<sup>th</sup>, 2013 and June 21<sup>st</sup>, 2013 were not. The State filed a motion to reconsider on October 7, 2016. On October

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1 17<sup>th</sup>, 2016, the court granted the State's motion for reconsideration and found that the interviews  
2 from March 26<sup>th</sup>, 2013 and June 21<sup>st</sup>, 2013 were also admissible.

3 The court having reviewed the record and files herein, the briefing and oral arguments of  
4 counsel, reviewed statutes and case law and deeming itself fully advised in the premises; NOW,  
5 THEREFORE, the Court enters the following:

6  
7 **FINDINGS OF FACT**

- 8 1. On February 11, 2013, the defendant requested that his attorney at Lakewood Municipal Court,  
9 Ms. Fay, put him in contact with the officers investigating the murder of Jaime Diaz-Solis.  
10 2. The defendant was in custody at the time on a Pierce County Superior Court matter and was  
11 housed at the Pierce County Jail.  
12 3. The defendant indicated to Ms. Fay that he wanted to provide information in exchange for his  
13 cases being dismissed. Ms. Fay decided to continue the defendant's misdemeanor trial to seek  
14 guidance from her supervisor.  
15 4. Ms. Fay attempted to contact Mary Kay High, the defendant's attorney in the Pierce County  
16 Superior Court matter, and also informed her supervisor Ken Harmell. Ms. High did not speak  
17 with either Ken Harmell or Kristin Fay.  
18 5. Ms. Fay caused a message to be sent to Detective Bunton regarding the defendant's request  
19 sometime after February 11<sup>th</sup>, 2013.  
20 6. The defendant next appeared in Lakewood Municipal Court on February 22, 2013. The defendant  
21 was transported by the Pierce County Jail to Lakewood for the hearing.  
22 7. The defendant was represented by Ms. Fay's supervisor Ken Harmell on February 22, 2013.  
23 Officers Jason Catlett and Les Bunton also appeared and contacted Mr. Harnell about speaking  
24 with the defendant.  
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8. Mr. Harmell met with the defendant and a Spanish interpreter for approximately 20 to 30 minutes.
9. Mr. Harmell advised the defendant that it was a bad idea to talk with the detectives. Mr. Harmell was concerned about Mr. Calo's safety because of the nature of the information he was going to provide.
10. Mr. Harmell tried to talk the defendant out of meeting with the officers but the defendant was not concerned about being implicated and was positive that he would not get caught up with the murder.
11. Mr. Harmell declined to accompany Mr. Calo to the interview.
12. The defendant, acting against legal advice, agreed to meet with the officers on February 22, 2013, at the Lakewood Police Station.
13. Mr. Harmell suggested that the defendant's cases in Lakewood Municipal Court and Pierce County Superior Court be dismissed and subsequently spoke to prosecutors regarding both cases.
14. Mr. Harmell attempted to contact Mary Kay High regarding the resolution of the felony case.
15. The defendant was transported by the officers to the Lakewood Police Department for the interview. The defendant was wearing jail clothing and handcuffed. The defendant was in custody and not free to leave because of the underlying felony case.
16. During the interview, the defendant spoke with the officers and discussed his contacts and dealing with the leaders of a local narcotics cartel and implicated "Borrego" and Mr. Alberto Mendoza. The defendant was not advised of *Miranda* warnings prior to or during this interview.
17. The defendant was not provided with a Spanish language interpreter at this interview but Investigator Catlett periodically communicated with the defendant in Spanish.

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18. Mr. Harmell suggested that the defendant's cases in Lakewood Municipal Court and the felony in Pierce County Superior Court be dismissed and subsequently spoke to prosecutor's regarding both cases.
19. The defendant's Lakewood Municipal case was dismissed on March 5<sup>th</sup>, 2013 and the identity theft in the second degree felony charge in Pierce County Superior Court was dismissed and the defendant pleaded guilty to one count of driving while license suspended in the second degree on March 13, 2013.
20. The defendant met with the officers again on March 18, 2013. The defendant was not in custody and was free to leave. The defendant was not advised of *Miranda* warnings. The defendant was not intoxicated.
21. The defendant provided additional details regarding the murder and drug trafficking and identified suspects from photo montages. The defendant was confronted with evidence that contradicted his first statement about who was given a ride away from the murder scene.
22. The defendant was acting as a paid informant at this time and requested money from Investigator Catlett at the conclusion of the interview which Investigator Catlett agreed to provide.
23. The defendant met with Investigator Catlett on at least two other occasions where statements were not recorded.
24. On March 26<sup>th</sup>, 2013, the defendant again meets with the officers at the Lakewood Police Department. At this time, the officers had probable cause to believe that the defendant was a co-conspirator or was rendering criminal assistance. The defendant should have been given *Miranda* warnings.
25. The defendant was not advised of *Miranda* warnings. The defendant made incriminating statements including that he had a part in arranging the hit to happen.

