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SUPREME COURT NO. 88577-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CESAR TROCHEZ-JIMENEZ,

Petitioner.

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

The Honorable Catherine Shaffer, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. ISSUE

Petitioner was arrested in Canada for violating Canadian law. He was advised of his right to counsel under the Canadian Charter and requested an attorney. Later that evening, King County detectives solicited a waiver of his right to counsel and questioned him about a homicide. Must petitioner's statements to the detectives be suppressed under Edwards v. Arizona<sup>1</sup>?

B. STATEMENT OF THE CASE<sup>2</sup>

Petitioner Cesar Trochez-Jimenez testified he shot Mario Batiz, his girlfriend's cousin, in self-defense. 14RP<sup>3</sup> 50. He felt he could not call the police because he is a citizen of Honduras and in the United States illegally. He fled to Canada instead. 15RP 5-6, 34-35.

The next day, after arriving in Vancouver, he was arrested for violating Canadian immigration law. 2RP 56. At 5:50 p.m., constable Jeffrey informed Trochez that, under the Canadian Charter of Rights and

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<sup>1</sup> Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

<sup>2</sup> This Statement of the Case is intended as a brief summary. Additional facts are provided in the Brief of Appellant in the Court of Appeals and the Petition for Review.

<sup>3</sup> There are 19 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 10, 2010; 2RP – Aug. 11-13, 16, 2010, Oct. 1, 2010; 3RP – Aug. 30, 2010; 4RP – Oct. 18, 2010; 5RP – Oct. 19, 2010; 6RP – Jan. 3, 2011; 7RP – Jan. 4, 2011; 8RP – Jan. 5, 2011; 9RP – Jan. 6, 2011; 10RP – Jan. 10, 2011; 11RP – Jan. 11, 2011; 12RP – Jan. 12, 2011; 13RP – Jan. 13, 2011; 14RP – Jan. 18, 2011; 15RP – Jan. 19, 2011; 16RP – Jan. 20, 2011; 17RP – Jan. 24, 2011; 18RP – Jan. 25, 2011; 19RP – Apr. 29, 2011.

Freedoms, he had a right to an attorney “without charge” and “without delay.” 2RP 56.<sup>4</sup>

Trochez requested an attorney. 2RP 58. No attorney was provided at that time. 2RP 71. The constable could not say whether Trochez was ever able to consult with an attorney. 2RP 72-73.

Later that evening, King County detectives arrived in Vancouver to interview Trochez. 1RP 89-90. They had to wait because Canadian immigration authorities were interviewing him. 1RP 90. It was after midnight when they were finally able to speak with Trochez. 1RP 127. Trochez had been in custody for at least six hours. 9RP 109.

Because Trochez’ English was limited, a constable who was a native speaker of Spanish assisted. 1RP 90; 11RP 24-26. He read Trochez his Miranda<sup>5</sup> rights in Spanish from a pre-printed King County form. 2RP 15-16. He testified Trochez appeared to understand, and did not, at that time, invoke his rights to counsel or to remain silent. 2RP 16-17. The King

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<sup>4</sup> Constable Jeffrey testified he informed Trochez of his Canadian Charter right to an attorney as follows:

I am arresting you in this case with respect to your immigration status. It is my duty to inform you you have the right to retain and instruct counsel in private without delay. You may call any lawyer you want. There’s a 24-hour telephone service available which provides a legal aid duty lawyer who can give you legal advice in private. This advice is given without charge, and a legal aid lawyer can explain the legal aid plan to you. If you wish to contact a legal aid duty lawyer, I can provide you with the telephone number.

2RP 57.

<sup>5</sup> Miranda v. Arizona, 384 U.S. 436, 458, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

County detectives also testified Trochez appeared to understand, there were no threats or promises made to him, and he did not exercise his right to silence or to an attorney. 1RP 102-03; 2RP 37-38.

Trochez testified he did not read well, even in Spanish, and his peasant vocabulary was insufficient to understand the legal terminology in the Miranda warnings. 2RP 84-85. He did not read the rights form and waiver before signing because he was too nervous and it was too difficult. 2RP 86-87. He believed the right to silence meant that, like his father used to tell him, he must remain silent except to answer the questions put to him. 2RP 89, 103. When informed of his right to an attorney, he said, "Okay," to indicate that he accepted and agreed to have an attorney. 2RP 90. He assumed he would have an attorney because he had already asked the Canadian authorities. 2RP 102, 105.

Trochez moved to suppress his statements because the State failed to scrupulously honor his request for an attorney. 5RP 78, 80. The trial court denied the motion and concluded he did not invoke his right to counsel by answering, "Yes" when the constable asked if he wanted an attorney. CP 83; 5RP 98. During its case in chief, the State presented Trochez' statements that he was "furious" when he shot Batiz. 14RP 95.

