

NO. 35600-7-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

FILED
APR 11 2007
CLERK OF COURT
JULIA A. HARRIS
42

STATE OF WASHINGTON

Respondent,

v.

IDA C. PEREZ-DIAZ,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael Sullivan, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

FM 4/23/07

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....	2
C. STATEMENT OF THE CASE.....	3
1. <u>Procedural history:</u>	3
a. Perez-Diaz’ statements to law enforcement following her arrest on July 26, 2006.	4
b. Perez-Diaz’ statements during a civil forfeiture hearing on September 19, 2006.	6
c. Suppression hearing.	6
d. Jury Instructions.....	10
e. Verdict.....	11
2. <u>Sentencing:</u>	11
3. <u>Substantive facts:</u>	11
a. June 7, 2006.	12
b. July 24, 2006.	12
c. July 25, 2006.	13
D. ARGUMENT.....	15
1. <u>PEREZ-DIAZ’ POST-MIRANDA STATEMENTS MUST BE SUPPRESSED BECAUSE HER WAIVER OF MIRANDA RIGHTS WAS</u>	

	<u>INEFFECTIVE DUE TO PRIOR IMPROPER INTERROGATION</u>	15
a.	Custodial Interrogation Poses Special Risks to the Privilege Against Self-Incrimination.	15
b.	The <i>Mirandized</i> Statement is Not Admissible Because It Followed An Un-<i>Mirandized</i> confession.	17
c.	Reversal Is Required Under the Constitutional Error Standard.	22
E.	CONCLUSION	23
F.	APPENDIX	A-1

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>Mead School Dist. 354 v. Mead Education Ass'n</i> , 85 Wn.2d 278, 534 P.2d 561 (1975).....	16
<i>State v. Dictado</i> , 102 Wn.2d 277, 687 P.2d 172 (1984)	16
<i>State v. Lavaris</i> , 99 Wn.2d 851, 664 P.2d 1234 (1983).....	19
<i>State v. Setzer</i> , 20 Wn. App.46, 579 P.2d 957 (1978)	16
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Arizona v. Fulminante</i> , 499 U.S. 279 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	22
<i>Chapman v. California</i> , 386, U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	23
<i>Dickerson v. United States</i> , 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).....	16
<i>Mincey v. Arizona</i> , 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).....	16
<i>Moran v. Burbine</i> , 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).....	22
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	5, 15, 16, 17, 18, 19, 20, 21, 22
<i>Missouri v. Seibert</i> , 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).....	18, 20, 21, 22
<i>Oregon v. Elstad</i> , 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed. 2d 222 (1985).....	18, 19
<i>United States v. Bayer</i> , 331 U.S. 532, 76 S. Ct. 1394, 91 L.Ed. 1654 (1947).....	19
<i>Wong Sun v. United States</i> , 371 U.S. 471, 88 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....	19

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 69.50.401(1).....	3
RCW 69.50.4013	3
<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. amend. V	1, 15, 22
Const. art I, § 9.....	15
<u>COURT RULES</u>	<u>Page</u>
CrR 3.5.....	6
RAP 10.3(a)(4).....	3

A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting Appellant Ida Perez-Diaz' *Mirandized* statements to police because it followed her un-*Mirandized* statements that were made without a knowing and voluntary waiver of her rights under the Fifth Amendment of the federal constitution.

2. The trial court erred in denying the Appellant's Criminal Rule 3.5 motion to suppress *Mirandized* statements made to law enforcement.

3. The trial court erred by entering the following Findings of Fact pertaining to the CrR 3.5 hearing:

6. At 8:21 p.m. Ron Clark read Ida Christine Perez-Diaz her *Miranda* Warning from his Pacific County Sheriff's Office Card. Ida Christine Perez-Diaz stated that she understood and agreed to continue the conversation that she had with Ron Clark a couple of minutes prior.

7. Ida Christine Perez-Diaz stated that she had not been dealing drugs for a long time only since December when she lost her job. She went on to state that she did not make much money selling drugs and was doing it to make ends meet, Ida Christine Perez-Diaz when the conversation turned to her supplier and amount she owed him, she asked Ron Clark is she should be talking to an attorney. Ron Clark informed her that she should and terminated the contact at 8:30 p.m.

8. On September 19, 2006 at approximately 10:00 a.m. a civil forfeiture hearing took place in North District Court in Pacific County State of Washington. At issue was \$1,200.00 found on the person of Ida Christine Perez-Diaz at the time of her arrest on July 26, 2006 and seized by the Sheriff's office. Forty dollars of the \$1,200.00

was traced back to a controlled buy that the Pacific County Sheriff's Office had conducted with Ida Christine Perez-Diaz as the target of the controlled buy.

