Supreme Court No. 99195-2
(COA No. 80372-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HARRIS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Harris, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Harris seeks review of the Court of Appeals decision dated October 5, 2020, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err by not suppressing a statement resulting from a two-step interrogation process, where the police did not provide *Miranda* warnings to Mr. Harris until placing him in a compromised position where he had no choice but to confess?

2. Did the trial court err when it did not believe it had the discretion to impose a sentence below the standard range, as authorized by *State v. Alexander*? [1]

[1] *State v. Alexander*, 125 Wn.2d 717, 888 P.2d 1169 (1995).

D. STATEMENT OF THE CASE

The two-part interrogation at issue here took place in the police precinct after the police claimed they saw Mr. Harris provide methamphetamines to an officer in a park close to Seattle Community College. RP 237, RP 56. Mr. Harris purportedly opened a bag and let several rocks drop into the officer's open hand. RP 56-57. The officer then gave Mr. Harris 20 dollars. *Id*.

The police arrested Mr. Harris almost immediately. RP 59. The police him to the police precinct, where Mr. Harris met Officer Matthew Blackburn, who interrogated Mr. Harris first about becoming a cooperating witness and then about the charged crime. *Id*.

Officer Blackburn told Mr. Harris that by agreeing to be a confidential informant, he would be released. RP 242. If his cooperation was successful, it could result in the dismissal of his charges. RP 244. Mr. Harris agreed to these terms, signing a document given to him by the officers. RP 243.

The officer then turned to the second part of his interrogation. The officer expected Mr. Harris to provide a recorded statement admitting to the crime for which he was arrested. RP 245. Mr. Harris agreed to give a recorded statement to the officer. RP 246.

The second part of the interrogation took place in the same interrogation room. RP 237. Unlike the first part, it was recorded. On the recording, Officer Blackburn advised Mr. Harris of his rights against self-incrimination, which he agreed to waive. RP 246. The officer did not warn Mr. Harris his pre-*Miranda* statements were not likely to be admissible. *Id*. Mr. Harris then confessed. *Id*. Mr. Harris was not successful in his attempt to challenge the statement. RP 631.

Mr. Harris pled not guilty and went to trial. At trial, the officer who made the buy admitted he did not see Mr. Harris arrested. RP 390. Likewise, the officers admitted they had no photographic or video evidence of the sale, only having recorded Mr. Harris' arrest and drug recovery. RP 456.

Very little other evidence suggested Mr. Harris was selling drugs before his arrest. At best, Mr. Harris was a low-level dealer. RP 479. Mr. Harris did not have much money on him when arrested. RP 459. There was no nearby stash, ledger, scales, or other indicia of sales. RP 401-02. The drugs were not even individually wrapped. RP 384. He had only one bag of drugs. RP 389.

He was found guilty of delivery of a controlled substance. RP 647. Mr. Harris asked for an exceptional sentence below the standard range, arguing the small amount of drugs involved in the transaction and the strides he had made towards recovery allowed for a downward departure. RP 662. Mr. Harris demonstrated he was no longer homeless and had made great strides towards recovery from his addiction. RP 665. The court rejected Mr. Harris' arguments, finding *Alexander* did not apply and sentenced him to twenty months in prison. RP 670.

E. ARGUMENT

1. This Court should accept review of whether suppression is required when the police engage in an intentional two-step interrogation process designed to subvert *Miranda* warnings.

The Court of Appeals held that the statement taken from Mr. Harris did not violate the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d (1966). App. 4. This Court should grant review of this holding, to address whether the government's intentional two-step interrogation violated the right against self-incrimination. U.S. Const. amend. V., Const. art. I, sec. 9; *Missouri v. Seibert*, 542 U.S. 600, 604-06, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004); *State v. Rhoden*, 189 Wn. App. 193, 356 P.3d 242 (2015); *State v. Hickman*, 157 Wn. App. 767, 238 P.3d 1240 (2010).

RAP 13.4(b) authorizes review as the Court of Appeals' decision conflicts with the United States Supreme Court case *Seibert*, and the Division Two cases of *Hickman* and *Rhoden*. This opinion is a split from the decisions of Division Two, which has suppressed evidence in similar circumstances in

two published cases. *Rhoden,* 189 Wn. App. at 200; *Hickman*, 157 Wn. App. at 772-75. The issue raised here is also a significant question of constitutional law and an issue of substantial public interest.

a. Mid-stream Miranda warnings in an deliberate two-step interrogation process render the warnings meaningless.

