

NO. 67158-8-I

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

REC'D

DEC 16 2011

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CESAR TROCHEZ-JIMENEZ,

Appellant.

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to suppress his statements to police and admitting the statements at trial.

2. Use of appellant's statements at trial violated the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 of the Washington Constitution.

3. The court erred in concluding appellant "did not invoke his right to counsel under the United States Constitution when, after being arrested in Canada by a Canadian law enforcement officer for a violation of Canadian immigration laws, and after being advised of his Canadian 'Charter Rights,' [appellant] answered yes when asked if he wanted to call a lawyer." CP 83.

Issue Pertaining to Assignments of Error

Must appellant's statements to King County detectives be suppressed when the detectives questioned him after appellant unequivocally invoke his right to counsel by answering "Yes" when Canadian officials asked if he wanted to call a lawyer?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Cesar Trochez-Jimenez with one count of first-degree murder while armed with a firearm

and one count of being an alien in possession of a firearm without a license. CP 21-22. The jury acquitted Trochez of premeditated first-degree murder, but convicted him of second-degree murder and found he was armed with a firearm. CP 133-34. Trochez waived jury trial on the alien in possession charge, and the court found him guilty. CP 124, 136. The court imposed a standard range sentence of 234 months plus the 60-month firearm sentencing enhancement for second-degree murder. CP 143. A 12-month sentence for the firearm possession charge was imposed to run concurrently. CP 143. The court also imposed 24-36 months of community custody. CP 144. Notice of appeal was timely filed. CP 148.

2. Substantive Facts

In July 2008, Trochez lived in south Seattle with his then-girlfriend, now wife Lesli Batiz, their three-year-old daughter, and Lesli's¹ brother Carlos. 8RP² 20-21. The couple had been living together for three years. 8RP 20-21. Unfortunately, unbeknownst to Trochez, his future wife and the mother of his child had become involved with someone else. 8RP 24.

¹ Several members of the Batiz family are involved in this case. First names are used to avoid confusion.

² 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.

a. January-June 2008

In January 2008, Trochez began to receive harassing phone calls. 14RP 32-33. At first the calls were merely insulting, demanding to know what he was doing in this country taking jobs away and telling him to go back to his own country. 14RP 32. The calls came nearly every day, usually when he was home alone with his daughter. 14RP 32-33. By April or May, the insults turned to threats. 14RP 33-34. The caller told Trochez if he did not deport himself, he would be killed. 14RP 34. The caller said it would be easy to get rid of an immigrant because they have no value. 14RP 34. Trochez took these threats seriously; growing up in rural Honduras, he learned threats of murder usually become reality. 14RP 34.

Beginning in May 2008, Batiz had been phoning daily and meeting weekly with Mario Batiz-Castillo, the son of her first cousin. 8RP 21-22, 24-25. Lesli worked hard to hide her affair from Trochez. 8RP 44. She deleted texts and phone calls and even labeled her paramour's phone number with her sister's name in her cell phone. 8RP 44. Trochez suspected something was amiss. 8RP 24. But Lesli consistently lied to him, always denying anything was going on. 8RP 24. Trochez trusted Lesli and took her at her word. 14RP 27. But despite his faith, tensions began to arise.

The couple argued because the many calls were running up the phone bill Trochez worked hard to pay. 8RP 25; 14RP 25, 69; 15RP 39-40.

In April or May, he checked the phone bill and called the number the threatening calls originated from. 14RP 26. Mario answered. 14RP 26, 35.

Believing Mario was pressuring and threatening his wife as well, Trochez was angry every time Mario called. 14RP 71. Finally, Trochez called Mario and warned him to stop bothering his wife. 14RP 70. Trochez testified he asked why Mario was threatening him, but never threatened Mario in return. 14RP 36-37. He denied ever leaving a message on Mario's answering machine.³ 14RP 37.

Trochez inadvertently came face to face with Mario one day near Lesli's workplace. 14RP 45. Trochez explained that when he told police he confronted Mario, he meant the two came face-to-face, not that he initiated the confrontation. 14RP 72; 15RP 17. He testified Mario was simply there when he walked out of the store and it was Mario who spoke first, hurling threats and insults. 15RP 17-18. Mario told Trochez if he wanted to, he could kill him right there and put his hand in his pocket as if handling a weapon. 14RP 45. Trochez refrained from hitting Mario because Mario was handling something that could have been a knife, while Trochez was unarmed. 14RP 73, 75. Instead he told Mario next time he would be prepared. 14RP 76. The confrontation ended when Lesli arrived. 15RP 18.