9. A person claiming to be Ida Christine Perez-Diaz appeared telephonically. Ida Christine Perez-Diaz was not in custody at the time. At one point during the hearing the person claiming to be Ida Christine Perez-Diaz stated that she was not going to lie it was (the forty dollars) was drug money. At another point in the hearing the person claiming to be Ida Christine Perez-Diaz stated that she was selling drugs to save her house.

4. The trial court erred by entering the following Conclusions of Law pertaining to the CrR 3.5 hearing:

2. Ida Christine Perez-Diaz statements to Deputy Ron Clark after receiving her *Miranda* warnings are admissible in the State's Case in Chief. Ida Christine Perez-Diaz knowingly, intelligently and voluntarily waived her right to remain silent and chose to speak with Ron Clark.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. A suspect's statements to police during custodial interrogation may be admitted in the State's case-in-chief only if the State can show by a preponderance of the evidence that the suspect was warned of her or his *Miranda* rights and knowingly, intelligently, and voluntarily waived those rights. The waiver may be rendered ineffective by prior statements improperly obtained through unwarned interrogation. After she was arrested, Perez-Diaz made incriminating statements to police. Approximately 21

minutes after the start of her first conversation with police at the Sheriff's Office, she was administered her *Miranda* warnings. Although Perez-Diaz waived her *Miranda* rights, was such waiver ineffective in light of the prior unwarned statements and the officer's failure to explain the distinction between statements given before and after *Miranda*? Assignments of Error No. 1, 2, 3, and 4.

C. STATEMENT OF THE CASE¹

1. Procedural history:

A jury convicted Ida Perez-Diaz of one count of possession of methamphetamine, contrary to RCW 69.50.4013, and three counts of delivery of methamphetamine, contrary to RCW 69.50.401(1), as charged by second amended information filed by the State in Pacific County Superior Court on October 30, 2006. Clerk's Papers [CP] at 30-32. The jury found that Counts II and III occurred within 1000 feet of a school bus route stop. CP at 69, 70.

Pacific County Superior Court Judge Michael Sullivan presided over the trial. Judge Sullivan imposed a standard range sentence of 366 days for Count I, 30 months for Counts II, III, and IV, to be served concurrently, and

¹This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

an enhancement in Counts II and III, for a total period of 54 months of confinement. CP at 77-91. Timely notice of this appeal followed. CP at 92-93.

a. Perez-Diaz' statements to law enforcement following her arrest on July 26, 2006.

Ida Perez-Diaz was arrested in Long Beach, Washington on July 26th, 2006. Report of Proceedings [RP] (Suppression) at 19.² She was taken into custody by Officer Paul Jacobson of the Long Beach Police Department and Deputy Michael Ray of the Pacific County Sheriff's Office. RP (Suppression) at 19-20. At approximately 7:40 p.m. Jacobson informed her that she had a right to an attorney but did not administer full constitutional warnings. RP (Suppression) at 22. Officer Jacobson then transported her to the Pacific County Sheriff's Office in Long Beach. RP (Suppression) at 20, 26. After being transported to the Sheriff's Office, Perez-Diaz was contacted by Deputy Ron Clark at approximately 8:00 p.m. RP (Suppression) at 26. Between 8:00 p.m. and 8:21 p.m. Clark spoke intermittently with Perez-Diaz for five to ten minutes. RP (Suppression) at 26-28. Clark informed her of the

² The Verbatim Report of Proceedings consists of 4 volumes of transcripts [RP], which are referred to in this Brief as follows:
Suppression Hearing, October 13, 2006; Sentencing, November 17, 2006
1RP October 30, 2006 Trial
2RP October 31, 2006 Trial
3RP November 1, 2006 Trial

reason for her arrest was the sale of drugs. He stated that during the course of this brief conversation she admitted that “she was a drug dealer, that she had dealt in drugs, drug activity, and it was to make ends meet.” RP (Suppression) at 30-31.

Clark stopped asking questions and asked Officer Jacobson if Perez-Diaz had been informed of her *Miranda*³ warnings. RP (Suppression) at 31. Jacobson told Clark that she had not been informed of her *Miranda* warnings. RP (Suppression) at 31, 38.

Clark read Perez-Diaz her *Miranda* warnings at approximately 8:20 p.m., and she stated that she understood and agreed to continue the conversation that she had with Clark a couple of minutes earlier. RP (Suppression) at 38-41. She stated that she had not been dealing drugs for a long time, only since December when she lost her job, that she did not make much money selling drugs, and that she was doing it to make ends meet. RP (Suppression) at 33, 41-42. She stated that \$1,200.00 obtained from her came from the bank. RP (Suppression) at 34. He asked her about who else was involved in the drug activity, and she asked about having an attorney.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

RP (Suppression) at 34, 41. Clark stopped questioned at that time. RP (Suppression) at 34-35.

b. Perez-Diaz' statements during a civil forfeiture hearing on September 19, 2006.