Although Division One embraced the same case law Division Two employed to hold that two-step interrogations are designed to subvert *Miranda* warnings, it found Division Two's published opinions did not apply here, reasoning that Mr. Harris did not confess until after *Miranda* warnings were given to him. App. 10.

Division One's analysis is incorrect. The test for when an interrogation begins is not when the police turned on the video recording equipment for a formal interview, but when the police placed a defendant into a compromised position through questioning. *Seibert*, 542 U.S. at 604-06. The two-step interrogation works to disable a person from making a

"free and rational choice" about speaking to the police, as occurred here. *Id*. at 608.

The process of compromising Mr. Harris' ability to resist confessing started when the police began interrogating Mr. Harris about becoming a confidential informant and not when the police turned the camera on. RP 243. By the time Mr. Harris was recorded, he had already spoken extensively with the police. *Id*.

This process was the two-step interrogation that *Seibert* forbids. Instead of following established case law to examine the two parts together, Division One instead determines the pre-*Miranda* questioning was not part of the interrogation because it was not incriminating. App. 11.

Division One's decision not to consider the initial part of Mr. Harris' questioning to be part of the interrogation creates a dangerous precedent. RP 245-46. Like the published cases of *Hickman* and *Rhoden*, this case makes out an intentional and systematic procedure by which the police put Mr. Harris into a circumstance where he had no choice but to

confess. *Rhoden*, 189 Wn. App. at 200; *Hickman*, 157 Wn. App. at 772-75.

The evidence at Mr. Harris' CrR 3.5 hearing demonstrated a deliberate use of delayed *Miranda* warnings. According to the testimony, Mr. Harris was arrested by the undercover buy and bust team after he gave an officer several pieces of methamphetamine in exchange for $20. RP 56. The officer alleged Mr. Harris poured a small amount of methamphetamine from a bag he had into the officer's hand. *Id*. The officer then left the scene. *Id*.

The backup team arrested Mr. Harris and took him to the east precinct for questioning. RP 73. At the precinct, Mr. Harris met Officer Blackburn. RP 237. Officer Blackburn spent about an hour talking with Mr. Harris about working with the police as a confidential informant. *Id*. The officers recognized that Mr. Harris was a minor part of the drug scene. RP 237-38. They were interested in using Mr. Harris to find more prominent dealers. *Id*. Officer Blackburn promised Mr. Harris he would release him if he agreed to cooperate. RP

242. Successful cooperation could also lead to the dismissal of Mr. Harris' charges. RP 244.

After securing his cooperation, Mr. Harris remained in the interrogation room. RP 237, 253. He was not free to leave. RP 258. When the police were ready to take his statement, Officer Blackburn returned. RP 243. For the first time, the police recorded Mr. Harris' statement. RP 261. As part of the recording, Mr. Harris was warned about his right against self-incrimination. RP 246. But by this time, Mr. Harris had committed to cooperating with the police. RP 244-45. His agreement to waive his right against self-incrimination was a foregone conclusion.

b. This Court should accept review of whether the delay in providing Mr. Harris with Miranda warnings required suppression of the post-Miranda statements.

This Court should accept review to clarify when Miranda warnings are necessary to prevent officers from using procedures designed to make the warnings meaningless. *Seibert*, 542 U.S. at 604-06. For *Miranda* warnings to be effective, the critical question is whether they

will be ineffective when given. *Seibert*, 542 U.S. at 604-06. By not providing warnings to Mr. Harris until after he had signed a cooperation agreement and given the promise of release, the warnings were ineffective.

The Court of Appeals erred when it found the trial court did not err when it allowed Mr. Harris' post-Miranda statements to be used by the government to prove his guilt. *Rhoden* 189 Wn. App. at 202; *Hickman*, 157 Wn. App. at 776. Because the officer engaged in the same interrogation methods, this has found to be insufficient to ensure Mr. Harris' right against self-incrimination was protected in other opinions issued by the Court of Appeals, suppressing Mr. Harris's post-*Miranda* statements was required.

Mr. Harris asks this Court to accept review of the trial court's ruling and hold that Mr. Harris' post-*Miranda* statements were not voluntarily made. *Rhoden* 189 Wn. App. at 202; *Hickman*, 157 Wn. App. at 776. Accepting review will correct the conflict between this decision and other state and federal precedent. RAP 13.4(b). This Court should also accept

review because the issue raised here is a significant question of constitutional law and is of substantial public interest. *Id*.

