

NO. 67158-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

CESAR TROCHEZ-JIMENEZ,

Appellant.

REC'D  
MAY 24 2012  
King County Prosecutor  
Appellate Unit

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

The Honorable Catherine Shaffer, Judge

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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A. ARGUMENT IN REPLY

THE CONCERNS UNDERLYING MIRANDA<sup>1</sup> AND ITS PROGENY REQUIRE EXCLUSION OF STATEMENTS TROCHEZ MADE AFTER HE ASKED CANADIAN OFFICIALS FOR AN ATTORNEY.

- a. Edwards<sup>2</sup> Requires Officials Respect Trochez' Expressed Desire to Interact with Police Only Through Counsel.

Police must scrupulously honor an accused person's request for counsel. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). The Edwards rule invalidates subsequent waivers once the accused has requested an attorney. Id. The burden is on police to learn whether they can legally interrogate the person before them. Arizona v. Roberson, 486 U.S. 675, 685-86, 687, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988). These are, by design, bright line rules that apply generally to protect the accused person's expressed desire not to interact with the police except through counsel. McNeil v. Wisconsin, 501 U.S. 171, 177-78, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). They do not depend on the stated legal source of the right; they are triggered once an accused has "expressed his wish for the particular sort of lawyerly assistance that is the subject of Miranda." McNeil, 501 U.S. at 178 (citing Edwards, 451 U.S. at 484).

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 458, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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

Thus, the State's attempt to characterize Trochez' claim as an "extension" of Edwards and Roberson is a misnomer. See Brief of Respondent at 28. A straightforward application of the general rules of those cases leads to the conclusion that Trochez' statements must be suppressed. Trochez was subject to the inherently coercive circumstances of custodial detention. In the face of custodial interrogation, he expressed his wish for the sort of lawyerly assistance provided by Miranda in dealing with police.

Established law already makes clear the burden was on the officers to find out, before interrogating Trochez, that he had already asked for a lawyer. Roberson, 486 U.S. at 687. Established law already makes clear his request is not limited to a specific offense, but instead applies generally to all dealings with police. McNeil, 501 U.S. at 177. Trochez' subsequent waiver of the right to counsel is therefore presumed invalid. Edwards, 451 U.S. at 484-85. Any statements made thereafter must be suppressed.

b. Trochez' Custodial Interrogation in Canada Triggered the Protections of Miranda and Its Progeny.

The State's reliance on Holland v. Florida, 813 So.2d 1007 (Fla. Dist. Ct. App. 2002), and United States v. Coleman, 25 M.J. 679 (A.C.M.R. 1987), aff'd, 26 M.J. 451 (C.M.A. 1988), is faulty because the triggering event for Miranda protections – incipient or imminent custodial interrogation – occurred in Trochez' case. The Holland court reasoned Holland's request

for an attorney upon being advised of his rights under the Canadian Charter did not invoke his Fifth Amendment rights because he could not invoke Miranda until a custodial interrogation had begun or was imminent. Holland, 813 So.2d at 1009. The Canadian Charter requires rights be read upon coming into custody, not as a precursor to interrogation. Id. at 110 n.2. Coleman similarly relied on this purported lack of a trigger for the Fifth Amendment. 25 M.J. at 687.

But unlike Holland and Coleman, Trochez was actually subject to custodial interrogation. Over the course of what must have been a very long night, he was, without benefit of counsel, first interrogated by Canadian immigration officials and then turned over to King County detectives for further interrogation. 1RP 90, 127; 2RP 56, 58, 71. All this occurred after he was told he had a right to counsel and requested a lawyer. 2RP 56, 58.

Moreover, Holland misperceives the extent of the Fifth Amendment right at stake, reasoning that Miranda did not apply because at the time he was read his rights, Holland was only being held on Canadian possession charges. 813 So.2d at 1009. But Miranda protections apply to all custodial interrogations and are not offense-specific. McNeil, 501 U.S. at 177.

The general applicability of the Fifth Amendment Miranda protections (as contrasted with the offense-specific protections of the Sixth Amendment right to counsel) also distinguish this case from the Second

Circuit's decision in United States v. Yousef, 327 F.3d 56 (2d Cir. 2003). Yousef claimed he requested an attorney during extradition proceedings in Pakistan. Id. at 141. The court first noted there was no factual support for this assertion aside from Yousef's own claim. Id. But even if Yousef's claim were true, the court analogized the circumstances of that case to the Sixth Amendment right to counsel. Id. at 140-41.