³ Mario's father testified he heard a message from Trochez on his son's answering machine threatening to kill Mario for messing with his woman. 12RP 13.

b. July 7, 2008

In the wee hours of the morning on July 7, 2008, Trochez and his family returned from a trip to California. 8RP 27. That evening, he noticed Lesli appeared desperate. 14RP 81. Since this was often her reaction when Mario called, he assumed the calls she received that evening were from him. 14RP 81. Lesli confirmed Mario called her that night around 7 p.m. 8RP 27-28. Around 9 p.m., Mario called again, and this time he was in the parking lot, right outside the family's apartment. 8RP 28-29.

Lesli went outside nervously, trying not to let Trochez know Mario had arrived. 8RP 30. As Mario was parking, she went back inside to retrieve her car keys. 8RP 32. After Trochez located them for her, Lesli told him she needed to get something from the car and went back outside. 8RP 32. Mario wanted to talk; Lesli just wanted him to leave so her affair would not be revealed. 8RP 33. Mario approached the front door of the apartment threatening to go inside, tell Trochez everything, and beat him up. 8RP 33-34, 46, 49. Lesli told him not to do that, got in her car, and drove away, hoping and believing he would follow her so they could talk elsewhere. 8RP 48, 50.

As he put his daughter to bed, Trochez saw from the bedroom window Lesli's angry confrontation with Mario. 14RP 44. Afraid Mario had returned to make good on his threat, Trochez wanted to drive away so

that if there were a confrontation, no one else would be hurt. 14RP 44, 46, 48; 15RP 34. Trochez told police he was “furious” when he grabbed the gun and ran out of the house because this was the person who had been insulting and threatening him. 14RP 95.

He saw Lesli leave, and saw Mario heading back toward where his car was parked. 14RP 47, 96. However, there was another entrance to the apartment building in that area where Mario could have entered the building. 14RP 97. Trochez did not believe it would be safe to remain in the apartment with its flimsy doors. 15RP 4-5, 34. He grabbed the only pair of pants that were handy and headed outside. 14RP 47, 97. As he put them on, he noticed his gun was in the pocket and figured it could come in handy if he needed to protect himself. 14RP 48; 15RP 43. Knowing he was in the United States illegally, he could not call the police on his own behalf. 15RP 34. That would have meant deportation and separation from Lesli and their daughter. 15RP 35. He got in his van and began to drive away. 14RP 48.

He could not say why he stopped directly behind Mario’s car. 14RP 106-07; 15RP 44. He noticed Mario getting in the car and decided to confront and perhaps scare him so he would leave the family alone. 14RP 49. As he got out of the car, he saw Mario reach for something. 14RP 49-50. Trochez knew Mario was armed. 14RP 44. He knew Mario had threatened to kill him. 14RP 44. He knew his little daughter was asleep

right upstairs. 14RP 43. He could see Mario through the car window, could see that Mario had seen him. 15RP 45-46. He saw Mario moving very quickly as if to reach for something in the back of the car. 15RP 44. In great fear for his life and family and with no time to think, Trochez yelled, "No, no, no," and fired into the car three or four times. 14RP 50. By the last shot, he was already turning around to run. 14RP 51. It was all over in a matter of seconds. 14RP 49, 55; Ex. 10.⁴

He fled to Canada because he did not know what else to do. 15RP 5-6. He took the gun apart and threw the pieces along the freeway. 15RP 6. Elvin Castillo drove Trochez to Blaine. 9RP 70-71. He testified Trochez told him he and Lesli had fought, and that he was angry with her for cheating on him. 9RP 63-64, 67.

A neighbor testified he saw the incident from his balcony across the parking lot. 8RP 64-73. He saw a man run out of the apartment wearing only boxers and holding a gun in his hand. 8RP 68-70. He claimed that, although he could not see what was in the person's hand, he could tell it was a pistol by the way he carried it. 8RP 70. He saw the man jump into a van, back out quickly, stop behind a Ford Explorer blocking it from leaving, get out of the car, fire several rounds through the window, get back in the van, and drive away. 8RP 72-76. He did not recognize anyone in the courtroom,

⁴ A supplemental designation of exhibits was filed December 15, 2011.

but when initially questioned by police he had identified Trochez as the shooter. 8RP 59-60; 9RP 143.

The apartment manager heard the shots, found Mario, and called 911. 9RP 9, 12, 13. Police arrived to find the engine running with the headlights on, the window shattered, and Mario slumped over the driver's seat. 9RP 25-26. Several shell casings were collected from the ground around the car. 9RP 80-86. In Mario's wallet was a receipt with Trochez' name and phone number scrawled on the back. 9RP 133, 157.

c. July 8, 2008

The next day in Canada, Vancouver police constable John Jeffrey arrested Trochez for crossing into Canada illegally. 2RP 56. At 5:50 p.m., he informed Trochez that, under the Canadian Charter of Rights and Freedoms, he had a right to an attorney "without charge" and "without delay." 2RP 56.⁵ Trochez requested an attorney. 2RP 58. No attorney was

⁵ 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.

provided at that time. 2RP 71. Constable Jeffrey could not say whether Trochez was ever able to consult with an attorney. 2RP 72-73.