Police found \$1,200.00 found Perez-Diaz's possession at the time of her arrest on July 26, 2006. 2RP at 74. This money was seized by law enforcement. A civil forfeiture hearing took place in North District Court in Pacific County on September 19, 2006. 2RP at 36. Forty dollars of the \$1,200.00 was traced back to money provided for a "controlled buy" that the Pacific County Sheriff's Office had conducted. Perez-Diaz had been the target of the "controlled buy." 2RP at 88.

Perez-Diaz appeared telephonically for the forfeiture hearing on September 19, 2006 before Judge Elizabeth Penoyar. RP (Suppression) at 7, 15. Court Administrator Jan Wilson testified that Perez-Diaz stated during the hearing that some of the money found on her person was from a check she cashed, that she had gotten some money from savings, and that "she said that she wasn't going to lie, that some of the money was drug money." RP (Suppression) at 10-11.

c. Suppression hearing.

Pursuant to CrR 3.5, defense counsel moved to suppress Perez-Diaz'

statements made to law enforcement on July 26, 2006 and made at the September 19 civil forfeiture hearing. The motion was heard by Judge Sullivan on October 13, 2006.

Judge Sullivan filed the following Memorandum Opinion on October 24, 2006 regarding the CrR 3.5 motion:

This matter came before the Court on October 13, 2006, for a 3.5/3.6 suppression hearing. The Court received supplemental briefing from the parties. The Court has reviewed the testimony and all written materials filed therein.

Issue I: Are Defendant's statements made at the civil seizure hearing admissible in the State's in the State's case-in-chief under the above cause number.

Holding: YES. This was a civil forfeiture hearing requested by Defendant. Defendant's statements about "not lying and part of the money being drug money" was voluntary and not as the result of any questioning by the deputy. Therefore, such statement was not subject to the Fifth Amendment warnings or Miranda warnings.

Issue II: Are Defendant's statements made to Deputy Clark prior to Deputy Clark reading Defendant her Miranda Warnings admissible in the State's case-in-chief?

Holding: NO. The Court finds that the State made a mistake in assuming that the prior officer had already read the Defendant her Miranda Warnings. The Court does not find any bad faith on the part of the parties or deputies.

Issue III: Are the Defendant's statements made to Deputy Clark post Miranda Warnings admissible in the State's case-in-chief?

Holding: YES. The Court finds that the Defendant intelligently waived her right to remain silent and that her choice to speak to Deputy Clark was not overcome by her prior incriminating admissions. The evidence does not support the finding that the defendant's will had been so overcome by her prior admissions such that a subsequent reading of her Miranda Warnings would be futile and prevent the Defendant from understanding the Miranda warnings and her right to remain silent.

The State shall prepare Findings of Facts and Conclusions of Law consistent with this opinion.

CP at 22-23.

The following findings of fact and conclusions of law were entered

November 17, 2006 regarding the CrR 3.5 motion:

FINDINGS OF FACT:

2. On July 26th, 2006, at approximately 7:35 p.m. Ida Christine Perez-Diaz was arrested in her vehicle pursuant to a warrant at 10th St. N. Long Beach, Pacific County, State of Washington. Ida Christine Perez-Diaz was taken into custody by Officer Paul Jacobson of the Long Beach Police Department and Deputy Michael Ray of the Pacific County Sheriff's Office.

3. At approximately 7:40 p.m. Officer Jacobson informed Ida Christine Perez-Diaz that she had a right to an attorney. Officer Jacobson then transported her to the Pacific County Sheriff's Office located in Long Beach.

4. Upon arriving at the Pacific County Sheriff's Office Ida Christine Perez-Diaz was contacted by Pacific County Chief Criminal Deputy Ron Clark at approximately 8:00 p.m. Ron Clark was coordinating the search warrant for Ida Christine Perez-Diaz residence at the time of the initial

contact and was interacting with other individuals involved in the search warrant. Between 8:00 p.m. and 8:21 p.m. Ron Clark conversed intermittently with Ida Christine Perez-Diaz for five to ten minutes. He informed her of the reason for her arrest was the sale of drugs. He inquired as to her safety in regards to owing money to her supplier. She stated no reason. During the course of this brief conversation she admitted to using drugs.

5. Ron Clark stopped to Ida Christine Perez-Diaz and inquired with officer Jacobson if Ida Christine Perez-Diaz had been informed of her Miranda warnings. Officer Jacobson informed Ron Clark that Ida Christine Perez-Diaz had not been informed of her *Miranda* warnings.

