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NO. ~~6810-6-1~~

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSE HERNANDEZ-GARCIA,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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10/11/11

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A. ARGUMENT

**After Mr. Hernandez-Garcia filed his opening brief, the State proposed written findings in the trial court which did not accurately reflect the oral findings and conclusions; the trial court properly rejected these findings, and the actual findings require reversal and suppression.**

The trial court concluded Mr. Hernandez-Garcia was not in custody for purposes of Miranda<sup>1</sup> even though the court recognized: (1) Mr. Hernandez-Garcia was interrogated for over an hour by two detectives with an interpreter in a small storage room with the doors closed; (2) He was never told he was free to leave; (3) He was never told he did not have to talk to the detectives; (4) He “probably felt that he had to talk, that he had no choice;” and (5) He could not leave after his supervisor told him to “go into the room” with the detectives. In his opening brief, Mr. Hernandez-Garcia pointed out that given these facts, the trial court violated his Fifth Amendment rights by denying his motion to suppress his unwarned statements.

The State, perhaps recognizing that the facts of this case require suppression, complains about the late-filed written findings even while recognizing they are consistent with the oral findings the

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

trial court made at the time of the CrR 3.5 hearing. The State fails to meaningfully distinguish the cases cited in the opening brief showing Mr. Hernandez-Garcia was in custody for Miranda purposes, and does not even attempt to prove the Fifth Amendment violation was harmless beyond a reasonable doubt. This Court should reverse and remand for suppression of the statements and a new trial.

1. The court orally found Mr. Hernandez-Garcia was never told he was free to leave, never told he did not have to talk to detectives, and could not leave after his supervisor told him to go into the small storage room with the detectives and interpreter.

The State failed to file written findings and conclusions following the CrR 3.5 hearing in the trial court. On appeal, Mr. Hernandez-Garcia relied on the oral findings and conclusions, as well as the detectives' testimony, to support his argument that he was in custody and should have been provided Miranda warnings. The facts essential to determining this issue, with citations to the record, are as follows:

1. Mr. Hernandez-Garcia was taken from his workstation and placed in a small storage room (12' by 13') with two detectives and an interpreter hired by the State. 9/28/11 RP 34-36, 52.
2. Both detectives wore guns. 9/28/11 RP 43.

3. The detectives closed the door after Mr. Hernandez-Garcia was brought in. 9/28/11 RP 51.
4. The detectives interrogated Mr. Hernandez-Garcia for over an hour. Ex. 4 at 1-41.
5. The detectives never told Mr. Hernandez-Garcia he did not have to talk to them. 9/28/11 RP 45; ex. 4 at 1-41; 10/6/11 RP 17.
6. The detectives never told Mr. Hernandez-Garcia he was free to leave. 9/28/11 RP 45-46; ex. 4 at 1-41; 10/6/11 RP 17.
7. After interrogating him, the detectives arrested him. Ex. 4 at 41; 9/28/11 RP 41.
8. The trial court stated, "The defendant or a reasonable person would know that he couldn't leave work or he couldn't get paid if he did leave work." 10/6/11 RP 18.
9. The trial court stated, "He can't leave work with his supervisor saying, 'go into the room.'" 10/6/11 RP 18.
10. The trial court stated that Mr. Hernandez-Garcia "probably felt he had to talk, that he had no choice." 10/6/11 RP 20.

Given these facts, Mr. Hernandez-Garcia was in custody and detectives violated his Fifth Amendment rights by failing to provide Miranda warnings before interrogating him. See Brief of Appellant at 6-18.<sup>2</sup>

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<sup>2</sup> (citing, inter alia, Orozco v. Texas, 394 U.S. 324, 327, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969); State v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976); United States v Craighead, 539 F.3d 1073, 1082 (9<sup>th</sup> Cir. 2008); United States v. Kim, 292 F.3d 969, 974 (9<sup>th</sup> Cir. 2002); United States v. Griffin, 922 F.2d 1343, 1348-

2. The State's late-filed findings did not reflect the oral findings, and the trial court properly filed findings that accurately reflected its oral ruling.

After the opening brief was filed, the State proposed written findings in the trial court. CP 78-81. The proposed findings were missing several facts that were clearly in the record and essential to the Miranda ruling. Within 45 minutes of receiving the proposed findings, undersigned counsel alerted trial counsel to the omissions. Appendix A. Trial counsel then moved to vacate the incomplete findings, and proposed additional findings consistent with the record. CP 95-96. The trial court ultimately held a hearing and filed findings which more accurately reflected its oral ruling and the testimony at the CrR 3.5 hearing. CP 90-94. It also explicitly "incorporate[d] by reference, without limitation, its oral findings of fact and conclusions of law as stated on the record considering all testimony provided." CP 93.