On appeal, Trochez argued his statements should have been suppressed because he unequivocally invoked his right to counsel, and the

subsequent waiver was not valid under Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). The Court of Appeals rejected this argument, holding that an invocation of a right to counsel made to foreign officials under a foreign legal source does not trigger the Edwards rule. State v. Trochez-Jimenez, 173 Wn. App. 423, 434, 294 P.3d 783 (2013). This Court granted review.

C. ARGUMENT

*EDWARDS* REQUIRES SUPPRESSION OF TROCHEZ' STATEMENTS BECAUSE POLICE FAILED TO HONOR HIS UNEQUIVOCAL REQUEST FOR COUNSEL.

a. Summary of Argument

Once an individual has clearly invoked the right to counsel during custodial interrogation, police may not question him further, on any topic, until an attorney is present. Minnick v. Mississippi, 498 U.S. 146, 154, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); Arizona v. Roberson, 486 U.S. 675, 685-86, 687, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988). Police have a duty to determine whether the person before them is one they can legally interrogate. Roberson, 486 U.S. at 687. The prohibition on further questioning includes soliciting a waiver of the right to counsel after invocation of the same right. Edwards, 451 U.S. at 484-85. These bright line rules have become a routine part of police procedure. Dickerson v.

United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

Statements obtained in violation of these rules must be suppressed. Edwards, 451 at 486-87. Whether suppression is required is a legal conclusion reviewed de novo. United States v. Connell, 869 F.2d 1349, 1351 (9th Cir. 1989); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Every court that has considered the issue, including the Court of Appeals in this case, has assumed the Miranda/Edwards framework applies to questioning by United States law enforcement outside the United States. In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177, 201 (2d Cir. 2008) (foreign nationals interrogated overseas but tried in civilian courts in the United States are protected by the self-incrimination clause); United States v. Rommy, 506 F.3d 108, 131 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008) (applying Fifth Amendment protections “to the custodial interrogation of a foreign national outside the United States by [U.S.] agents . . . engaged in a criminal investigation.”). This Court should apply the Miranda/Edwards framework here because the Fifth Amendment is a trial right, and the violation occurs, not at the time the statement is taken, but when the statement is used as evidence in

a United States court. United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

In this case, Trochez clearly and unequivocally asked constable Jeffrey for an attorney. 2RP 56, 58. The subsequent request for a waiver of his right to counsel, in the face of Trochez' invocation of the right, raises the same specter of coercion that troubled the Edwards court. Roberson, 486 U.S. at 685-86. This Court should not follow the military courts and the one state appellate court that have carved out an overseas exception to the Edwards rule. United States v. Coleman, 25 M.J. 679 (A.C.M.R. 1987), aff'd, 26 M.J. 451 (C.M.A. 1988); Holland v. Florida, 813 So.2d 1007 (Fla. Dist. Ct. App. 2002). That exception fails to provide both the broad Fifth Amendment protection and the clear guidance to law enforcement that are the guiding principles behind the Miranda/Edwards line of cases.

b. Courts Should Not Read Exceptions into Trochez' Clear and Unequivocal Request for Counsel.

Whether an accused person has invoked the right to counsel is an objective inquiry. Davis v. United States, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). The right to counsel is invoked by language that "articulate[s] [a] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would

understand the statement to be a request for an attorney.” Id. at 459. The goal of this rule is “[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations.” Id. at 458-59.

When a request for counsel is expressly limited, police may question an accused person within those limitations. See Connecticut v. Barrett, 479 U.S. 523, 529, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987) (Barrett desired counsel before making written statement; Fifth Amendment was not violated by admission of oral confession); United States v. Dock, 40 M.J. 112 (C.M.A. 1994) (no Miranda violation where accused expressed a desire not to talk to German police without an attorney but indicated he would talk to United States officials). But officers are not required to speculate whether, under the circumstances, it is likely the accused wishes to have counsel. Id. at 459. With no express limitation on Trochez’ request for counsel, courts should avoid “difficulties of proof” and decline to speculate about the impact of the international circumstances on that request. Davis, 512 U.S. at 458-59.<sup>6</sup>

There is no evidence in this case that Trochez’ request for counsel was in any way limited. Even if it could be assumed that a native speaker of English, born and raised in the United States wanted a lawyer only in

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<sup>6</sup> But see United States v. Vidal, 23 M.J. 319, 322–323 (C.M.A. 1987) (speculating that a request for counsel made to foreign authorities may indicate mere unfamiliarity with foreign legal system).

dealing with foreign law enforcement, the same assumption cannot be made about Trochez. Trochez was born and raised in Honduras. His English is limited. A better assumption in this case would be that he is equally ill at ease dealing with United States and Canadian law enforcement.