6. Ron Clark was surprised to hear that Ida Christine Perez-Diaz had not been read her *Miranda* warnings. The oversight was not intentional or part of an instituted procedure by the Sheriff's Office.

7. At 8:21 p.m. Ron Clark read Ida Christine Perez-Diaz her *Miranda* Warning from his Pacific County Sheriff's Office Card. Ida Christine Perez-Diaz stated that she understood and agreed to continue the conversation that she had with Ron Clark a couple of minutes prior.

8. Ida Christine Perez-Diaz stated that she had not been dealing drugs for a long time only since December when she lost her job. She went on to state that she did not make much money selling drugs and was doing it to make ends meet, Ida Christine Perez-Diaz when the conversation turned to her supplier and amount she owed him, she asked Ron Clark is she should be talking to an attorney. Ron Clark informed her that she should and terminated the contact at 8:30 p.m.

9. On September 19, 2006 at approximately 10:00 a.m. a civil forfeiture hearing took place in North District Court in Pacific County State of Washington. At

issue was \$1,200.00 found on the person of Ida Christine Perez-Diaz at the time of her arrest on July 26, 2006 and seized by the Sheriff's office. Forty dollars of the \$1,200.00 was traced back to a controlled buy that the Pacific County Sheriff's Office had conducted with Ida Christine Perez-Diaz as the target of the controlled buy.

10. A person claiming to be Ida Christine Perez-Diaz appeared telephonically. Ida Christine Perez-Diaz was not in custody at the time. At one point during the hearing the person claiming to be Ida Christine Perez-Diaz stated that she was not going to lie it was (the forty dollars) was drug money. At another point in the hearing the person claiming to be Ida Christine Perez-Diaz stated that she was selling drugs to save her house.

CONCLUSIONS OF LAW

11. Ida Christine Perez-Diaz's statements made to Deputy Ron Clark prior to reading her *Miranda* Warnings are not admissible in the State's Case in Chief but are admissible for impeachment.

12. Ida Christine Perez-Diaz statements to Deputy Ron Clark after receiving her *Miranda* warnings are admissible in the State's Case in Chief. Ida Christine Perez-Diaz knowingly, intelligently and voluntarily waived her right to remain silent and chose to speak with Ron Clark.

13. Ida Christine Perez-Diaz statements during the civil forfeiture hearing are admissible in the State' Case in Chief. Ida Christine Perez-Diaz statements were voluntary and not subject to Fifth Amendment warning or *Miranda* Warnings.

CP at 72-76. Appendix A-1 through A-5.

d. Jury instructions.

Neither counsel noted exceptions to requested instructions not given or objected to instructions given. 3RP at 3. CP at 40-64.

e. Verdict.

The jury found Perez-Diaz guilty of possession of methamphetamine and three counts of delivery of methamphetamine. The jury found Counts II and III were committed within 1000 feet of a school bus route stop. CP at 65, 66, 67, 68, 69 and 70.

2. Sentencing:

The matter came on for sentencing on November 17, 2006. RP (Sentencing) at 2-23. Perez-Diaz was given an opportunity for allocution and two family members addressed the court on her behalf. RP (Sentencing) at 12-15. The court sentenced her within the standard range. The enhancements were ordered to be served consecutively to the underlying sentences, but concurrently to each another. RP (Suppression) at 16. CP at 82.

3. Substantive facts:

Rod Davis acted on behalf of Pacific County Sheriff's Office as a "confidential informant." 1RP at 20. In exchange for making twelve "controlled buys" from four people, the State would dismiss three counts of delivery of a controlled substance pending against Davis and allow him to

plead guilty to possession of methamphetamine and serve 90 days in jail. IRP at 22, 50-52.

In his capacity as an informant, Davis would engage in “controlled buys,” where he would take money from the police and use it to obtain drugs.

1RP at 100-04.

a. June 7, 2006.

Deputy Rich Byrd met with Davis on June 7, 2006, in Ocean Park. Byrd searched Davis' person and his bicycle and gave him \$100.00 in cash. 1RP at 31, 33, 61. Davis then rode to Perez-Diaz' house at 3001 272nd Street in Ocean Park. 1RP at 26. Davis returned ten to fifteen minutes later and gave him a Ziploc baggie containing a crystalline powder. 1RP at 30, 31. Exhibit 1. The powder subsequently tested positive for the presence of methamphetamine. 1RP at 84.

b. July 24, 2006.