Upon verifying Trochez' identity, Constable Jeffrey learned he was wanted for murder in King County, and the King County Sheriff's Office was alerted. 2RP 58; 9RP 109. Later that evening, Detectives Crenshaw and Do arrived in Vancouver to interview Trochez. 1RP 89-90. They were told they would have to wait because Canadian immigration authorities were interviewing Trochez. 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.

Canadian authorities warned the detectives Trochez' English was limited, so they asked Constable Luis Ramirez to accompany them. 1RP 90; 11RP 26. Ramirez is a native speaker of Spanish and often assists other officers by translating. 11RP 24-25. However, he is not certified or formally trained as an interpreter. 2RP 20; 11RP 34.

Ramirez read Trochez his Miranda⁶ rights in Spanish from a pre-printed King County form. 2RP 15-16. He testified Trochez appeared to understand, and never invoked his rights to counsel or to remain silent. 2RP 16-17. Detectives Do and Crenshaw also testified Trochez appeared to

⁶ Miranda v. Arizona, 384 U.S. 436, 458, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

understand, there were no threats or promises made to him, and he never exercised his right to silence or to an attorney. 1RP 102-03; 2RP 37-38.

Trochez testified he was unable to read well, even in Spanish, and his simple 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 testified he was confused and unable to express himself well in that first interview with police in Vancouver. 2RP 97, 99; 14RP 74. However, he conceded the defense interpreter, Claudia A'Zar's translation was accurate. 15RP 47. Trochez confessed to shooting Mario. 2RP 99; Exs. 42, 43⁷ at 9, 14. When asked why he grabbed the gun, Trochez told the detectives he was "furious." Ex. 43 at 29.

⁷ Exhibit 42 is the tape recording of Trochez' interview with detectives in Vancouver which was admitted into evidence and played for the jury at trial. Exhibit 43 is the transcript/translation provided to the jury for illustrative purposes only. For ease of reference, this brief refers to the page numbers of Exhibit 43, the transcript.

After interviewing Trochez, police were able to locate his van. 9RP 111. Inside was an empty gun magazine. 10RP 37. Both the magazine and the shell casings found at the scene were tested for DNA. 11RP 74-76. Unfortunately, the technician at the crime lab placed the swabs together in the same test tube of reagent and thus was unable to determine whether the DNA came from the magazine or the casings or both. 11RP 78-79, 83. She obtained a partial male profile that matched Trochez.⁸ 11RP 79-80.

Dr. Richard Harruff performed the autopsy on Mario. 10RP 63. He testified he found four bullet wounds, one to the arm, one to the chest, one to the abdomen, and one to the back. 10RP 68; 11RP 4, 6, 8. The wounds to the chest, abdomen, and back could each have been fatal even if taken individually. 11RP 5, 7-8, 11. He certified the cause of death as multiple gunshot wounds and the manner of death as homicide. 11RP 21-22. Two of the bullets entered Mario from behind. 11RP 22.

Trochez moved to suppress his statements to the detectives in Vancouver because the State failed to scrupulously honor his request for an attorney, both to Constable Jeffrey upon his arrest and to Detectives Crenshaw and Do when he answered "Okay," upon being read his Miranda rights. 5RP 78, 80. The court denied his motion to suppress and specifically

⁸ She testified the chances of the DNA coming from someone other than Trochez were one in 22 billion. 11RP 82.

concluded he did not invoke his right to counsel by answering, “Yes” when Constable Jeffrey asked if he wanted an attorney. CP 83; 5RP 98. The court reasoned that Constable Jeffrey arrested Trochez only for immigration violations, that an assertion of the right to counsel under the Canadian Charter is not an assertion of the right to counsel under the United States Constitution, and none of the officers present at the interview were told he had requested counsel. 5RP 97.

C. ARGUMENT

TROCHEZ’ STATEMENTS TO POLICE SHOULD HAVE BEEN SUPPRESSED BECAUSE HIS UNEQUIVOCAL REQUEST FOR COUNSEL WAS NOT HONORED.