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- 1 26. The March 26, 2013 interview was not custodial and the defendant was free to leave.
- 2 27. On June 21, 2013, the officers arranged to meet with the defendant and picked him up in an
- 3 unmarked police vehicle. The defendant was advised of *Miranda* warnings. The defendant was
- 4 in custody and was not free to leave.
- 5 28. The officers had already consulted with the prosecutor and had probable cause to arrest the
- 6 defendant for murder and conspiracy.
- 7 29. The defendant stated that he did not read English well because he is dyslexic. Investigator Catlett
- 8 read the warning to him in English. The defendant signed the waiver form.
- 9 30. The defendant agreed to answer more questions and talked with the officers for approximately 45
- 10 minutes to an hour and then the officers placed the defendant under arrest.
- 11 31. The defendant could not make a knowing intelligent or voluntary waiver of his rights without first
- 12 knowing that he is a suspect.

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14 **DISPUTED FACTS**

- 15 1. Mary Kay High met with the defendant for a scheduled pre-trial conference on February 20<sup>th</sup>,
- 16 2013. The court records indicate the hearing took place but Ms. High does not have an
- 17 independent recollection.
- 18 2. A plea set in Pierce County Superior Court on the defendant's case for February 27<sup>th</sup>, 2013 was
- 19 struck. Ms. High does not have an independent recollection of this hearing.
- 20 3. The police may have had probable cause to arrest the defendant after the first interview for drug
- 21 trafficking.
- 22 4. Whether the officers knew the defendant had a prior felony conviction at the time they frisked
- 23 him and requested he leave his gun at the house.

24 BASED upon the foregoing FINDINGS OF FACT, the Court enters the following:

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CONCLUSIONS OF LAW

1. The defendant voluntarily contacted police and wanted to speak with them.
2. The defendant's statements on February 22, 2103, were voluntarily made and he was not in custody or under investigation for the murder.
3. The statements made by the defendant on February 22, 2013 to the detectives are admissible.
4. The interview made on February 22, 2013 does not taint any further interviews with the defendant as the officers did not initiate this contact.
5. The defendant was not in custody on March 18, 2013 and the statements made to detectives were voluntary.
6. The statements made by the defendant on March 18, 2013 to the detectives are admissible.
7. The defendant was not in custody on March 26<sup>th</sup>, 2013 but was a suspect in the murder.
8. Because the officers had probable cause to arrest the defendant, the statements made on March 26<sup>th</sup>, 2013 are not admissible under *State v. Dictado* 102 Wn.2d 277 (1984).
9. The defendant was in custody on June 21<sup>st</sup>, 2013, and was advised of his *Miranda* warnings.
10. The statements made on June 21<sup>st</sup>, 2013 are not admissible as the defendant did not know the officers had probable cause to arrest him and did not place him under arrest for 45 minutes to 1 hour.
11. After reconsideration, the court finds that the *Dictado* line of cases has been abrogated by *State v. Harris* 106 Wn.2d 784 (1996) and *State v. Lorenz* 152 Wn.2d 22 (2004).
12. The statements made by the defendant on March 26<sup>th</sup>, 2013 and June 21<sup>st</sup>, 2013 are admissible.

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The Court having entered the fore stated FINDINGS OF FACT AND CONCLUSIONS OF LAW, NOW, THEREFORE, it is hereby:

**ORDER**

ORDERED, ADJUDGED AND DECREED that the defense 3.5 motion to suppress oral testimony is hereby denied.

DATED this May 8, 2017.

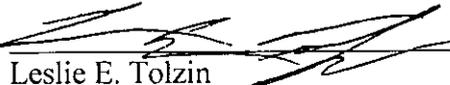
  
FRANK CUTHBERTSON  
JUDGE

Presented by:



Maureen C. Goodman  
Deputy Prosecuting Attorney  
WSB No. 34017

*Approved as To Form only.*



Leslie E. Tolzin  
Attorney for the Defense  
WSB No. 20177



**LAW OFFICE OF LISA E TABBUT**

**November 07, 2017 - 3:32 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49794-8  
**Appellate Court Case Title:** State of Washington, Respondent v. William Alvarez-Calo, Appellant  
**Superior Court Case Number:** 13-1-02553-3

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