Byrd met with Davis on July 24, 2006 in Ocean Park and searched him. 1RP at 34. Byrd gave Davis \$100.00 to purchase methamphetamine from Perez-Diaz. 1RP at 35, 39. Davis went to Perez-Diaz' house on his bicycle and returned approximately 14 minutes later. 1RP at 38, 69. Byrd searched him again, and Davis gave him one gram of suspected methamphetamine. 1RP at 36-39. Exhibit 2.

c. July 25, 2006.

Davis conducted another controlled buy on July 25, 2006. 1RP at 38. Byrd searched Davis and gave him \$100.00. 1RP at 39-40. Davis went to Perez-Diaz' house and returned 37 minutes later with 1.5 grams of suspected methamphetamine. 1RP at 38, 39. Exhibit 3.

Following the controlled buy, police obtained a warrant to search Perez-Diaz' house the following day. 1RP at 41. Police found methamphetamine and digital scales in an upstairs bedroom in the house. 1RP at 42. Exhibits 4 and 6. Exhibits 1, 2, 3, and 4 tested positive for methamphetamine. 2RP at 150, 154, 155, 157.

Ron Davis testified that he bought methamphetamine from Perez-Diaz while working for the police on June 6 or 7, July 24, and July 25, 2006. 1RP at 98-102.

After Perez-Diaz was arrested on July 26, 2006, police found \$1200.00 in her pocket. 2RP at 74. Of that amount, the serial numbers on two \$20.00 bills matched the serial numbers of "buy money" given by police to Davis. 2RP at 88.

Elizabeth Penoyar testified that she presided over a civil forfeiture hearing on September 19, 2006 regarding the \$1,200.00 obtained by police.

2RP at 35-42. She stated that Perez-Diaz did not appear in person at the hearing, but that a person identifying herself as Perez-Diaz called into the court at the scheduled time of the hearing. 2RP at 37. Judge Penoyar stated that during the telephonic appearance, the person speaking said "I'll be honest, some of that money is drug money but some of that money was my own money." 2RP at 38.

Perez-Diaz testified that she lived at the house located at 3001 272nd Street in July, 2006, but denied that Ron Davis was at her house on June 7, 2006, and denied selling him methamphetamine. 2RP at 182, 191. She also denied selling methamphetamine to him on or around July 24 and July 26. 2RP at 183. She testified that the \$1,200.00 police obtained when she was arrested was from the bank and money that she had saved. 2RP at 184. She acknowledged that she said that "some of the money was drug money" during the forfeiture hearing. 2RP at 187. She testified that she made that statement because some of the money was rent money paid to her by her roommates, and that based on what the police told her, she thought that it may be drug money. 2RP at 187. Perez-Diaz denied having drugs in her bedroom, and denied that the methamphetamine obtained by the police during the search of the house belonged to her. 2RP at 189.

Timely notice of appeal was filed on November 17, 2006. CP at 92-

93. This appeal follows.

D. ARGUMENT

1. **PEREZ-DIAZ' POST-MIRANDA STATEMENTS MUST BE SUPPRESSED BECAUSE HER WAIVER OF MIRANDA RIGHTS WAS INEFFECTIVE DUE TO PRIOR IMPROPER INTERROGATION.**

a. **Custodial Interrogation Poses Special Risks to the Privilege Against Self-Incrimination.**

The Fifth Amendment of the United States Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.” Article 1, § 9 of the Washington Constitution provides “[n]o person shall be compelled in any criminal case to give evidence against himself.” The privilege against self-incrimination “is fully applicable during a period of custodial interrogation.” *Miranda v. Arizona*, 384 U.S. 436, 460-61, 86 S. Ct. 1602, L. Ed. 2d 694 (1966).

The Supreme Court in *Miranda* found “an intimate connection between the privilege against self-incrimination and police custodial questioning.” *Id.* at 458. The Court has repeatedly recognized the special dangers inherent in *all* custodial interrogations. “Even without employing brutality, the ‘third degree’ or [other] specific statements . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the

weakness of individuals.”” *Dickerson v. United States*, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (quoting *Miranda*, 384 U.S. at 455).

Custodial interrogation poses a special risk to the privilege against self-incrimination because it is inherently coercive. *Id.* It “blurs the line between voluntary and involuntary statements” by heightening the risk a person will be compelled to incriminate himself, thus violating his constitutional privilege. *Id.*

The Constitution forbids the use of involuntary statements against a criminal defendant. *State v. Dictado*, 102 Wn.2d 277, 293, 687 P.2d 172 (1984) (citing *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)); *Mead School Dist. 354 v. Mead Education Ass’n*, 85 Wn.2d 278, 534 P.2d 561 (1975). Involuntary statements are excluded because they lack trustworthiness and thus impede the truth-finding function of the trial court. *State v. Setzer*, 20 Wn. App.46, 51, 579 P.2d 957 (1978).