Custodial interrogation is an inherently coercive situation. Miranda v. Arizona, 384 U.S. 436, 458, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Therefore, statements made during custodial interrogation are deemed involuntary and inadmissible unless the speaker was fully advised of the rights to silence and to have an attorney present during questioning. U.S. Const. Amends. V, XIV, § 1;⁹ Const. art. 1, § 9;¹⁰ Miranda, 384 U.S. at 469-73, 476, 479. When the speaker invokes the right to counsel, questioning

⁹ The Fifth Amendment provides in relevant part, “No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.” The Fourteenth Amendment provides, “No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

¹⁰ Article 1, section 9 of Washington’s Constitution provides, “No person shall be compelled in any criminal case to give evidence against himself.”

must cease. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

In the context of the privilege against self-incrimination, Article 1, section 9 of Washington's Constitution is interpreted as equivalent to the Fifth Amendment. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). Adequacy of Miranda warnings and whether suppression is required are legal conclusions reviewed de novo. United States v. Connell, 869 F.2d 1349, 1351 (9th Cir. 1989); see also State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (legal conclusions in suppression hearing reviewed de novo). Findings of fact are reversed if the record lacks substantial evidence to support them. State v. Radcliffe, 139 Wn. App 214, 219, 159 P.3d 486 (2007).

Canadian authorities arrested Trochez and informed him of his right to consult an attorney without delay. 2RP 55-57. Trochez requested an attorney. 2RP 58. He was then questioned, first by Canadian immigration authorities and then by King County detectives. 1RP 90. No evidence shows an attorney was ever provided. 2RP 71-73. Because his request for an attorney was not scrupulously honored, his subsequent waiver of rights was not knowing, intelligent, and voluntary. See Edwards, 451 U.S. at 484-85. Therefore, the trial court erred in failing to suppress his statements. Id.

a. Miranda and Its Progeny Govern Admissibility of Trochez' Statements.

The Fifth Amendment privilege against self-incrimination is a trial right, and a violation occurs not when a coerced statement is taken, but when it is admitted into evidence at trial. United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990). Thus, federal courts have repeatedly held the privilege protects non-citizens interrogated in custody outside the United States when resulting statements are admitted against them at trial within the United States. See, e.g., In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177, 201 (2d Cir. 2008) (holding foreign nationals interrogated overseas but tried in civilian courts in the United States are protected by the Fifth Amendment self-incrimination clause); United States v. Rommy, 506 F.3d 108, 131 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008) (Fifth and Sixth Amendment protections apply “to the custodial interrogation of a foreign national outside the United States by [U.S.] agents . . . engaged in a criminal investigation.”)¹¹ The Second Circuit concluded:

¹¹ See also United States v. Heller, 625 F.2d 594 (5th Cir. 1980); Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir. 1980); Cranford v. Rodriguez, 512 F.2d 860, 863 (10th Cir. 1975); United States v. Dopf, 434 F.2d 205, 207 (5th Cir. 1970); United States v. Bout, ___ F. Supp. 2d ___, 2011 WL 4389537 (S.D.N.Y., No. 08 CR 365(SAS), filed Aug. 25, 2011) (“[T]he Fifth Amendment . . . applies to a foreign national interrogated abroad but tried in the United States.”) (citing In re Terrorist Bombings, 552 F.3d at 201); United States v. Hasan, 747 F. Supp. 2d 642 (E.D. Va. 2010) (“Fifth and Sixth Amendment protections apply even “to the custodial interrogation of a foreign national

[R]egardless of the origin – i.e. domestic or foreign – of a statement, it cannot be admitted at trial in the United States if the statement was ‘compelled.’ U.S. Const. amend. V. Similarly, it does not matter whether the defendant is a U.S. citizen or a foreign national: ‘no person’ tried in the civilian courts of the United States can be compelled ‘to be a witness against himself.’ Id.

In re Terrorist Bombings, 552 F.3d at 199.

While application of Miranda warnings may differ slightly when interrogations occur outside the United States,¹² the only court to confront this issue directly proceeded on the assumption that “the Miranda framework generally governs the admissibility of statements obtained overseas by U.S. agents.” In re Terrorist Bombings, 552 F.3d at 202. This Court should similarly presume the Miranda framework governs for two reasons. First, it was undisputed below that Miranda governed admissibility of Trochez’ statements. Second, as the Second Circuit noted, the reasons supporting the need for Miranda warnings and exclusion of unwarned statements apply equally to interrogations outside the United States.

The two objectives undergirding the requirement of Miranda warnings are “trustworthiness and deterrence.” In re Terrorist Bombings,

outside the United States by [U.S.] agents ... engaged in a criminal investigation.” (citing Rommy, 506 F.3d at 131).

¹² Flexible application of Miranda in the context of interrogation outside the United States is more thoroughly addressed in section C.1.b., infra.

552 F.3d at 202 (quoting Oregon v. Elstad, 470 U.S. 298, 308, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985)). Statements made in police custody outside the United States are no less likely to have been produced by the inherently coercive nature of detention than those made inside the United States. And because the officers involved are United States officers, applying the Miranda framework serves the goal of deterring misconduct. See In re Terrorist Bombings, 552 F.3d at 203 (“When U.S. law enforcement agents or officials are involved in overseas interrogation, however, the deterrence rationale retains its force.”).