A request for counsel during custodial interrogation signals, in terms clear to any law enforcement officer, the individual's desire not to deal with police without counsel. Davis, 512 U.S. at 459; Miranda, 384 U.S. at 484-85. A layperson should not also be required to specify the legal source of the right and whether that request applies only to dealings with the foreign authorities or to United States officials as well. This is an unreasonable burden to place on a person deprived of his or her freedom and taken into custody in a foreign land.

c. The Failure to Honor a Request for Counsel Presents the Same Concerns for Coercion in the International Context.

“When a suspect understands his (expressed) wishes to have been ignored . . . he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.” Davis, 512 U.S. at 472-73 (Souter, J., concurring). Preventing this type of coercion was the goal of the Edwards decision. Maryland v. Shatzer, 559 U.S. 98, 105, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). Police may not “take advantage of

the mounting coercive pressures of ‘prolonged police custody.’” Shatzer, 559 U.S. at 105 (quoting Roberson, 486 U.S. at 686).

The purpose of the rule invalidating subsequent waivers once a person has invoked the right to counsel is to “‘show the individual that his interrogators are prepared to recognize his privilege.’” Davis, 512 U.S. at 472 (Souter, J., concurring) (quoting Miranda, 384 U.S. at 468). The principle that “subsequent requests for interrogation pose a significantly greater risk of coercion” holds true in the international context. Shatzer, 559 U.S. at 105 (quoting Roberson, 486 U.S., at 686).

The “mounting coercive pressures of ‘prolonged police custody’” are no different when in the custody of foreign officials. Shatzer, 559 U.S. at 105. Like those arrested in the United States, persons arrested on foreign soil are “‘thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.’” Davis, 512 U.S. at 469 (Souter, J., concurring) (quoting Miranda, 384 U.S. at 457). Many are “woefully ignorant” and many more are “intimidated by the interrogation process” or “overwhelmed by the uncertainty of their predicament.” Davis, 512 U.S. at 469 (Souter, J., concurring). As a result, the ability to speak assertively may abandon them. Id.

In the paradigmatic Edwards situation, the individual is cut off from his normal life and companions and is subjected to a police-

dominated environment “where his captors ‘appear to control his fate.’” Shatzer, 559 U.S. at 106 (quoting Illinois v. Perkins, 496 U.S. 292, 297, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990)). The perception of isolation and police control of one’s fate is no different in the international circumstances of this case.

The Edwards prohibition on subsequent waivers applies “of course” when subsequent interrogation pertains to a different crime or involves a different law enforcement authority. Shatzer, 559 U.S. at 109. The fact that the different law enforcement agency in this case was Canadian is of no matter. “The only logical endpoint of Edwards disability is termination of Miranda custody and any of its lingering effects.” Shatzer, 559 U.S. at 108. The arrival of King County detectives should not be presumed to be such a relief that it amounts to the termination of custody’s lingering effects.

The Court of Appeals pointed out that there was no indication the Canadian officials were acting at the behest of King County detectives or in any way working in concert with them. Trochez, 173 Wn. App. at 434. But this is not the relevant inquiry. The question is how it appears to the individual. “Questioning by captors, who appear to control the suspect’s fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect’s will.” Perkins, 496 U.S. at 297.

Edwards requires assurance that police will honor a request for counsel. Dickerson, 530 U.S. at 442. It prohibits coercion via suggestion that such a request will be futile. Davis, 512 U.S. at 472-73 (Souter, J., concurring). When King County detectives solicited a waiver of Trochez' constitutional rights, the suggestion was that his previous request was in vain. The international context does not mitigate the presumption of coercion required by the Edwards rule.

d. This Court Should Not Reduce the Protections of Miranda and Edwards.

Edwards and Miranda are not mere procedural rules. They are constitutional principles that may not be overborne by legislative will. Dickerson, 530 U.S. at 432. The Miranda framework is overbroad by design: "The failure of police to administer Miranda warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." Oregon v. Elstad, 470 U.S. 298, 310, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222 (1985) (citing New York v. Quarles, 467 U.S. 649, 654 and n. 5, 104 S. Ct. 262, 681 L. Ed. 2d 550 (1984); Miranda, 384 U.S. at 457).

Because the broad scope of the Miranda/Edwards framework is intentional, the United States Supreme Court has been cautious in limiting

the scope of its protection. The United States Supreme Court has rejected proposed exceptions to the Edwards rule that were “inconsistent with Edwards’ purpose.” Minnick, 498 U.S. at 154. The Court in Minnick declared, “[N]either admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause. The Edwards rule sets forth a specific standard to fulfill these purposes, and we have declined to confine it in other instances.” 498 U.S. at 155-56.