To combat the pressures of custodial interrogation and “permit a full opportunity to exercise the privilege against self-incrimination.” The Court in *Miranda* fashioned a bright-line rule. *Miranda*, 384, U.S. at 467. Under *Miranda*, police must “adequately and effectively” apprise a suspect of his rights and “the exercise of those rights must be fully honored.” *Id.* The rule

forbids the use of a defendant's custodial statements in the prosecution's case-in-chief, "unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444.

Miranda requires police to do more than merely inform a suspect of her right to be silent; police must also provide a meaningful opportunity to exercise the right. "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." *Miranda*, 384 U.S. at 469. Suspects must be warned of their right to be silent and given an opportunity to exercise the right throughout the interrogation. *Id.* at 479. Only "[a]fter such warnings have been given, and such opportunity afforded him, [may] the individual . . . knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.*

b. Her *Mirandized* Statements are Not Admissible Because They Followed An Un-*Mirandized* confession

The trial court correctly found that Perez-Diaz' initial statements were not admissible because they were not *Mirandized*. Finding of Fact 1. CP at 72. The trial court erred, however, by admitting the statements she made after being administered her rights. When an officer interrogates a suspect

without giving *Miranda* warnings, obtains a confession, gives the warnings, then continues the interrogation and obtains another confession, the warnings cannot “function effectively as *Miranda* requires.” *Missouri v. Seibert*, 542 U.S. 600, 611-12, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). The threshold question is “whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.” *Id.* at 622. Thus, the *Seibert* Court asked,

Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has been just interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second state of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 612.

Since the U.S. Supreme Court’s ruling in *Elstad*, police have begun using a tactic in which they question a suspect first to see if they can get a confession, then they advise the suspect of their rights and hope to get a second confession. *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). The Supreme Court weighed in on that tactic in *Seibert* and said both confessions should be excluded because the tactic acts to undermine the protections set up in *Miranda*. *Seibert*, 542 U.S. 611-12,

citing *Miranda*. In this case, the police used this same tactic and were successful in getting statements from Perez-Diaz. However, based on *Seibert*, her second statements should have been excluded, along with her first statement. The trial court erred in admitted her second statements.

The later *Mirandized* statement by Perez-Diaz after talking to Deputy Clark is not admissible because it followed an un-*Mirandized* confession that was not voluntary and free from coercion. If a properly *Mirandized* confession was obtained after an initial, unconstitutionally obtained confession, the later statement may also be inadmissible, as “fruit of the poisonous tree.” See *Wong Sun v. United States*, 371 U.S. 471, 487-88 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The post-*Miranda* confession is necessarily “tainted” by the illegality of the pre-*Miranda* confession, *State v. Lavaris*, 99 Wn.2d 851, 857-58, 664 P.2d 1234 (1983). It will be inadmissible, unless some “insulating factors separates the subsequent, post-*Miranda* statement from the taint of the pre-*Miranda* confession. *Lavaris*, at 860. This rule of exclusion is known as the “cat out of the bag” doctrine. See *United States v. Bayer*, 331 U.S. 532, 540, 76 S. Ct. 1394, 91 L. Ed. 1654 (1947).

The question-first tactic needs to carefully examined and precluded. The purpose of the tactic is to get a confession the suspect would not make if she understood her rights at the outset. As noted in *Seibert*, the postwarning

confession made after a prewarning confession allows the interrogator to "count on getting it duplicate, with trifling additional trouble." *Seibert*, 124 S.Ct. at 2611.

Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think she had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. *Seibert*, 124 S.Ct. at 2610-11. The Court found this type of police tactic undermined *Miranda*. *Seibert*, 124 S.Ct. at 2612.

The facts in the instant case present the same dangers addressed by the Court in *Seibert*. In *Seibert*, the officer questioned the suspect for 30 to 40 minutes without *Miranda* warnings until the suspect gave an incriminating response. *Seibert*, 124 S.Ct. at 2606. *Seibert* was given a 20-minute coffee and cigarette break and then the officer turned on the tape recorder, gave *Seibert* full *Miranda*, and obtained a waiver of her rights. *Id.* Before her first-degree murder trial, *Seibert* moved to exclude both her prewarning and postwarning statements. *Id.* The Supreme Court ruled this form of "question-first" tactic undermines the efficacy of *Miranda*, since the warnings after an unwarned confession would not effectively advise the suspect that he had any real choice but giving a statement. *Seibert*, 124 S.Ct. at 2610. The

paramount guarantee under *Miranda* is that a “suspect must be ‘adequately and effectively’ advised of the choice the Constitution guarantees.” *Seibert*, 124 S.Ct. at 2609-10 (citing *Miranda*, 384, U.S. at 467).