The requirement of Miranda warnings under the Fifth Amendment is triggered when police question an individual whose freedom of movement is restrained by police custody. Miranda, 384 U.S. at 444. It was undisputed below that Trochez was subjected to custodial interrogation. CP 80. Therefore, assuming, as did the Second Circuit, that the Miranda framework governs interrogations outside the United States, the protections of Miranda and its progeny were triggered in this case.

b. Trochez’ Statements Were Inadmissible Because the Officers Questioned Him After He Requested an Attorney.

In addition to the Miranda warnings, the Fifth Amendment requires questioning must cease immediately when the person indicates a desire for an attorney “in any manner and at any stage” of custodial interrogation.

Edwards, 451 U.S. at 484-85; see also Davis v. United States, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); Miranda, 384 U.S. at 444-45. No further questioning is permitted unless either the person himself re-initiates discussion or counsel is provided. Edwards, 451 U.S. at 484. When officers continue or resume interrogation after the right to counsel has been invoked, all resulting statements must be suppressed. Id. at 487-88.

After the right to counsel has been invoked, police may not immunize further questioning by re-reading the Miranda rights and obtaining a waiver. Edwards, 451 U.S. at 484. Edwards was arrested, gave a taped statement presenting an alibi defense and then sought to make a deal. Id. at 478-79. He then told police he wanted an attorney before doing so. Id. Questioning stopped, but the next morning, two different detectives came to the jail, informed Edwards of his Miranda rights, and questioned him. Id. Edwards then implicated himself in the crimes. Id. The Court held that, having already asserted his right to counsel the day before, the subsequent waiver was not valid. Id. at 482.

The use of Edwards' confession at trial violated his rights under the Fifth and Fourteenth Amendments because, the Court reasoned, additional safeguards were necessary to find a knowing and intelligent waiver of the right to counsel. Id. at 480, 484. The Court held, "[W]hen an accused has

invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.” Id. at 484 (emphasis added). A valid waiver could exist only if the new statements were initiated by the accused, not the police. Id. at 485-86.

Since Edwards, the Court has reaffirmed that “The bright-line, prophylactic Edwards rule protects against the inherently compelling pressures of custodial interrogation by creating a presumption that any subsequent waiver of the right to counsel at the authorities’ behest was coercive and not purely voluntary.” Arizona v. Roberson, 486 U.S. 675, 685-86, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988); see also Montejo v. Louisiana, 556 U.S. 778, _____, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009) (Edwards rule presumes post-assertion statements to be involuntary even when subsequent waiver is executed.). Unless the individual invites new discussion or counsel is provided, a waiver executed after invocation of the right to counsel is invalid. Edwards, 451 U.S. at 484-85.

Setting aside, for a moment, the international context, this case presents precisely the dilemma the Court resolved in Edwards. Trochez was alerted he had a right to counsel. 2RP 56-58. He then requested counsel. 2RP 56-58. Roughly six hours later, no counsel having been provided,

police again warned him of his Miranda rights and questioned him, eliciting incriminating statements. 1RP 94, 127; 2RP 71-73; Exs. 42, 43. Under Edwards, if this entire scenario had played out in Seattle, with Trochez arrested for immigration violations by United States officials, to whom he clearly communicated his desire for counsel, there would be no question his statements should be suppressed.

The result should not differ merely because Trochez was interrogated in Canada. First, invocation of the right to counsel is a significant event that precludes all questioning, and the King County detectives had a duty to determine whether this event had occurred. Second, invocation of the right to counsel is not specific to the offense for which a person is arrested. Finally, unequivocal invocation of the right to counsel does not require specifying the source of that right.

- i. *The Detectives Had a Duty to Determine Whether Trochez Had Asked for an Attorney Before They Questioned Him.*

The trial court erred when it denied the suppression motion on the grounds that no one told Constable Ramirez or Detectives Do and Crenshaw that Trochez had requested counsel. 5RP 96, 97. Knowledge is imputed between state officials, largely because it is the officers' responsibility to determine whether the person before them is someone

they can legally interrogate. See, e.g., Roberson, 486 U.S. at 687; Edwards, 452 U.S. at 479-80.¹³

In Roberson, the Court placed this duty squarely on the officers. The Court attached “no significance” to the fact that the officer conducting the interrogation did not know the individual had requested counsel. 486 U.S. at 687. First, the Court reasoned the Edwards rule is concerned with the state of mind of the suspect, not the police. Roberson, 486 U.S. at 687. Second, it reasoned police must establish procedures that “enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel.” Id. The court laid particular weight on the fact that a written report noted the request for counsel, but the officers failed to examine the report. Id. The Court concluded:

Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists. The police department’s failure to honor that request cannot be justified by the lack of diligence of a particular officer.