2. This Court should review whether the trial court's misunderstanding in its ability to impose a sentence outside the standard range requires resentencing.

The Court of Appeals declined to address whether the trial court erred at sentencing when it determined it could not apply *Alexander* to impose a sentence outside the standard range. App. 14. The Court of Appeals misinterpreted when a sentence may be reviewed. This Court should accept review to correct the Court of Appeals error for when a sentence may be reviewed and to hold that the trial courts error at sentencing requires a new sentencing hearing.

a. The Court of Appeals belief it cannot review Mr. Harris' sentence is mistaken.

The decision not to review the trial court's error is inconsistent with when courts have previously held that review of a standard range sentence should occur. There is no question that a standard range sentence generally cannot be appealed. RCW 9.94A.585(1). But when "a defendant has

requested an exceptional sentence below the standard range, we may review the decision if the [trial] court either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence." *State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). Review should occur where the trial court erroneously believes it lacks the authority to impose an exceptional sentence. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Here, the trial court believed it lacked the authority to depart from the standard range. RP 670. While it is true that Mr. Harris does not have the ability to challenge the length of his sentence within the standard range, the trial court's mistake in when it can depart is reviewable. McGill, 112 Wn. App. at 97. The Court of Appeals holding to the contrary is in error. This Court should accept review of whether the Court of Appeals' decision not to review whether the trial court's mistaken belief in when it can impose a sentence below the standard range was made in error. RAP 13.4(b).

b. This Court should also review the trial court's error in determining it lacked the authority to sentence Mr. Harris below the standard range.

This Court should review whether the trial court erred when it did not believe it had the authority to impose a sentence below the standard range. This Court has held that conduct that distinguishes the accused's crime from others in the same category can provide a basis for the exceptional sentence. *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002).

At sentencing, Mr. Harris cited *Alexander* as grounds for departing from the standard range. CP 76 (citing *Alexander*, 125 Wn.2d at 723). In *Alexander*, this Court affirmed a sentence below the standard range on facts like those here. *Alexander*, 125 Wn.2d at 719. Nonetheless, the sentencing court found Alexander did not authorize it to depart from the standard range. RP 670.

The court first asserted *Alexander* involved a much smaller amount of drugs than this case. RP 671. But like *Alexander*, Mr. Harris delivered a minimal amount of drugs.

125 Wn.2d at 728-29. Mr. Harris produced .7 grams of methamphetamine from a bag containing only 1.7 grams more. RP 114. This amount is equivalent to the sale in *Alexander*. 125 Wn.2d at 719. In 1991, Alexander sold $20 of cocaine to the undercover officer. *Id*. In 2017, Mr. Harris was alleged to have delivered $20 of methamphetamine. RP 384. While the drugs' weight may be slightly more here, their street values were the same.

The court also found that the drug deal in *Alexander* "involved someone with much less participation in the drug deal than [Mr. Harris]." RP 671. This analysis was inconsistent with Alexander's findings, where the defendant was part of a multi-person drug sale along with a person actively involved in the transaction. 125 Wn.2d at 719. In *Alexander*, the defendant approached the police officer and asked him if he wanted some "coca." *Id*. After the officer said yes, Alexander asked whether he wanted to buy $20 worth. *Id*. The officer agreed. *Id*. Alexander led the officer to a donut

shop where a third person gave the officer a small cocaine bindle. *Id*. Alexander was arrested a short time later. Id.

There was no indication Mr. Harris was actively involved in selling drugs, except to the officer. RP 384. Mr. Harris did not appear to be looking for buyers. *Id*. He was not working with anyone else. He did not have bindles of methamphetamine but instead just had a bag of it in his pocket. RP 389, 463. A friend approached Mr. Harris, hugged him, and then the officer asked Mr. Harris to sell him some methamphetamine. RP 408. When the officer asked to buy some of the drugs Mr. Harris was holding, Mr. Harris asked him to hold out his hand. RP 384. He then poured some of the bag into the officer's outreached hand. *Id*.

Nothing else about this interaction suggested Mr. Harris was running a sophisticated operation. Mr. Harris had very little money on him. RP 454-55. He had no drugs, other than the bag he poured some of the drugs from into the officer's hand. RP 384. There were no ledgers, stash, or scales. RP 401-02. The drugs were not even individually wrapped, as

is almost always the case when drugs are sold. RP 384. Nothing suggested Mr. Harris was involved in anything other than a minor delivery. *Alexander*, 125 Wn.2d at 729, RP 401. Like *Alexander*, Mr. Harris demonstrated that there were grounds to depart from the standard range.