Under McNeil, when an accused person requests an attorney for an initial appearance under the Sixth Amendment, he or she may still execute a valid waiver of the Fifth Amendment privilege against self-incrimination with regard to other offenses police may be investigating. 501 U.S. at 175-76. The Sixth Amendment right to counsel is offense-specific and does not apply to future interrogations. Id. In contrast, the Fifth Amendment right to an attorney is not offense specific and, once invoked, is effective with respect to future interrogations. McNeil, 501 U.S. at 177, 182 n.3.

Unlike Yousef (and the defendant in McNeil), Trochez does not claim he invoked the Sixth Amendment right to an attorney in a previous judicial proceeding that should be extended to custodial interrogations. He invoked his right to an attorney in the context of custodial interrogation by Canadian immigration officials followed virtually immediately by King County detectives. 1RP 90, 127; 2RP 56, 58. That request should have been honored.

c. The Concerns for Deterrence that Undergird the Exclusionary Rule Require Exclusion in this Case.

The State's reliance on United States v. Covington, 783 F.2d 1052 (9th Cir. 1985), is misplaced because the reasoning of that opinion does not apply in this case. First, Covington involved interrogation by foreign officers, rather than by United States police in this case. Id. at 1056. The court reasoned the exclusionary rule for Miranda violations should not apply because the goal – deterrence of police conduct – could not be achieved when foreign police conducted the interrogation. Covington, 783 F.2d at 1056. The limited extent of United States officials' involvement was the “vital inquiry” in that case. Id.

In applying Covington, the military court in Coleman declared United States constitutional law should apply to any actions taken by United States officials. Coleman, 25 M.J. at 686. Here, it was King County detectives who conducted the custodial interrogation. They are subject to the deterrent effect that is the goal of the exclusionary rule.

The Coleman court also reasoned that if police were required to honor a request for counsel made to foreign officials, it would encourage police to ensure they remained ignorant of any such request. 25 M.J. at 687. But the court's concern was misplaced because under Roberson, police

would be presumed to know of a request for counsel. Roberson, 486 U.S. at 687.

Trochez agrees with the State it would be unworkable to have the validity of a request for counsel hinge on lack of familiarity with the foreign judicial system. See Brief of Respondent at 26 n.18. But it is important to note that United States v. Dock, 40 M.J. 112 (C.M.A. 1994), cited by the State, is inapposite for that very reason. In Dock, the accused person specifically expressed a desire not to talk to *German* police without an attorney but indicated he would talk to United States officials. 40 M.J. at 117.

Trochez, on the other hand, made an unqualified request for the assistance of an attorney in his dealings with police. 2RP 56. That request was effective for all offenses and extended to future interrogations. McNeil, 501 U.S. at 177, 182 n.3. This Court should reject the reasoning of Coleman and Covington because those cases do not sufficiently protect an accused person's right to the assistance of counsel in dealing with custodial interrogation. It is fair, reasonable, and in line with United States Supreme Court precedent in Roberson to require United States police to ascertain whether a suspect has already requested an attorney and to respect that request. When the interrogating officers are from the United States, the goal of deterrence is served by imputing knowledge of the request and excluding

subsequent statements. The purpose of the Edwards rule is to “prevent police from badgering a defendant into waiving his previously asserted Miranda rights.” Michigan v. Harvey, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990). Trochez should not have had to ask more than once for an attorney.

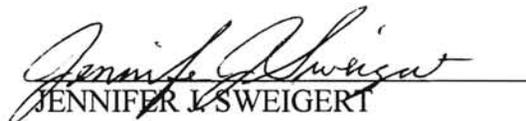
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Trochez requests this Court find his statements were admitted in violation of the Fifth and Fourteenth Amendments and reverse his second-degree murder conviction.

DATED this 24<sup>th</sup> day of May, 2012.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON	)	
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Respondent,	)	
	)	
v.	)	COA NO. 67158-8-1
	)	
CESAR TROCHEZ-JIMENEZ,	)	
	)	
Appellant.	)	

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**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 24<sup>TH</sup> DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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  
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P.O. BOX 769  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF MAY 2012.

x *Patrick Mayovsky*

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