Id. at 687-88.

In the analogous circumstance of the Sixth Amendment right to counsel, the United States Supreme Court has expressly held knowledge

¹³ See also State v. Melendez, ___ N.J. Super. ___, 30 A.3d 320, 335-36 (N.J. Super. Ct. App. Div. 2011) (Edwards requires imputing knowledge of invocation of right to counsel from one officer to another because request for counsel must be scrupulously honored.) (citing Edwards, 451 U.S. at 482).

of a defendant's invocation of the right must be imputed among state officials. Michigan v. Jackson, 475 U.S. 625, 634, 106 S. Ct. 1404, 1410, 89 L. Ed. 2d 631, 641 (1986), overruled on other grounds by Montejo, 556 U.S. at ____, 129 S. Ct. at 2091; Maine v. Moulton, 474 U.S. 159, 170–171, 106 S. Ct. 477, 479, 88 L. Ed. 2d 481 (1985). The right to counsel is so significant that law enforcement officers' duty is greater than merely not impeding exercise of the right to counsel. Moulton, 474 U.S. at 170. The State has an "affirmative obligation to respect and preserve" the accused person's choice to seek assistance of counsel. Id. at 170-71.¹⁴ That "affirmative obligation to respect and preserve the accused's choice" required the officers in this case to determine whether Trochez had requested an attorney.

Under Miranda, the request for counsel is a significant event, one that serves to preclude police questioning. Edwards, 451 U.S. at 485 (citing Miranda, 384 U.S. at 474). The detectives who questioned Trochez were required to first determine whether that significant event had occurred. A simple question or perusal of Constable Jeffrey's report

¹⁴ The Court stated:

Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.

Moulton, 474 U.S. at 170–171 (1985).

would have alerted the detectives that Trochez had requested counsel. 2RP 68. Knowledge that Trochez requested an attorney should be imputed to the two King County detectives who questioned him.

- ii. *Trochez' Invocation of the Right to Counsel Applies to Questioning Regarding Any and All Offenses.*

The trial court also erred in disregarding Trochez' request for an attorney on the grounds that it was made in the context of an arrest for immigration violations. See Roberson, 486 U.S. at 687. The right to counsel under the Fifth Amendment is not offense-specific; it applies to any crime for which the suspect is being interrogated.¹⁵ Once the accused has invoked the right to counsel, he may no longer be questioned in the absence of counsel "on any offense." Davis, 512 U.S. at 458; see also McNeil v. Wisconsin, 501 U.S. 171, 177, 111 S. Ct. 2204, 115 L. Ed. 2d 158, (1991). ("[O]nce a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present."). The Fifth Amendment protection of Miranda and Edwards "relates to interrogation regarding any suspected crime." McNeil, 501 U.S. at 178. It protects the suspect's desire not to

¹⁵ The right to counsel under the Fifth Amendment in the Miranda context is distinguished from the Sixth Amendment right to counsel at critical stages of the proceedings, which is "offense-specific." Texas v. Cobb, 532 U.S. 162, 167, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001) (quoting McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (Assertion of the Sixth Amendment right to counsel at critical stages of a prosecution does not prevent custodial interrogation on unrelated charges.)).

interact with the police except through counsel, regardless of the specific offense. Id. at 177.

The facts of Roberson illustrate this principle as well. Roberson was arrested at the scene of a just completed burglary. 486 U.S. at 678. He was advised of his rights and said he “wanted a lawyer before answering any questions.” Id. This request was noted in the arresting officer’s report. Id. However, three days later, a different officer questioned him about a different burglary and obtained incriminating statements. Id. The Court held the incriminating statement on the second burglary had to be suppressed because of Roberson’s original request for counsel on the unrelated charge. Id. at 681-83.

Under Roberson, the fact that Trochez was arrested in Canada for immigration violations is immaterial. Id. at 681-83. His request for counsel indicated a desire to interact with the police solely through counsel, regardless of the offense. McNeil, 501 U.S. at 177. Because his request for counsel was not scrupulously honored, his statements were not admissible. Roberson, 486 U.S. at 681-83.

- iii. *Police Should Not Be Permitted to Ignore a Request for Counsel Merely Because It Was Made in Response to the Canadian Charter Rights Rather Than the Miranda Rights.*

The only remaining justification for failing to suppress the statements is that the right to counsel Trochez invoked was his right to counsel under the Canadian Charter of Rights and Freedoms rather than his right to counsel under the Fifth Amendment of the United States Constitution. While this distinction would certainly be crucial in many situations, in this case, it is not.