The court also relied on Mr. Harris' prior history to deny the downward departure. RP 671. This is not a basis for denying a departure. A sentencing court may not, in imposing an exceptional sentence, consider the defendant's criminal history and the seriousness level of the offense because those are considered in computing the presumptive range for the crime. *Fowler*, 145 Wn.2d at 405. Consistently, this Court has held that prior history, or its lack, cannot be the basis for a departure from the standard range.

c. A departure from the standard range was warranted.

The trial court imposed one month for every dollar the police were alleged to have given to Mr. Harris. This small exchange fell well within when a court should contemplate departing from the standard range. *Alexander*, 125 Wn.2d at

729. Had the court understood it had the authority to depart from the standard range, given that it imposed the minimum sentence already, it is likely it would have.

By the time for sentencing, Mr. Harris was deep into his recovery. CP 74. He was no longer homeless. *Id*. He was living in a recovery house and paying rent. *Id*. He was working with LEAD social workers.[2] *Id*., RP 669. By going to prison, he would "lose everything." *Id*.

Mr. Harris' circumstances are not unique. Incarcerated persons come mainly from the most disadvantaged segments of the population. National Research Council, *The Growth of Incarceration in the United States* 2 (2014). They are mostly minority men under age 40, poorly educated, carrying additional deficits of drug and alcohol addiction, mental and physical illness, and a lack of work preparation or experience. *Id*. "Their criminal responsibility is real, but it is embedded in a context of social and economic disadvantage." *Id*.

[2] Law Enforcement Assisted Diversion (LEAD) is a community-based diversion approach with the goals of improving public safety and public order, and reducing unnecessary justice system involvement of people who participate in the program. LEAD National Support Bureau, *What is LEAD?*, found at https://www.leadbureau.org/

Mr. Harris met many of these criteria, especially before he started working to correct his problems. He was homeless. CP 74. He suffered from illnesses that required close monitoring and constant medication. CP 75. He had dependency issues. RP 17-18. He has struggled his entire life. RP 15. Before his trial, he told the court:

> I just feel like I'm fighting against a stacked deck already. I go one way, start doing things the right way, then I get sideswiped. And I sideswipe myself or something else happens -- steps up in the plate.
>
> I'm doing the best I can at the moment. And I went from having too much support to having hardly any support at all. So I don't know what to say really. But to be honest about it is I'm human. I make mistakes. I'm trying to do better. I mean, it just takes a little bit more time for me than it does other people.

RP 15.

Mr. Harris spent over two years trying to overcome his problems while this case was pending. For many reasons, these efforts did not work. RP 14, 18. But at no time did a court ever suggest Mr. Harris was not trying. RP 19. All the time, Mr. Harris wanted to make it work and turn his life around. RP 21. By the time he faced sentencing, he had made

great strides, all of which would be lost with a prison sentence.

d. The trial court's error at sentencing warrants review.

It is an abuse of discretion for a trial court to erroneously believe it lacks the authority to impose a sentence below the standard range. *McGill*, 112 Wn. App. at 100. Here, the trial court abused its discretion when it determined Alexander did not authorize an exceptional sentence. RP 671. The Court of Appeals' decision not to review this sentence was in error.

This Court has the authority to accept review of the trial court's error as it is an issue of substantial public interest. RAP 13.4(b). Imposing Mr. Harris' requested sentence would have achieved the goals of the Sentencing Reform Act.[3] It was error for the trial court not to recognize it

[3] RCW 9.94A.010 lists seven policy goals the legislature intends the Sentencing Reform Act to advance:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

had the authority to depart from the standard range and error for the Court of Appeals not to address this issue. Mr. Harris asks this Court to grant review.

F. CONCLUSION

Based on the preceding, Mr. Harris respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 4th day of November 2020.

Respectfully submitted,

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(5) Offer the offender an opportunity to improve himself or herself;
(6) Make frugal use of the state's and local governments' resources; and
(7) Reduce the risk of reoffending by offenders in the community.

APPENDIX

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FILED
10/5/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT LEE HARRIS, Appellant.	)	DIVISION ONE No. 80372-7-I UNPUBLISHED OPINION

DWYER, J. — Robert Harris appeals from his conviction of delivering methamphetamine in Violation of the Uniform Controlled Substances Act.[1] Harris contends that the trial court erred by denying a motion to suppress his post-Miranda[2] admission of guilt, asserting that he made the statement as the result of a two-step interrogation process designed to subvert Miranda. Additionally, Harris contends that the trial court failed to recognize its authority to impose an exceptional sentence below the standard range. We conclude that the trial court did not err in either of these respects. Accordingly, we affirm.