The State intimates that it was somehow improper for Mr. Hernandez-Garcia's appellate attorney to insist on complete written findings that accurately reflected the oral findings and statements made at the CrR 3.5 hearing. Brief of Respondent at 22-27. To the contrary, it would be improper and disingenuous to enter findings

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49 (8<sup>th</sup> Cir. 1990); United States v. Carter, 884 F.2d 368 (8<sup>th</sup> Cir. 1989); People v. LaFrankie, 858 P.2d 702 (Colo. 1993)).

that did not comport with the record. See State v. Portomene, 79 Wn. App. 863, 864-65, 905 P.2d 1234 (1995) (written findings must accurately reflect oral ruling and must not be tailored to arguments raised on appeal). Appellate counsel simply sent one piece of e-mail listing the missing facts with citations to the record. Appendix A. The trial court properly incorporated these facts and the entirety of its oral ruling in its written findings and conclusions. CP 92-94.

The State concedes that the written findings now reflect and incorporate the oral findings, but – perhaps recognizing that the findings require suppression – urges this Court to ignore several of them. Brief of Respondent at 22-25. But the findings are proper and must be considered. First, the finding that Mr. Hernandez-Garcia “was placed” in the storage room is supported by substantial evidence. See Brief of Respondent at 24-25. Mr. Hernandez-Garcia did not decide to go to the storage room and summon detectives to talk with him. Instead, his employer escorted him to the room where two detectives and an interpreter were waiting for him, and a detective shut the door behind him. 9/28/11 RP 34 (Detective testified, “they brought him to us”); id. at 51 (Detective says she closed the door after Mr. Hernandez-Garcia was brought to the room).

The State also complains about the trial court's conclusions that Mr. Hernandez-Garcia "probably felt he had to talk, that he had no choice," that "a reasonable person would know that he couldn't leave work or he couldn't get paid if he did leave work," and "he can't leave work with his supervisor saying, 'go into the room.'" Brief of Respondent at 22-24; see 10/6/11 RP 18-20. But this is exactly the type of analysis a court must perform: determining whether a reasonable person in the defendant's position would "have felt he or she was not at liberty to terminate the interrogation and leave." United States v. Craighead, 539 F.3d 1073, 1082 (9<sup>th</sup> Cir. 2008) (citing Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). In other words, the question is "whether a reasonable person in [the defendant's] position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation." Craighead, 539 F.3d at 1082. Given the facts elicited at the CrR 3.5 hearing, the trial court properly concluded that a reasonable person in Mr. Hernandez-Garcia's position would probably feel he had no choice, that he could not leave, and that he had to go into the storage room with the detectives when his employer told him to do so.

3. Reversal is required because the totality of circumstances demonstrates that Mr. Hernandez-Garcia was in custody when the detectives interrogated him for an hour without having provided *Miranda* warnings.

Given the above, the trial court erred in concluding Miranda warnings were not required. As explained in the opening brief, Miranda warnings are required prior to a custodial interrogation, and a suspect is “in custody” when a reasonable person in his position would have felt deprived of his freedom of action in any significant way. Under the numerous cases cited in the opening brief, Mr. Hernandez-Garcia was in custody and warnings were required. See Brief of Appellant at 6-18.

The State claims Mr. Hernandez-Garcia was “never physically restrained,” but he was escorted by his employer to a room with three state actors, two of whom were armed, who closed the door after he was brought into the room. He was physically restrained. See Craighead, 539 F.3d at 1086 (suspect physically restrained where two officers escorted him to storage room and closed the door); Kim, 292 F.3d at 971-72 (suspect was physically restrained even though she was not handcuffed and not taken to jail where two officers interrogated her inside store she owned).

The State notes a detective said “we’re not here to take you to jail,” but that says nothing about whether he was free to end the interrogation and leave the storage room. The trial court properly found Mr. Hernandez-Garcia was never told he was free to leave and was never told he did not have to speak with the detectives. See Kim, 292 F.3d at 972 (suspect in custody despite lack of handcuffs and familiar location where she was not told she was free to leave). And of course, the detectives did arrest Mr. Hernandez-Garcia and take him to jail after the unwarned interrogation.

The prosecutor posits that “the entire tone of the interview would signal to a reasonable person in Hernandez’s position that he was not in custody.” Brief of Respondent at 15. The “interview” involved being brought into a small closed space with two armed detectives and a state interpreter and spending over an hour being repeatedly accused of raping a young child. For the State to characterize this encounter as “friendly” borders on the absurd. Brief of Respondent at 10, 14.

The State contends that the fact that detectives did not arrest Mr. Hernandez-Garcia the first time they went to his workplace goes to show he was not in custody the second time. This argument does not make sense. On December 2<sup>nd</sup>, detectives

made clear that they were leaving without further action only because they did not have an interpreter. They went back with an interpreter on December 9<sup>th</sup> and subjected Mr. Hernandez-Garcia to a custodial interrogation.