Two principles have guided the refinement of Miranda’s sweeping mandate. First, the Miranda rules must be applied so as to “assure that the individual’s right to choose between speech and silence remains unfettered throughout the interrogation process.” Davis, 512 U.S. at 468-69 (Souter, J., concurring). Second, the rules must be consistent with practical realities. Id.

Simply put, Miranda should be applied, “where its benefits outweigh its costs.” Shatzer, 559 U.S. at 106. Specifically, courts should consider the protection provided for the Fifth Amendment rights of individuals and any additional burden placed on law enforcement. See Elstad, 470 U.S. at 312 (“This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual’s interest in not being *compelled* to testify against himself.”).

The Court of Appeals rejected Trochez' claim for two reasons. First, the court concluded invocation of a right to counsel under a foreign document does not trigger the protections of Miranda/Edwards when United States officials were not involved in Trochez' advisement of rights and interrogation by Canadian immigration. Trochez, 173 Wn. App. at 433-34. The court also declared there was no "forum" in which the Fifth Amendment right to counsel could be invoked until the King County detectives arrived. Id. at 434.

The Court of Appeals did not discuss whether the right to counsel is weakened when a request made to authorities in Canada can be ignored by United States law enforcement. It did not discuss whether it is reasonable to expect a person in custody to distinguish between the right to an attorney under Canadian or United States law. It did not discuss whether the procedure sufficiently protected Trochez from the inherently coercive nature of custodial interrogation. Nor did it discuss whether requiring the police to determine whether Trochez had asked for an attorney would be a burden on law enforcement.

Failing to apply Edwards in this case increases the likelihood that coerced statements will be admitted at trial. It is, therefore, inconsistent with Edwards' purpose of providing "both particular and systemic

assurances” that waivers are not the result of “the coercive pressures of custody.” Minnick, 498 U.S. at 155.

Applying Edwards in this case places no additional burden on law enforcement. The procedures required by Miranda and Edwards have now become “embedded in routine police practice.” Dickerson, 530 U.S. at 443. Trochez asks merely that police follow the routine practice they use every time they assume custody from law enforcement in another jurisdiction and determine whether a request for counsel has been made.

“The merit of the Edwards decision lies in the clarity of its command and the certainty of its application.” Minnick, 498 U.S. at 151. The Court of Appeals decision makes that command less clear and its application less certain. This Court should reverse.

e. The State Cannot Prove this Error Did Not Contribute to the Verdict.

When a statement is admitted in violation of Miranda, the error is of constitutional magnitude. State v. France, 121 Wn. App. 394, 401-02, 88 P.3d 1003 (2004); see also Dickerson, 530 U.S. at 444 (holding Miranda is a constitutional rule, not merely evidentiary). Constitutional errors are presumed prejudicial unless the State can prove beyond a reasonable doubt that the error did not contribute to the jury’s verdict. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S. Ct. 1246, 113 L. Ed. 2d

302 (1991) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); France, 121 Wn. App. at 401-02. The State cannot meet that burden because the State relied heavily on Trochez' statement that he was furious in countering his claim of self-defense. 16RP 23, 27, 31-32. This Court should apply the well-settled principles of Edwards and reverse because police failed to honor his invocation of the right to counsel. 451 U.S. at 585-85.

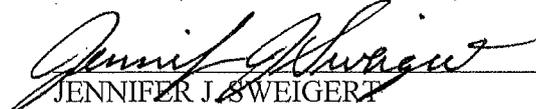
D. CONCLUSION

Because his statements were admitted in violation of the Fifth and Fourteenth Amendments as well as Article I, Section 9 of the Washington Constitution, Trochez asks this Court to reverse the Court of Appeals decision and remand for a new trial.

DATED this 18<sup>th</sup> day of September, 2013.

Respectfully submitted,

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Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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|------------------------|---|---------------------------|
| STATE OF WASHINGTON    | ) |                           |
|                        | ) |                           |
| Respondent,            | ) |                           |
|                        | ) | SUPREME COURT NO. 88577-0 |
| v.                     | ) |                           |
|                        | ) |                           |
| CESAR TROCHEZ-JIMENEZ, | ) |                           |
|                        | ) |                           |
| Petitioner.            | ) |                           |

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18<sup>TH</sup> DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CESAR TROCHEZ-JIMENEZ  
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COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2013.

X Patrick Mayovsky

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**Subject:** State v. Cesar Trochez-Jimenez, No. 88577-0

Attached for filing today in the above referenced case is a supplemental brief of petitioner. Thank you.

State v. Cesar Trochez-Jimenez  
No. 88577-0  
Supplemental Brief of Petitioner

Filed By:  
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