I

On February 18, 2017, Robert Harris was arrested for selling methamphetamine to Anthony Ducre, an undercover police officer. Prior to purchasing the drugs from Harris, Officer Ducre approached a woman named

[1] Chapter 69.50 RCW.
[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"Carmela" in Cal Anderson Park in Seattle's Capitol Hill neighborhood. Officer Ducre asked Carmela if she had any "clear," which is a street name for methamphetamine. Carmela offered to let Officer Ducre smoke her pipe containing methamphetamine. Officer Ducre declined and stated that he wanted to buy a larger amount of methamphetamine.

Carmela introduced Officer Ducre to Harris, who was standing on a nearby street corner. Officer Ducre told Harris that he was "looking for 20," meaning 20 dollars' worth of methamphetamine. Harris told Officer Ducre to "hold out [his] hand" and poured out .7 grams of methamphetamine from a small baggie. Officer Ducre paid Harris with a 20 dollar bill.

After the transaction, Officer Ducre walked away and signaled for uniformed officers to arrest Harris. Officers arrested Harris and recovered a 20 dollar bill and a baggie containing 1.74 grams of methamphetamine from Harris's person. A forensic scientist from the Washington State Patrol Crime Laboratory confirmed that the substance Harris provided to Officer Ducre contained methamphetamine.

Around 12:30 p.m., the police took Harris to the nearby east police precinct. Harris was initially placed in a temporary holding cell. Shortly before 2:00 p.m., Harris was questioned by Officer Matthew Blackburn in an interrogation room. Officer Blackburn first approached Harris about becoming a confidential informant. The part of the interview concerning Harris becoming a confidential informant was not recorded. Officer Blackburn testified that he does

not record interviews with potential confidential informants because, if released, those recordings could endanger the informant.

Officer Blackburn presented to Harris a cooperation disclaimer form and a cooperation release form. At 2:06 p.m., Harris and Officer Blackburn both signed the cooperation disclaimer form. This disclaimer form states that Harris had "entered into and completed this agreement freely, voluntarily, and knowingly and being aware of all risk(s) involved, which may be significant."

At 2:08 p.m., Harris and Officer Blackburn both signed the cooperation release form. Under this form, Harris was required to telephone Officer Blackburn by 6:00 p.m. on February 23, 2017, and complete three separate narcotics transactions from suspected drug dealers. In return, Officer Blackburn agreed to release Harris pending further cooperation and, if Harris cooperated, to not forward Harris's case to the King County Prosecuting Attorney's Office. Officer Blackburn testified that he never told Harris that he had to confess as part of the cooperation agreement.

After signing the cooperation release form, Harris remained in the room for approximately one hour. Harris was under arrest and was not free to leave. Officer Blackburn testified that, during this time, Harris did not express any desire to either speak to an attorney or refrain from giving a recorded statement.[3]

Officer Blackburn then recorded an interrogation of Harris. The entirety of this recorded interrogation lasted for two minutes between 3:14 p.m. and 3:16

[3] At trial, Officer Blackburn testified that he did not recall what conversations he had with Harris during this hour-long period before Harris gave a recorded confession. At the hearing on the admissibility of Harris's recorded confession, there was no testimony regarding what, if anything, Officer Blackburn and Harris discussed during this hour-long period.

p.m. During this recorded interrogation, another police officer—Officer Kristopher Safranek—was also present. Officer Blackburn read Harris the Miranda rights prior to interrogating him. After receiving the Miranda rights, Harris expressly affirmed that he understood them. Harris subsequently confessed to delivering methamphetamine. Officer Safranek testified that there were no unrecorded questions asked of Harris while Officer Safranek was in the interrogation room.

Harris was not booked into jail that day. However, because Harris did not contact Officer Blackburn to follow through with the cooperation agreement, Harris's case was forwarded to the King County Prosecuting Attorney's Office.

The State charged Harris with one count of Violation of the Uniform Controlled Substances Act for delivering methamphetamine. Harris initially entered drug court, but his case was ultimately set for trial. Following a jury trial, Harris was convicted as charged. At the sentencing hearing, Harris requested an exceptional sentence below the standard range. The trial court imposed a sentence of 20 months of incarceration, which was the low end of the standard range. Harris appeals.