Cases that have considered the Miranda framework overseas have recognized that local law provides the only actual access to counsel. In re Terrorist Bombings, 552 F.3d at 206-07. Thus, in invoking his right to an attorney under the Canadian Charter of Rights and Freedoms, Trochez invoked the only source of law that could actually have afforded him the opportunity to consult a lawyer at the time.

Moreover, invocation of the right to counsel does not require accused persons to cite the legal authority supporting that right. Invocation of the right to counsel occurs when the accused makes “some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.” Davis, 512 U.S. at 459 (quoting McNeil, 501 U.S. at, 178). In other words, the desire for an attorney must

be expressed clearly enough that a reasonable police officer would understand it. Davis, 512 U.S. at 459; see also State v. Aronhalt, 99 Wn. App. 302, 307, 994 P.2d 248 (2000) (statement is not “equivocal” when, objectively, a reasonable officer would know it was an invocation of the right to counsel). Citation to the specific legal authority or source of the right is not required.

Cases discussing interrogations on foreign soil indicate some flexibility is appropriate in the Miranda warnings, but they do not indicate that a clear and unequivocal request for counsel may be ignored merely because it was made in the context of a foreign arrest. The Miranda opinion expressly contemplates the warnings need not be given precisely as formulated in that opinion, so long as the procedure used provided equivalent safeguards. Miranda, 384 U.S. at 467. For example, when it would be impossible for the United States officer to provide access to an American lawyer, the officer may offer to put the individual in contact with the American embassy instead. See Cranford v. Rodriguez, 512 F.2d 860 (10th Cir. 1975); United States v. Dopf, 434 F.2d 205, 207 (5th Cir. 1970). The warnings were also sufficient where the assistant U.S. attorney accurately informed suspects they may not be able to access an attorney immediately because they were in Kenya. In re Terrorist Bombings, 552 F.3d at 205. None of these cases indicate that a clear request for an

attorney may be ignored merely because it was made in a foreign jurisdiction.

Trochez should not have had to ask more than once for an attorney. A vital purpose of the Miranda warnings is to ensure the accused that his interrogators will recognize his constitutional rights, should he choose to exercise them. Miranda, 384 U.S. at 468. The requirement that questioning must cease when an accused invokes the right to counsel is designed to prevent police from badgering an individual into waiving previously asserted Miranda rights. Davis, 512 U.S. at 458. “It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not.” Miranda, 384 U.S. at 468 n. 37 (quoting Devlin, The Criminal Prosecution in England 32 (1958)). If interrogation does not cease, the accused is likely to “succumb to the interrogators imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained.” Miranda, 384 U.S. at 468.

Here, Trochez’ first attempt to exercise his right to an attorney was ineffectual. The interrogations, first by Canadian and then by Washington State law enforcement officers continued more than six hours after he requested an attorney. 5RP 91. Under these circumstances the Miranda

warnings and waiver were invalid because their purpose was thwarted. See Miranda, 384 U.S. at 468. Trochez' statements were not voluntary and should have been suppressed.

c. The State Cannot Prove Admission of Trochez' Statements in Violation of *Miranda* and *Edwards* Did Not Contribute to the Jury's 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 v. United States, 530 U.S. 428, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (holding Miranda is constitutional rule, not merely evidentiary). Reversal is required unless the State meets the burden of proving the error was harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); France, 121 Wn. App. at 401-02.¹⁶ The error is presumed prejudicial unless the State can prove beyond a reasonable doubt that the error did not contribute to the jury's verdict. Fulminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26); Easter, 130 Wn.2d at 242. The State cannot meet that burden here because the State relied heavily on the

¹⁶ See also State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001) (citing State v. Miller, 131 Wn. 2d 78, 90, 929 P.2d 372. (1997).

Trochez' statement that he was furious in countering his claim of self-defense.

First, generally speaking, an accused person's own statements are extremely likely to contribute to the jury's verdict. As the Court noted in Fulminante,

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

499 U.S. at 296 (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 391 (1968) (White, J., dissenting)); see also State v. Wilson, 144 Wn. App. 166, 185, 181 P.3d 887 (2008) (although other witnesses testified about Wilson's acts, testimony about confession "has significant impact on a jury and was not harmless beyond a reasonable doubt."). Thus, courts exercise great caution in the harmless error analysis. Fulminante, 499 U.S. at 296.