Strangely, the State describes the length of the interview here as being on the “shorter end of the spectrum” and not cutting toward a finding of custody. Brief of Respondent at 16-17. But the State concedes that the interview lasted over an hour. The interview was longer than those at issue in Kim, Carter, and LaFrankie – cases in which the Courts held defendants were in custody for Miranda purposes when interviewed for less than an hour at their places of work. Kim, 292 F.3d at 972; Carter, 884 F.2d at 371-72; LaFrankie, 858 P.2d at 704.

When the prosecutor told the trial court the detective went to Mr. Hernandez-Garcia’s workplace “with no intention of” arresting him, the trial court disagreed. 10/6/11 RP 10. The court said, “I don’t believe she wasn’t going to arrest him shortly. I do believe that she was there to see if she could get an interview with him without giving him Miranda warnings.” 10/6/11 RP 10. As noted in the opening brief, this behavior violates the Fifth Amendment:

The application of the rule of Miranda is not a process to be avoided by law enforcement officers. Custody should not be a mystical concept to any law enforcement agency. We see no reason why doubts as to the presence or absence of custody should not be resolved in favor of providing criminal suspects with the simple expedient of Miranda warnings.

...

The constant reluctance of law enforcement to advise suspects of their rights is counterproductive to the fair administration of justice in a free society. ... Such practices protect the integrity of the criminal justice system by assuring that convictions obtained by means of confessions do not violate fundamental constitutional principles.

Griffin, 922 F.2d at 1356.

The State makes no attempt to prove beyond a reasonable doubt that the violation was harmless. Brief of Respondent at 1-28. The failure to present argument on this issue constitutes an implicit concession. In re J.J., 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999). This Court should reverse and remand for suppression of the statements and a new trial.

B. CONCLUSION.

For the reasons set forth above and in the opening brief, Mr. Hernandez-Garcia respectfully requests that this Court reverse his convictions and remand for suppression of his statements and a new trial.

DATED this 24th day of September, 2012.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Appellant

## APPENDIX A

## Lila Silverstein

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**From:** Lila Silverstein  
**Sent:** Monday, June 18, 2012 12:15 PM  
**To:** Palmer, Hal (Hal.Palmer@scraplaw.org)  
**Subject:** FW: State v. Hernandez-Garcia, Jose 10-1-10214-7 SEA

Hal,

Please propose the following additional findings of fact, which are supported by the transcripts:

- Mr. Hernandez-Garcia was placed in a small storage room (approximately 12'x13') with the two detectives and interpreter. See 9/28/11 RP 34-36, 52.
- The detectives closed the door after Mr. Hernandez-Garcia was brought into the room. See 9/28/11 RP 51.
- The detectives interviewed Mr. Hernandez-Garcia for over an hour. See 9/28/11 RP 45.
- After the interview, the detectives placed Mr. Hernandez-Garcia under arrest.

As to conclusions of law, the State is wrong that the court concluded Mr. Hernandez-Garcia "could" have felt he had to talk, that he had no choice. The court said Mr. Hernandez Garcia "**probably** felt he had to talk, that he had no choice." 10/6/11 RP 20. The court also concluded, "The defendant **or a reasonable person** would know that he couldn't leave work or he couldn't get paid if he did leave work." 10/6/11 RP 18.

Let me know if you have any questions, and great job with this case.

Lila

Lila J. Silverstein  
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**From:** Sanchez, Philip [mailto:Philip.Sanchez@kingcounty.gov]  
**Sent:** Monday, June 18, 2012 11:30 AM  
**To:** Court, Heavey  
**Cc:** Palmer, Hal (Hal.Palmer@scraplaw.org); Lila Silverstein  
**Subject:** State v. Hernandez-Garcia, Jose 10-1-10214-7 SEA

Good morning,

This trial was previously held in front of Judge Heavey in October of 2011. The parties did not submit written findings of the court's oral ruling pursuant to CrR 3.5. I would like to set this for a hearing so that such findings may be entered before the court.

Attached below is:

- (1) Proposed findings of fact and conclusions of law.
- (2) Transcript from September 28, 2011
- (3) Transcript from September 29, 2011
- (4) Transcript from October 6, 2011

**Philip J. Sanchez**  
Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office  
Domestic Violence Unit  
Direct Line: 206-205-5524

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68106-1-I
v.	)	
	)	
JOSE HERNANDEZ-GARCIA,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SAMANTHA KANNER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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[X] JOSE HERNANDEZ-GARCIA 354143 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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*Handwritten:* N  
*Stamp:* 2012 SEP 24 PM 11:45  
COURT OF APPEALS - DIVISION ONE

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2012.

X \_\_\_\_\_ 

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