II

Harris first contends that the trial court erred by denying the motion to suppress his recorded confession. Specifically, Harris asserts that his confession was made as the result of a two-step interrogation process designed to subvert the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We disagree.

A

When reviewing the denial of a motion to suppress, we first determine "whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" Garvin, 166 Wn.2d at 249 (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Unchallenged findings of fact are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). However, "[w]e review conclusions of law from an order pertaining to the suppression of evidence de novo." Garvin, 166 Wn.2d at 249.

B

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. To assure that an accused is accorded this privilege against compulsory self-incrimination, the United States Supreme Court in Miranda set forth procedural safeguards to be employed during custodial interrogation: "In order to combat [the compelling] pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda, 384 U.S. at 467. Specifically, an accused must be clearly informed of his or her right to remain silent and right to counsel, either retained or appointed, and that any

statements made can and will be used against the individual in court. Miranda, 384 U.S. at 467-72. After an accused is apprised of his or her rights and given the opportunity to invoke those rights, he or she "may knowingly and intelligently waive these rights and agree to answer questions or make a statement." Miranda, 384 U.S. at 479. The requisite warnings and showing of waiver are "prerequisites to the admissibility of any statement made by a defendant." Miranda, 384 U.S. at 476.

The Supreme Court has been protective of this right. For instance, in Missouri v. Seibert, 542 U.S. 600, 617, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), a plurality of the Court held that Miranda warnings given mid-interrogation—after the defendant had already confessed—were designed to be ineffective and, thus, the defendant's confession repeated after the warnings were given was inadmissible. In that case, the interrogating officer first obtained the defendant's confession during a custodial interrogation that was not preceded by Miranda warnings. Seibert, 542 U.S. at 604-05. Then, after a 20-minute break, the officer provided Miranda warnings and again obtained the defendant's confession. Seibert, 542 U.S. at 605. The Court reasoned that "[b]y any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Seibert, 542 U.S. at 613.

In the aftermath of the Seibert decision, Division Two recognized a federal court's construction of the opinion:

> "[A] trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the mid-stream Miranda warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights. . . . This narrower test—that excludes confessions made after a deliberate, objectively ineffective mid-stream warning—represents Seibert's holding."

State v. Hickman, 157 Wn. App. 767, 774-75, 238 P.3d 1240 (2010) (first alteration in original) (quoting United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir. 2006)). In determining whether an interrogation process deliberately subverts Miranda, courts should consider "'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.'" Hickman, 157 Wn. App. at 775 (quoting Williams, 435 F.3d at 1159).

The Hickman court thus held that a defendant's post-Miranda statements were inadmissible because a detective's midstream Miranda warnings ineffectively apprised the defendant of his rights under the Fifth Amendment. Hickman, 157 Wn. App. at 776. In that case, a detective informed the defendant that they would engage in a two-part interview consisting of administrative questioning followed by an advisement of the Miranda rights and a criminal investigation concerning the defendant's suspected failure to register as a sex offender. Hickman, 157 Wn. App. at 770. However, during the first part of the interrogation, the detective elicited statements from the defendant indicating that he had violated the reporting requirements. Hickman, 157 Wn. App. at 775-76. The detective then stopped the interview, explained that they were going to shift into the criminal investigation, and advised the defendant of the Miranda

rights. Hickman, 157 Wn. App. at 770. The defendant then made a recorded statement. Hickman, 157 Wn. App. at 770. Division Two reasoned that the detective's "midstream Miranda warnings, without a significant break in time or place and without informing [the defendant] that his pre-Miranda statements could not be used against him in a subsequent criminal prosecution, did not [sufficiently] inform [the defendant] of his Fifth Amendment right to silence." Hickman, 157 Wn. App. at 776.

Similarly, in State v. Rhoden, 189 Wn. App. 193, 202, 356 P.3d 242 (2015), Division Two again held that a confession made after a defendant received the Miranda rights was inadmissible because it resulted from a prohibited, deliberate two-step interrogation procedure. In Rhoden, the defendant was first questioned by a police officer while he was handcuffed in his living room. 189 Wn. App. at 196. Without informing the defendant of the Miranda rights, the officer asked whether there were any drugs or guns in the residence. Rhoden, 189 Wn. App. at 196. The defendant told the police officer that there were drugs and at least one gun in his bedroom. Rhoden, 189 Wn. App. at 196. The same police officer then escorted the defendant to the kitchen, read the Miranda rights, and questioned him a second time. Rhoden, 189 Wn. App. at 196. Upon receiving the Miranda rights, the defendant confessed to having methamphetamine in his bedroom. Rhoden, 189 Wn. App. at 196. Division Two reasoned that "the objective evidence of 'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements' all support

the conclusion that the two-step interrogation procedure used here was deliberate." Rhoden, 189 Wn. App. at 202 (quoting Williams, 435 F.3d at 1159).