In this case, Officer Jacobson gave only abridged warnings to Perez-Diaz, telling her that she had the right to an attorney. She was then transported to the Sheriff’s Office, where she was questioned by Deputy Clark, starting at approximately 8:00 p.m. He questioned her intermittently between 8:00 p.m. and 8:21 p.m. without giving any *Miranda* advisement, during which time she made incriminating statements. At 8:21 p.m. she was given her *Miranda* warnings. She stated that she understood and agreed to continue answering questions. The pause between the unwarned and warned phases of questioning was at most a couple of minutes. As in *Seibert*, the officers did not advise Perez-Diaz that her prior unwarned statement could not be used against her. “Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after” the unwarned interrogation. *Id.* at 617. Perez-Diaz’ waiver was therefore neither knowing nor voluntary, and were influenced by the fact that she had already made unwarned, incriminating statements. The post-*Miranda* statements therefore run afoul of *Seibert* and must be suppressed.

The police tactics used in the instant case made the second statement,

given after *Miranda* rights were fully read, inadmissible. This vital constitutional warning is the very essence of *Miranda* – it is the advisement against self-incrimination under the 5th Amendment. The fact that Perez-Diaz was not properly advised of her right against self-incrimination until after her initial statements made her postwarning statements inadmissible because the subsequent warnings were “likely to mislead and deprive[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.” *Seibert*, 124 S. Ct.at 2610 (citing *Moran v. Burbine*, 475 U.S. 412. 424. 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

The technique used here operated to circumvent the procedures required by *Miranda*, which are meant to overcome the inherently coercive pressures of custodial interrogation. Because the police tactics made the postwarning statement ineffective, the Court must reverse the convictions.

c. Reversal Is Required Under the Constitutional Error Standard.

The appropriate remedy is reversal and remand. The erroneous admission of custodial statements is subject to constitutional harmless error review. *Arizona v. Fulminante*, 499 U.S. 279 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The question is whether the reviewing court can conclude

the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386, U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State must be able to demonstrate beyond a reasonable doubt the error did not contribute evidence, honest, fair-minded jurors might have brought in not-guilty verdicts, the error cannot be deemed harmless. *Id.* at 25-26.

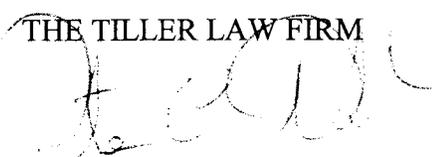
E. CONCLUSION

For the foregoing reasons, Perez-Diaz respectfully requests that this Court reverse the trial court's ruling that her statements after being advised of her *Miranda* rights were admissible, reverse her convictions and remand this matter for a new, fair trial. In the unlikely event that she does not prevail, she asks this Court to deny any State request for costs on appeal.

DATED: April 23, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER - WSBA 20835
Of Attorneys for Ida Perez-Diaz

A

FILED

2006 NOV 17 PM 6:17

VIRGINIA LEACH CLERK
PACIFIC CO. WA

BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR
PACIFIC COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,)	NO. 06-1-00161-1
)	
vs.)	
)	FINDINGS OF FACT,
IDA CHRISTINE PEREZ-DIAZ,)	CONCLUSIONS OF LAW
)	
)	
)	
Defendant.)	

FINDINGS OF FACT:

1. On July 26th 2006, at approximately 7:35 p.m. Ida Christine Perez-Diaz was arrested in her vehicle pursuant to a warrant at 10th St. N. Long Beach, Pacific County State of Washington. Ida Christine Perez-Diaz was taken into custody by Officer Paul

**FINDINGS OF FACTS,
CONCLUSIONS OF LAW
AND ORDER**

Page 1 of 5

Jacobson of the Long Beach Police Department and Deputy Michael Ray of the Pacific County Sheriff's Office.

2. At approximately 7:40 p.m. Officer Jacobson informed Ida Christine Perez-Diaz that she had a right to an attorney. Officer Jacobson then transported her to the Pacific County Sheriffs Office located in Long Beach.
3. Upon arriving at the Pacific County Sheriff's Office Ida Christine Perez-Diaz was contacted by Pacific County Chief Criminal Deputy Ron Clark at approximately 8:00 p.m. Ron Clark was coordinating the search warrant for Ida Christine Perez-Diaz residence at the time of the initial contact and was interacting with other individuals involved in the search warrant. Between 8:00 p.m. and 8:21 p.m. Ron Clark conversed intermittently with Ida Christine Perez-Diaz for five to ten minutes. He informed her of the reason for her arrest the sale of drugs. He inquired as to her safety in regards to owing money to her supplier. She stated no concern. During the course of this brief conversation she admitted to selling drugs.
4. Ron Clark stopped talking to Ida Christine Perez-Diaz and inquired with officer Jacobson if Ida Christine Perez-Diaz had been informed of her Miranda warnings. Officer Jacobson informed Ron Clark that Ida Christine Perez-Diaz had not been informed of her Miranda warnings.