Specifically, courts are reluctant to find harmless error when the State specifically attempts to put the disputed evidence before the jury and when it relies on that evidence in closing argument. See, e.g., State v. Carnahan, 130 Wn. App. 159, 169, 122 P.3d 187 (2005) (prejudicial error

when prosecutor emphasized evidence in closing argument); State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990) (harmless error claim should be closely examined when error results from State's deliberate effort to put improper evidence before the jury). In Carnahan, the State violated Carnahan's Fifth Amendment right to silence by using his silence as evidence of guilt. 130 Wn. App. at 159. The State "repeatedly emphasized the improper testimony in closing." Id. Moreover, it did so in order to "discredit Carnahan's trial defense." Id. Although it found "the State's case was strong," the court could not find the error harmless beyond a reasonable doubt and reversed. Id.

As in Carnahan, the prosecutor in this case repeatedly emphasized the improper testimony in closing argument to discredit Trochez' defense. The only real question before the jury was Trochez' mental state – whether he reasonably feared imminent death or substantial bodily harm, whether he intended to kill, whether that intent was premeditated, whether he was merely reckless or criminally negligent. In arguing against Trochez' self-defense claim, the State relied on his statements to detectives in Vancouver.

The prosecutor began his closing argument by reminding the jury that, when police asked why he grabbed the gun, Trochez told them he was "furious," not scared, but furious. 16RP 23. The prosecutor told the jury, "look at his statement, not at the bologna that came from his mouth two and

a half years later.” 16RP 27. The prosecutor read several sections of the transcript of the taped statement to the jury and referred again to Trochez’ use of the word “furious” in his statement. 16RP 31-32.

The Fulminante court considered that some confessions may concern only isolated aspects of the crime and may, therefore, be harmless if wrongly admitted. 499 U.S. at 296. But “a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.” Id. Here, Trochez’ statement did not concern only an “isolated aspect” of the crime. On the contrary, it went to the heart of not only his motive, but also his mental state, an essential element both of the crime and of his affirmative defense of self-defense. If the jury believed Trochez’ testimony that he feared for his life, it would have to acquit. On the other hand, if it followed the prosecutor’s suggestion to reject Trochez’ testimony in favor of his statement that he was “furious,” it would, and did, convict him of intentional murder. Trochez’ conviction should be reversed because the State cannot show the admission of these statements did not contribute to the verdict.

d. Trochez’ Statements Were Not Used as Mere Impeachment.

The State may argue Trochez’s statement were properly admitted to impeach Trochez’ testimony. This argument should be rejected because no

instruction limited the jury's consideration of this evidence to mere impeachment of credibility. On the contrary, the prosecutor used it to argue the substantive facts of the case during closing argument.

Under Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), statements deemed involuntary under Miranda that are excluded from the State's case in chief may nonetheless be admitted to impeach the defendant's testimony. However, Harris does not control this case. First, in Harris, the State did not attempt to admit the statements in its case in chief. 401 U.S. at 223-24. The judge instructed the jury that the statements could be used only to gauge Harris' credibility, not as substantive evidence. Id. at 223.¹⁷ The statement was not given to the jury. Id. By contrast, here, Trochez' statement was played for the jury as part of the State's substantive evidence during its case in chief and nothing limited the jury's consideration of the statement solely to impeachment. 12RP 24-25.

This case is more analogous to State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008), where the court held evidence violating the Fifth Amendment right to silence is admissible only if limited to impeaching the defendant's credibility as a witness. In Burke, the court considered comments on pre-arrest silence and noted they may be permissible if carefully limited to

¹⁷ See also Oregon v. Hass, 420 U.S. 714, 716-17, 723-24, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975) (statements inadmissible under Miranda and Edwards properly admitted for impeachment in rebuttal; jury instructed as to limited purpose).

impeachment. 163 Wn.2d at 217-23. However, the prosecutor's argument urged the jury to find Burke guilty because he followed his father's advice to keep quiet and consult with an attorney. Id. at 222. Therefore, the court concluded this was an impermissible comment on the right to silence, not a mere reference to silence or mere impeachment. Id. at 219-22. The court noted that impeachment evidence "may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true." Id. at 219.

Where the evidence that violates the Fifth Amendment right to silence is used as substantive evidence of guilt, the conviction must be reversed. See id. at 222-23. As in Burke, Trochez's statement was used to support the State's case in chief, specifically the mens rea and to disprove the affirmative defense. 12RP 24-25. The State used his statement, in violation of the Fifth Amendment, to argue substantive guilt during closing argument. 16RP 23. His conviction should be reversed.

D. CONCLUSION

Because his statements were admitted in violation of the Fifth and Fourteenth Amendments as well as Article 1, Section 9 of the Washington Constitution, Trochez' conviction for second-degree murder should be reversed.

DATED this 16th day of December, 2011.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67158-8-1
)	
CESAR TROCHEZ-JIMENEZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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 16TH DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CESAR TROCHEZ-JIMENEZ
DOC NO. 349921
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF DECEMBER 2011.

x Patrick Mayovsky

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STATE OF WASHINGTON
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