C

Even viewed in light of the foregoing authority, the trial court did not err in concluding that Officer Blackburn properly administered Miranda rights to Harris and that Harris's confession was admissible. The following findings of fact entered by the trial court support its ruling:

> 14. No other questions outside of the taped interview were asked of the Defendant while Officer Safranek was present.
>
> . . . .
>
> 16. Officer Blackburn approached the Defendant after he was arrested with a proposed agreement to become a confidential informant.
>
> 17. The discussion regarding becoming a confidential informant was not recorded.
>
> 18. There was credible testimony from Officer Blackburn that it was not recorded because it can put informants in danger to do so since the audio can get disseminated causing discussions to not remain secret.
>
> . . . .
>
> 20. In the agreement, two promises were made to the Defendant. (1) police would not book him into jail on that day, and (2) charges would not be referred to the King County Prosecuting Attorney's Office if the Defendant followed up on his end of the agreement.
>
> 21. No other promises were made.
>
> 22. There was no evidence that conversation about the confidential informant agreement was coercive.
>
> 33. The Defendant providing a confession was not a term of the agreement.

Because Harris does not challenge any of these individual findings of fact, they are verities on appeal. See Broadaway, 133 Wn.2d at 131.

The trial court's findings of fact and the evidence presented during the CrR 3.5 hearing support the trial court's conclusion that Harris's Miranda rights were properly observed. Notably, Harris's situation is significantly different from that of the suspects in the Seibert, Hickman, and Rhoden decisions. In those cases, each defendant confessed both prior to and after receiving Miranda warnings. Seibert, 542 U.S. at 604-05; Rhoden, 189 Wn. App. at 196; Hickman, 157 Wn. App. at 775-76. This fact was essential to each court's holding that the defendants' post-Miranda confessions were inadmissible.

Indeed, in Seibert, the Court reasoned that "[b]y any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds *in eliciting a confession*, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Seibert, 542 U.S. at 613 (emphasis added).

Likewise, in Hickman, the court reasoned that a detective's "midstream Miranda warnings . . . without informing [the defendant] that his *pre-Miranda statements* could not be used against him in a subsequent criminal prosecution, did not [sufficiently] inform [the defendant] of his Fifth Amendment right to silence." Hickman, 157 Wn. App. at 776 (emphasis added).

Finally, in Rhoden, the court reasoned that a deliberate two-step interrogation procedure occurred because of "'the timing, setting and

completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content *of the pre- and postwarning statements.*'" Rhoden, 189 Wn. App. at 202 (emphasis added) (quoting Williams, 435 F.3d at 1159).

Here, there is no evidence that Harris confessed prior to receiving Miranda warnings. The trial court's findings of fact and the evidence presented at the CrR 3.5 hearing indicate that Officer Blackburn's initial conversation with Harris was limited to the topic of Harris becoming a confidential informant. The trial court found that, during Officer Blackburn's initial conversation with Harris, only two promises were made: "(1) police would not book him into jail on that day, and (2) charges would not be referred to the King County Prosecuting Attorney's Office if the Defendant followed up on his end of the agreement." Officer Blackburn testified that he never told Harris that he had to give a confession as part of the cooperation agreement. Likewise, the trial court found that Harris "providing a confession was not a term of the agreement." As the trial court found, "[t]here was no evidence that conversation about the confidential informant agreement was coercive."

Indeed, the evidence and findings of fact indicate that Officer Blackburn's interrogation of Harris was limited to what was contained in the recording. Officer Safranek—who was present for the recorded interrogation—testified that there were no unrecorded questions asked of Harris while Officer Safranek was in the interrogation room. Similarly, the trial court found that "[n]o other questions outside of the taped interview were asked of the Defendant while Officer Safranek was present." Therefore, there is nothing in the record indicating that

Harris confessed to delivering methamphetamine prior to receiving the Miranda warnings.