**FINDINGS OF FACTS,
CONCLUSIONS OF LAW
AND ORDER**

Page 2 of 5

5. Ron Clark was surprised to hear that Ida Christine Perez-Diaz had not been read her Miranda warnings. The oversight was not intentional or part of an instituted procedure by the Sheriff's Office.
6. At 8:21 p.m. Ron Clark read Ida Christine Perez-Diaz her Miranda Warning from his Pacific County Sheriff's Office Card. Ida Christine Perez-Diaz stated that she understood and agreed to continue the conversation that she had with Ron Clark a couple of minutes prior.
7. Ida Christine Perez-Diaz stated that she had not been dealing drugs for a long time only since December when she lost her job. She went on to state that she did not make much money selling drugs and was doing it to make ends meet. Ida Christine Perez-Diaz when the conversation turned to her supplier and amount she owed him, she asked Ron Clark if she should be talking to an attorney. Ron Clark informed her that she should and terminated the contact at 8:30 p.m.
8. On September 19, 2006 at approximately 10:00 a.m. a civil forfeiture hearing took place in North District Court in Pacific County State of Washington. At issue was \$1,200.00 found on the person of Ida Christine Perez-Diaz at the time of her arrest on July 26, 2006 and seized by the Sheriff's office. Forty dollars of the \$1,200.00 was traced back to a controlled buy that the Pacific County Sheriff's Office had conducted with Ida Christine Perez-Diaz as the target of the controlled buy.

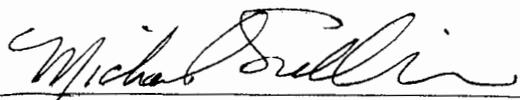
**FINDINGS OF FACTS,
CONCLUSIONS OF LAW
AND ORDER**

9. A person claiming to be Ida Christine Perez-Diaz appeared telephonically. Ida Christine Perez-Diaz was not in custody at the time. At one point during the hearing the person claiming to be Ida Christine Perez-Diaz stated that she was not going to lie it was (the forty dollars) was drug money. At another point in the hearing the person claiming to be Ida Christine Perez-Diaz stated that she was selling drugs to save her house.

CONCLUSIONS OF LAW

1. Ida Christine Perez-Diaz's statements made to Deputy Ron Clark prior to reading her Miranda Warnings are not admissible in the State's Case in Chief but are admissible for impeachment.
2. Ida Christine Perez-Diaz statements to Deputy Ron Clark after receiving her Miranda warnings are admissible in the State's Case in Chief. Ida Christine Perez-Diaz knowingly, intelligently and voluntarily waived her right to remain silent and chose to speak with Ron Clark.
3. Ida Christine Perez-Diaz statements during the civil forfeiture hearing are admissible in the State's Case in Chief. Ida Christine Perez-Diaz statements were voluntary and not subject to Fifth Amendment warnings or Miranda Warnings.

DATED: 11/17/06



THE HONORABLE MICHAEL SULLIVAN

Presented by:



MICHAEL ROTHMAN, WSBA #33048
Deputy Prosecuting Attorney

Approved for entry:

Harold Karlsvick WSBA
Attorney for Defendant

COURT OF APPEALS
STATE OF WASHINGTON
07 APR 21 11:10 AM '07
STATE OF WASHINGTON
BY *[Signature]*

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

IDA C. PEREZ-DIAZ,

Appellant.

COURT OF APPEALS NO.
35600-7-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Ida C. Perez-Diaz, Appellant, and David John Burke, Prosecuting Attorney, by first class mail, postage pre-paid on April 23, 2007, at the Centralia, Washington post office addressed as follows:

Mr. David J. Burke
Prosecuting Attorney
Pacific County Prosecutor's Office
P. O. Box 45
South Bend, WA 98586

Mr. David Ponzoha
Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

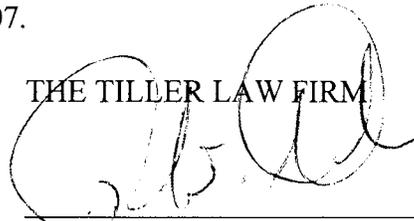
CERTIFICATE OF
MAILING

1

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE - P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828

Ms. Ida C. Perez-Diaz
P. O. Box 129
Ocean Park, WA 98640

DATED: April 23, 2007.

THE TILLER LAW FIRM


PETER B. TILLER – WSBA #20835
Attorney for Appellant

CERTIFICATE OF
MAILING

2

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828