Because the record is devoid of evidence that Harris made an incriminating statement prior to receiving the Miranda warnings, Officer Blackburn did not engage in a deliberate, two-step interrogation procedure designed to subvert the requirements of Miranda as prohibited by Seibert. Therefore, when Officer Blackburn read Harris the Miranda rights, Harris was "'effectively apprise[d] . . . of his rights.'" Hickman, 157 Wn. App. at 774 (quoting Williams, 435 F.3d at 1157-58).

Accordingly, the trial court did not err by admitting Harris's confession.

III

Harris next contends that the trial court erroneously concluded that it lacked the authority to impose an exceptional sentence below the standard range. In particular, Harris asserts that the trial court was authorized by State v. Alexander, 125 Wn.2d 717, 888 P.2d 1169 (1995), to impose an exceptional sentence. We disagree.

A

A standard range sentence generally cannot be appealed. RCW 9.94A.585(1). But when "a defendant has requested an exceptional sentence below the standard range, we may review the decision if the [trial] court either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence." State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). Accordingly, we may review a trial court's

imposition of a sentence within the standard range if "[the trial court] erroneously believed it lacked the authority to [impose an exceptional sentence]." State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). However, "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

B

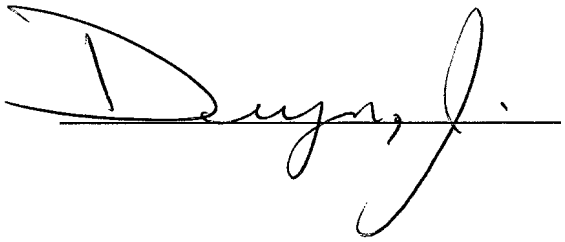
In State v. Alexander, our Supreme Court affirmed an exceptional sentence below the standard range imposed upon a defendant convicted of delivering a controlled substance. The defendant approached an undercover police officer and asked if he wanted to buy cocaine. Alexander, 125 Wn.2d at 719. The police officer asked for 20 dollars' worth, and the defendant led the police officer to a donut shop to meet another man who had cocaine. Alexander, 125 Wn.2d at 719. The police officer attempted to pay the other man directly for the cocaine, but the defendant intercepted the money, keeping $5 for himself and giving $15 to the other man. Alexander, 125 Wn.2d at 719. In exchange for the $15, the man gave the defendant .03 grams of cocaine, which the defendant then passed to the police officer. Alexander, 125 Wn.2d at 719. The court held that the trial court properly imposed an exceptional sentence because: (1) the crime involved "an extraordinarily small amount of a controlled substance"; and (2) the defendant had a "low level of involvement" in the drug transaction. Alexander, 125 Wn.2d at 721-22.

C

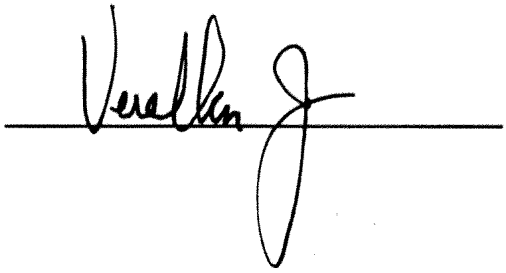
Here, the trial court did not erroneously believe that it lacked authority to impose an exceptional sentence. Rather, it determined that Alexander was factually distinguishable from Harris's case in significant ways. First, during the sentencing hearing, the trial court stated that Alexander "involved someone with much less participation in the drug deal than [Harris]." Whereas the defendant in Alexander acted as an intermediary to a drug transaction, Alexander, 125 Wn.2d at 719, Harris dealt drugs directly to an undercover police officer. In addition, the trial court concluded that there was "also a much smaller amount of drugs in [Alexander]." Indeed, in Alexander, the defendant transferred .03 grams of cocaine. 125 Wn.2d at 719. Harris, on the other hand, transferred .7 grams of methamphetamine and had an additional 1.74 grams on his person. In determining that Alexander did not control the disposition of Harris's sentence, the trial court "considered the facts and . . . concluded that there [was] no basis for an exceptional sentence." Garcia-Martinez, 88 Wn. App. at 330. In so doing, the sentencing court did not err.

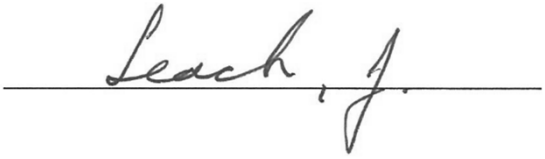
Accordingly, Harris may not appeal the standard range sentence imposed upon him.

Affirmed.



We concur:





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